



# Waiver of BT's price notification requirements to extend FTTC Simultaneous Provide offer

Notification of a proposal to give consent to a  
shorter price notification period in a specific case

Consultation

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Closing Date for Responses: 11 September 2012

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## Section 1

# Request to waive a notice period

## Introduction

- 1.1 This document sets out Ofcom's proposals in relation to BT's request for consent to waive the requirement to notify price changes 90 days in advance in relation to a two month extension of the Generic Ethernet Access - Fibre To The Cabinet (GEA - FTTC) Simultaneous Provide wholesale offer. We invite comments from interested parties on whether it would be appropriate for Ofcom to accept BT's request and grant the proposed consent set out in Annex 4 of this document. Interested parties have until Tuesday 11 September 2012 to provide their views.
- 1.2 Significant Market Power (SMP) services condition FAA6 - Requirement to notify charges and terms and conditions ('Condition FAA6') was imposed on BT by Ofcom's 2010 statement *Review of the Wholesale Local Access Market - Statement*<sup>1</sup> published in October 2010. In particular, Condition FAA6.2 requires BT to give not less than 90 days' notice of any amendment to the charges, terms and conditions for existing Network Access, before any such amendment comes into effect.
- 1.3 In the remainder of this document we refer to Openreach instead of BT, as this is the operating division within BT responsible for supplying FTTC wholesale products.
- 1.4 On 22 August 2012 Openreach requested that Ofcom consent to a waiver of the notification period referred to above to enable it to give effect to a price change earlier than 90 days. On the same date Openreach published the document titled "NGA023/12 Proposed extension of GEA-FTTC simultaneous provide special offer"<sup>2</sup> which sets out details of the offer and Access Charge Change Notice ( 'ACCN OR264 Revised' – attached as Annex 6).<sup>3</sup>
- 1.5 The document "NGA023/12 Proposed extension of GEA-FTTC simultaneous provide special offer" sets out the details of Openreach's offer to its wholesale customers. The scheme consists of a £50 discount to the FTTC connection price (£80) where FTTC is ordered together with either a) a new provide for Wholesale Line Rental (WLR) or MPF (Metallic Path Facility) or b) a request to start a line previously stopped for more than 90 days. The FTTC Simultaneous Provide offer is currently available to Communication Providers (CPs) from Openreach on a national basis and will end on 30 September 2012. The current offer also applies to FTTP connections at Brownfield sites but Openreach has not requested to extend the FTTP element of the offer beyond 30 September 2012 as it has attracted very low volumes.
- 1.6 Openreach intends to extend the FTTC Simultaneous Provide offer for two additional months (from 1 October to 30 November 2012) but limit it to specific geographic areas, i.e. large areas of London and North West England excluding Cumbria (the

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<sup>1</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf)

<sup>2</sup> <http://www.openreach.co.uk/orpg/home/updates/briefings/super-fastfibreaccessbriefings/super-fastfibreaccessbriefingsarticles/nga02312.do>

<sup>3</sup> <http://www.openreach.co.uk/orpg/home/products/pricing/notificationDetails.do?data=ThQLPOgdo8c%2FpcQINXj7BV0AzMfOC1w%2B7d4ELMHNgDcoiUHCRZvKBvza4ozCo5emImbMkfEWV9Hg%0AS5od5xPk5mMrG2JXeytL6pFJZpTLM42nMTEF%2BKjWmexJt5mYlgMVVCBTHUK%2FAkGGPXhiPyurwQ%3D%3D>

proposed list of Local Exchanges entitled to the offer is available in Annex 5). As Openreach has not provided 90 days notice of its intention to extend the offer, the two month extension would require Ofcom to agree to waive the 90 day notice period contained in SMP condition FAA6.

- 1.7 Openreach has advised us that the proposal to extend the price reductions earlier has already been presented to relevant industry stakeholders. Openreach has also advised that it has received no objections to its proposed offer but rather support from those Communication Providers (CPs) who are currently considering increasing their consumption of FTTC wholesale lines, e.g. Sky.
- 1.8 Openreach considers that the terms of the price change require 90 days' written notice in accordance with SMP services condition FAA6.2. However, Openreach wishes to bring forward the date on which the price reduction applies to 1 October 2012. Under SMP condition FAA6.1, Ofcom may consent in writing to Openreach publishing charges, terms and conditions in a manner different to that provided for in condition FAA6.2 where it considers it appropriate to do so. This would include a waiver of the requirement to provide 90 days' written notice.

