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**Our ref:  
Your ref:**

By email only (paul.dean@ofcom.org.uk)

24 August 2012

Dear Paul,

**(1) Disputes between each of Sky, TalkTalk and Virgin Media and BT regarding BT's charges for Ethernet services (Ethernet 1); (2) Dispute between Cable & Wireless and BT about BT's charges for Ethernet services (Ethernet 2); (3) Dispute between Verizon and BT about BT's charges for WES (Ethernet 3); and (4) Continuing disputes between each of Cable & Wireless, Verizon, Virgin Media and COLT and BT regarding BT's charges for PPCs (PPCs 2)**

Further to your letters to Mark Shurmer and Theresa Brown of 6 August 2012, BT has considered the impact of the Court of Appeal's Judgment ("the Judgment") on the above disputes.

#### The Judgment generally

The Judgment confirms the CAT's decisions that: (a) Ofcom has jurisdiction to resolve disputes that are historic, concern an allegation of a compliance failing, and which would clearly take longer than 4 months to resolve; and (b) that the repayment remedies available to Ofcom to resolve a dispute are not based on common law or equity, but rather a stand-alone statutory system.

#### Each and every charge for network access

It is now clear that prices for services falling within separate regulatory markets, where one of these products is subject to a charge control and the other a cost orientation obligation, cannot be aggregated together as a single charge for the purpose of assessing compliance with the latter obligation. However, the position in respect of prices for services falling within the same regulatory market, whether covered by a charge control or not, remains

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unresolved. The same is also true for the aggregation of prices for services at different bandwidths that fall within the same regulatory market.

BT's position remains as set out in its responses to the various dispute references and its responses to the various draft and provisional determinations and conclusions. For the avoidance of doubt, for the purposes of the Ethernet 1, 2 and 3 disputes, BT does not propose that Ofcom should combine services of different bandwidths or combine mainlink services with other services, for the purpose of assessing compliance with the relevant basis of charges condition.

### Repayment

The Judgment helpfully clarifies that the statutory dispute resolution scheme does not involve a hard discretion in respect of repayments, but rather, should the payee show good reason, Ofcom may reduce, in part or even in full, the gross repayment (i.e. the difference between the actual charge for the relevant network access and what Ofcom determines should be the fair and reasonable charge for that network access).

There are clear, significant and good reasons why Ofcom should not simply direct that BT pay the gross repayment, and direct a reduced payment or no payment at all. These reasons are set out in full in BT's response to the various dispute references and its response to the various draft and provisional determinations and conclusions, and include:

- giving BT a significant allowance or margin of error when assessing what BT should have concluded was a compliant maximum charge for network access at the time that BT set those charges, or, alternatively, reviewed those charges. Specifically, allowance should be made reflecting the significant policy and regulatory obligations with which BT was striving to meet and comply, for example the creation of Openreach and a new Ethernet portfolio, the level of discussion between BT and both Ofcom and industry in respect of BT's portfolio, the general difficulties, particularly in 2006 and 2007 of predicting end of year DSACs for what were essentially nascent products, etc.;
- to the extent that Ofcom declines to allow BT's proposed cost adjustments (or objections to Ofcom's cost adjustments) and error corrections for the purpose of assessing the after the event limit of what is a compliant charge, by reflecting those cost adjustments and error corrections in a reduction in the amount of any repayment;
- should Ofcom conclude, for the purpose of assessing compliance with the basis of charges condition, that it is appropriate to disaggregate the charge for network access into separate rental and connection prices, or that it is inappropriate to aggregate prices across bandwidths, nonetheless assessing whether the total charge to any given CP for the provision of a service or group of services results in an excessive or otherwise unfair charge and to the extent that there has been no unfairness reduce the repayment accordingly; and
- considering the impact of "pass-through" or alternatively "windfall" and the impact of either of these two factors on citizens generally in communications markets and

consumers of these products specifically, especially in the context of the promotion of effective competition, reducing any repayment accordingly.

BT's stand-alone issues

Dispute Resolution: in section 10 of BT's April 2012 response BT preserved its position in respect of a number of stand-alone issues arising as a result of BT's appeal of the CAT's PPC 2Mbit/s trunk charges judgment to the Court of Appeal.

BT does not persist with those arguments advanced in section 10.2 and paragraphs 358 thru 360 of its 20 April 2012 Ethernet response, those points having been resolved against BT in the Judgment.

Cost orientation: the Court of Appeal found that BT's appeal's 'second ground' arguments were ones of fact and application of regulatory policy and not of law, and that in the context of 2Mbit/s trunk charges Ofcom had not erred. Given the facts of this dispute and the relevant regulatory policy considerations BT maintains those arguments set out in section 10.3 and paragraphs 361 thru 371 of its 20 April 2012 Ethernet response, including to the extent those issues are applicable to PPC2.

Yours sincerely,



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BT Legal

**cc**  
(by email only)

Neil Buckley (Ofcom)  
Mark Shurmer (BT Group), Alan Lazarus (Openreach), Theresa Brown  
(BT Wholesale)