

Notification under Section 107(6) of the Communications Act 2003

Proposal to give a direction applying the Electronic Communications Code to Highlands & Islands Enterprise

1. The Office of Communications (“Ofcom”) propose to give a direction under section 106(3) of the Communications Act 2003 (the “Act”) applying the electronic communications code (the “Code”) to Highlands & Islands Enterprise.
2. The draft Direction and accompanying explanatory statement setting out Ofcom’s reasons for the proposal are available at http://www.ofcom.org.uk/consultations/current/hie_note/. Hard copies of the draft Direction and the explanatory statement will be made available on request. For hard copies, please contact Michael Galvin on 020 7783 4158 or by sending an email to Michael.galvin@ofcom.org.uk.
3. Representations on the proposal may be made to: Michael Galvin, Ofcom, Riverside House, 2a Southwark Bridge Road, London SE1 9HA by not later than 5pm on **11 October 2004**.
4. All confidential information should be clearly marked as such and separated out into a confidential annex. All representations received will be published, unless it is clearly marked that the response is confidential, and made available in Ofcom’s Knowledge Centre. Please contact Jan Kacperek (jan.kacperek@ofcom.org.uk) for further information with respect to public inspection or, for responses to the draft Direction, visit Ofcom’s website (www.ofcom.org.uk).
5. In this Notification, unless the contrary intention appears, words and phrases shall have the same meaning as in the Act.

Sean Williams

Partner, Competition and Markets

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

8 September 2004

**[Draft] Direction under Section 106(3) of the Communications Act 2003
applying the electronic communications code in the case of Highlands &
Islands Enterprise**

[A Notification of this proposal was published on 9 September 2004]

Whereas:

- (A) On 31 August 2004 Highlands & Islands Enterprise made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the Highlands & Islands in accordance with section 107(1) of the Act and the notification deemed to be published by Ofcom under section 107(2) of the Act and the transitional provisions on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 9 September 2004 Ofcom published a notification of their proposal to give a direction applying the Code to Highlands & Islands Enterprise in accordance with section 107 of the Act;
- (C) Ofcom have consider every representation made to them about the proposed Direction;
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-

1. The electronic communications code shall apply to Highlands & Islands Enterprise for the purposes of the provision by Highlands & Islands Enterprise of an electronic communications network to have effect in relation to the Highlands & Islands.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

"Act" means the Communications Act 2003; and

"Highlands & Islands" means Barra, Benbecula, Berneray, Eriskay, Harris, Lewis, North Uist, Scalpay, and South Uist.

"Transitional Provisions" means sections 408 and 411 of the Communications Act 2003 (Commencement No.1) Order 2003 and the Office of Communications Act 2002 (Commencement No.3) and the Communications Act 2003 (Commencement No.2) Order 2003.

3. Except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions cognate with those referred to in this Direction shall be construed accordingly.

4. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published.

Sean Williams
Partner, Competition and Markets

**A person authorised by Ofcom under paragraph 18 of the Schedule to
the Office of Communications Act 2002**

[Date]

Explanatory Statement

1.1 On 31 August 2004 Highlands & Islands Enterprise (the “Applicant”) applied for the electronic communications code (the “Code”) for the purposes of the provision of an electronic communications network. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a direction applying the Code, as set out in the Notification deemed to be published by Ofcom on 10 October 2003 under section 107(2) of the Act, transitional provisions in the Act and accompanying statutory instruments.

1.2 In considering the applicant’s application Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty in section 3(1)(a) “to further the interests of citizens in relation to communications matters” and section 3(2)(b) under which Ofcom is required to secure “the availability throughout the United Kingdom of a wide range of electronic communications services”. Ofcom has also considered the third Community requirement set out in section 4(5) to promote competition “to promote the interests of all persons who are citizens of the European Union”. The proposed direction applying the Code would benefit those citizens in the Highlands & Islands who would not otherwise be able to access broadband technology should they so wish by enabling the Applicant to build out its network. In considering the Applicant’s application, Ofcom has also had regard to its duties set out in section 107(4) of the Act, as set out below.

The benefit to the public of the electronic communications network by reference to which the Code is to be applied to the applicant

1.3 The Applicant proposes to install a high performance next generation broadband network which will predominantly be wireless based. The network will provide a varying range of bandwidths to suit different applications.