## **Openreach wishes to extend its current offer for specific geographies**

- 1.9 Openreach has explained that it wishes to extend its current GEA-FTTC Simultaneous Provide offer which reduces the connection price of a new line by £50, meaning that the total connection price is brought down from £80 to £30 during the offer period. The discount would only apply when FTTC is ordered together with either a) a new provide of WLR or MPF or b) a request to start WLR/MPF lines which have previously been stopped for more than 90 days.
- 1.10 The offer will be available to all CPs that purchase FTTC and either WLR or MPF and no registration process is required. CPs will be rebated monthly at a £50 per FTTC line that is covered by the terms of the offer.
- 1.11 In addition, Openreach wishes to modify the current FTTC offer which applies at a national level and limit it to specific geographic areas identified by a list of local exchanges (see Annex 5). The areas include large parts of London and North West of England excluding Cumbria.
- 1.12 Openreach has advised us that the price discount would target specific locations in order to meet its wholesale customers' demand and ensure that Openreach's overall service delivery is not impacted. The targeted areas are currently characterised by satisfactory performance levels, therefore the offer extension is unlikely to disrupt or delay the provision and fault repair of other Openreach wholesale services. Openreach has further explained that, considering volumes from 1 April 2012 (when the national offer started) to date, FTTC connections which have benefited from the price discount represent 5% of FTTC total volumes. By extending the offer by two months, Openreach expects FTTC Simultaneous Provide orders to rise to around 6% of total FTTC volumes for the months of October and November.

## **Ofcom's view**

- 1.13 On 7 October 2010, we published the *Review of the Wholesale Local Access market* ("the WLA Statement") in which we set out the market definitions, market power findings and remedies in the UK market for the provision of wholesale local access

services. We set out in that statement our finding that Openreach retains SMP in the market for local access and set a number of SMP services conditions on Openreach, including Condition FAA6. Condition FAA6 requires Openreach to give not less than 90 days' written notice for any amendment to charges, terms and conditions for existing network access.

- 1.14 As set out in the WLA Statement<sup>4</sup>, the purpose of the notification requirement contained in FAA6 is to support the non-discrimination obligation. In particular, the 90 day period contained in FAA6 is designed to ensure that customers of local access services supplied by Openreach are able to reflect price changes in respect of their own products at the same time as BT, thus ensuring that BT's downstream operations are not able to obtain a competitive advantage by implementing such changes earlier than its competitors.
- 1.15 However, we consider in this case that the shortening of the notice period from 90 to 40 days is likely to bring forward any benefits to wholesale purchasers of GEA – FTTC services, as they will benefit earlier from the price reduction. We note that the market has already benefited from the GEA-FTTC Simultaneous Provide offer in the past few months as competitors of BT's downstream divisions which consume Openreach wholesale products have increasingly marketed next generation broadband services and consequently consumers' uptake of superfast broadband lines has continued to grow steadily.
- 1.16 Ofcom's experience in respect of the grant of previous requests to waive the requirement to provide 90 days notice does not show that the grant of such a consent is likely to result in a distortion of competition in any affected market.<sup>5</sup> We do not therefore expect to observe any competitive distortion in granting consent in this case. Furthermore, both BT downstream and CPs have been notified about the details of the offer at the same time and we believe that most CPs will be able to respond to this offer within 40 days. We note in this respect that the proposed offer is an extension of an existing offer which has been open to CPs up to 30 September 2012 and has been notified in accordance with the 90 day requirement. Consequently, we consider it unlikely that any party will gain a competitive advantage by the granting of this consent.
- 1.17 We therefore consider that such a measure would be consistent with our duties under section 3 of the Communications Act 2003 ("the Act"). In particular, the decision to grant a waiver of the 90 day period would be consistent with the duty to further the interests of consumers in communications markets and the requirement to have regard to:
- the desirability of encouraging investment and innovation in relevant markets; and
  - the interests of consumers in respect of choice, price, quality of service and value for money.
- 1.18 We therefore consider that we should proceed to grant consent in this case and enable Openreach to introduce the offer earlier than it would otherwise be able to do.

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<sup>4</sup> at paragraphs 5.117 – 5.127

<sup>5</sup> See for instance "Waiver of BT's price notification for charges in relation to the transfer and migration of legacy Ethernet services to new Ethernet services", 10 April 2012.

<http://stakeholders.ofcom.org.uk/binaries/consultations/ethernet-waiver/statement/statement.pdf>

## Statutory requirements to be met before giving a consent

- 1.19 Section 49 of the Act applies where Ofcom proposes to grant a consent which affects the operation of a condition made under section 45 of the Act (including SMP services conditions). In order to give such consent, Ofcom must first satisfy itself that the criteria set out in section 49(2) are satisfied, namely that the giving of a consent:
- i) is objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - ii) is not such as to discriminate unduly against particular persons or against a particular description of persons;
  - iii) is proportionate to what it is intended to achieve; and
  - iv) is transparent, in relation to what it is intended to achieve.
- 1.20 Openreach submitted a letter to Ofcom on 22 August 2012 in which Openreach's views on the legal and regulatory basis for the request are set out. The letter can be found in Annex 7.
- 1.21 We consider that the criteria set out in section 49(2) of the Act are satisfied for the following reasons and therefore consider that we should grant the consent to a shorter notice period in this case.

*The waiver is objectively justifiable.*

- 1.22 Openreach believes that the price reduction will be beneficial to wholesale purchasers of GEA-FTTC services and that it is also likely to be of benefit to end users. Openreach has stated that the offer is constructed in such a way as to be of benefit to all of its CP customers regardless of their size. Openreach explained that it would like to bring the benefits of the scheme to its customers at the earliest possible opportunity, and considers that a 40 day notification period would enable CPs to benefit earlier from the price reductions.
- 1.23 We consider that granting a consent to a shorter notice period in this case is objectively justifiable since this would enable any benefits to be experienced earlier by CPs and also potentially by end-users to the extent that the reduction in charges is passed on to them.

*The waiver is not unduly discriminatory*

- 1.24 We do not consider that the granting of a consent to a shorter notice period in this case would discriminate unduly against particular persons or against a particular description of persons. Openreach consider that this scheme meets the non-discriminatory SMP condition for its local access services in that:
- It is available to all CPs purchasing FTTC services a) with a new provide of WLR or MPF or b) to start WLR/MPF stopped lines which have been stopped for more than 90 days.
  - It is intended to be beneficial to all CPs, irrespective of size.
- 1.25 Ofcom notes that SMP condition FAA3 imposes obligations on Openreach not to unduly discriminate in the provision of wholesale local access services, and that

undue discrimination would exist if Openreach unfairly favoured to a material extent BT's downstream activities so as to place other CPs at a competitive disadvantage.

In considering Openreach's request to shorten the notice period for the proposed price changes, Ofcom has not reached any conclusion on whether or not the changes themselves would be discriminatory. Should it appear necessary to consider the substance of the offer in greater detail, in particular in light of any complaints, Ofcom retains the right to investigate compliance with the requirements not to discriminate contained in SMP condition FAA3. We note in this respect Openreach's submission that the geographic limitations of the offer reflect the need to meet CPs' demand without impacting on Openreach service delivery but make no further comment.

- 1.26 As a result of the above, we do not consider that the granting of consent to the shortening of the notice period for price changes in this case would be unduly discriminatory against any party.

*The consent to waive the 90 day notice period is transparent in relation to what it is intended to achieve*

- 1.27 This consultation sets out why we are intending to grant a consent in this case and the relevant documents pertaining to Openreach's proposal are annexed to this document. We therefore consider that the proposed consent to waive the 90 day notification requirement is transparent in what it is intended to achieve.
- 1.28 Openreach has advised that it has received no objections from any CPs to its proposed offer. In particular, Openreach has received strong support from at least one non-BT CP, i.e. Sky.
- 1.29 On the basis that this price change is limited geographically and only applies to simultaneous provide of FTTC and WLR/MPF, it is unclear to us whether the impact on the market will be particularly significant. As outlined above, Openreach's forecast of incremental lines generated by the offer is quite limited (from 5% to 6%). However, the offer extension may contribute to accelerate wholesale providers' shift from current generation to next generation broadband, hence increasing consumers' adoption of superfast broadband. Given that it is Ofcom's custom to consult on such matters we are providing stakeholders with an opportunity to express their views.