1.4 The Applicant is an Economic Development Agency and its funding to build and operate the network has been granted by, amongst others, the Department of Trade and Industry and the Scottish Executive. The network will serve one of the most remote rural areas of Scotland and, as a consequence, the provision and rollout of broadband networks in the absence of the proposed network is likely to be slow and, in some of the most remote areas of the Western Isles, it is unlikely to happen. The Applicant anticipates that the network will expand broadband penetration to approximately 97% of potential subscribers. Its network will therefore provide broadband coverage to communities which might not otherwise have access to broadband technology.

1.5 For these reasons, Ofcom believes that early rollout of the network will be beneficial, as the network is likely to increase broadband penetration and assist local communities, educational establishments, the public sector, and businesses.

The practicability of the provision of the network without the Code

1.6 The Applicant aims to rollout its network by the end of 2004 and go live in spring 2005. In the absence of the Code, this timetable might not be achievable. In itself this is not necessarily a convincing reason to grant the Code. However, as many of the areas which will be covered by the network have no means of obtaining broadband access, Ofcom believes that it is desirable to assist in expediting rollout of the

network. Code powers might help to achieve early rollout.

1.7 In this instance, one of the funding partners is Comhairle nan Eilean Siar (Western Isles Council), which is also the Roads Authority for the area. The Western Isles Council has agreed the network plan and has also agreed to make available existing conduits for the passage of fibre cable. The predominant reasoning for seeking Code powers is therefore to hasten the installation of masts and nodes on sites other than local highways.

The need to encourage the sharing of the use of electronic communications apparatus

1.8 In its application, the Applicant explained that wherever possible it will seek to enter into mast sharing agreements. In total, it believes that its network will require at least 30 masts. However, of these, it only expects to install seven new masts. For the other sites, the Applicant has already opened negotiations with companies who already have masts in place to share those masts. The Applicant has also reached a duct sharing agreement with a communications provider running fixed services. For the new mast sites, the Applicant has confirmed that it would allow other communications providers to use these masts on suitable commercial terms.

1.9 In addition, the Applicant intends to introduce a Code of Good Practice which it will follow when digging up/closing streets for new conduits, installation of equipment on buildings and planned/emergency maintenance or repairs.

Whether the Applicant will be able to meet liabilities as a consequence of:

(i) the application of the Code; and

(ii) any conduct in relation to the application of the Code

1.10 The Applicant is an Economic Development Agency and is mainly financed by the Scottish Executive's Economic Development and Lifelong Learning Department. The Applicant has therefore confirmed that there will be sufficient (actual and contingent) funds to meet any liabilities.

How to respond

1.11 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **11 October 2004**.

1.12 Ofcom prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

1.13 Please can you send your response to Michael.galvin@ofcom.org.uk.

1.14 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Michael Galvin
Competition and Markets
4th Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Fax: 020 7783 4109

Confidentiality

1.15 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

1.16 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

1.17 Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.

1.18 Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

Next steps

1.19 Following the end of the consultation period, depending on responses to the consultation, Ofcom intends to publish the final direction and explanatory statement applying the Code to Connected Communities Broadband Network.

Ofcom's consultation processes

1.20 Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations.

1.21 This consultation is shorter than Ofcom's standard 10 week period because - for guidance on valid reasons see Ofcom's published consultation guidelines, available at http://www.ofcom.org.uk/consultations/consult_method/consult_guide.pdf.

1.22 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small

businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

1.23 If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion:

Philip Rutnam
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3585
Fax: 020 7981 3333
E-mail: philip.rutnam@ofcom.org.uk

Annex 1

Ofcom's consultation principles

Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

1 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

2 We will be clear about who we are consulting, why, on what questions and for how long.

3 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

4 We will normally allow ten weeks for responses to consultations on issues of general interest.

5 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

6 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

7 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 2

Consultation response cover sheet

2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, unless we are asked not to.

2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.

2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to confirm on the response cover sheet that Ofcom can publish their responses upon receipt.

2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.

2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

Name/contact details/
job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

Yes

No

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and all intellectual property rights in the response vest with Ofcom. If I have sent my response by email, Ofcom can disregard any standard email text about not disclosing email contents and attachments.

Ofcom can publish my response: on receipt once the consultation ends

Name

Signed (if hard copy)