*Do you think this offer will have a significant impact on the market? Please explain why.*

## Consultation details and Notification of a proposal to give consent

- 1.30 Section 49A of the Act obliges Ofcom to publish a notification whenever it proposes to give a consent for the purposes of a SMP condition set under section 45 of the Act where that proposal would, in Ofcom's opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which Ofcom has functions under Part 2 Chapter 1 of the Act. As set out above, we do not consider that the offer extension of GEA-FTTC Simultaneous Provide will have a substantial impact on the market. However, before granting our consent we think it is appropriate to seek stakeholders' view on the potential impact that this price notification waiver would have on the market and ultimately consumers. As a result, Ofcom considers it appropriate to issue a notification in accordance with section 49A.
- 1.31 Section 49A(3) of the Act provides that such notification must :



- i) state that there is a proposal to give, modify or withdraw the consent;
  - ii) identify who the responsible person is;
  - iii) set out the direction, approval or consent to which the proposal relates;
  - iv) set out the effect of the direction, approval or consent or of its proposed modification or withdrawal;
  - v) give reasons for the making of the proposal; and
  - vi) specify the period within which representations may be made about the proposal.
- 1.32 Section 49A(4) of the Act provides that the period within which representations may be made must be not less than one month after the date of the publication of the notification. However, section 49A(5) provides that where Ofcom are satisfied that there are exceptional circumstances, a shorter period may be specified for making representations, provided that period is reasonable in the circumstances.
- 1.33 Without prejudice to our approach in future cases, we have decided in this case to proceed in accordance with the procedure adopted in previous price notification waiver proposals. That approach is set out in Ofcom's letter to industry of 11 October 2004, which provides as follows:
- “In the circumstances of a proposed consent to a waiver of a 28 day notice period, it would not be appropriate to consult on the proposition for 1 month, and unhelpful even in the context of a 90 day notice period. In such cases Ofcom will take into consideration its duties under Sections 3 and 4 of the Communications Act, in particular the promotion of competition, in deciding whether a case is justified. Ofcom also notes that proposals to implement a price change with shorter than usual notice may not be likely to affect trade between member states. The period for consultation may vary according to the significance of complexity of the proposed price change, but in most of these particular cases, Ofcom will consult for 5 working days only, unless there are particular reasons for allowing a longer period. Ofcom will endeavour to adopt a very concise and standardised format for such consultations, to minimise the time which it will take for interested parties to consider the proposition. Ofcom will also aim to consider responses and publish its consent, or a refusal, within a few days of the consultation period ending unless, the nature of the responses received requires more extended analysis.”
- 1.34 Ofcom is seeking comments on its proposal to grant a consent in this particular case by 11 September 2012. We note that this gives little time for respondents to consider the proposal but in this case we consider that the circumstances justify a shorter consultation period of five working days.
- 1.35 Section 49A(7) provides that where a proposal is not of “EU significance”, Ofcom can, following the notification period, give immediate effect to a proposal, with any modifications as appear to be appropriate. If a proposal is of “EU significance” it is necessary, following the notification period but before the proposal is implemented, to provide a copy to the European Commission, BEREC and other Member States’ regulatory authorities to obtain their views. Under section 150A of the Act a proposal



will be of EU significance if, in Ofcom's opinion, it would affect trade between Member States. As set out in our letter of October 2004, we do not consider that the proposal to shorten the notice period for a price change would affect trade between Member States and therefore, not of EU significance requiring notification to the European Commission, BEREC or the other NRAs prior to implementation.

- 1.36 Ofcom does not consider that a waiver of the price notification period from 90 days to 40 days would affect trade between Member States since its effect would be limited to a national market for a limited period of time. In those circumstances, Ofcom does not consider that the proposal is one which is of EU significance.
- 1.37 In light of the foregoing considerations, Ofcom considers it is justified and appropriate to reduce the consultation period in this case. The effect of the proposed consent and Ofcom's reasons for making this proposal are as set out herein.

*Do respondents agree that Ofcom should proceed to waive the notification period in this particular case? If not, please explain why.*

- 1.38 A copy of the proposed Consent is attached at Annex 4. Respondents have 5 working days to provide comments in accordance with Annex 1.

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 11 September 2012**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form 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 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [valeria.baiamonte@ofcom.org.uk](mailto:valeria.baiamonte@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Valeria Baiamonte  
4<sup>th</sup> Floor  
Competition Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the question asked in this document. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Valeria Baiamonte on 020 7981 3834.

## Confidentiality

- A1.8 We believe 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](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

## Next steps

- A1.11 Following the end of the consultation period, Ofcom proposes to proceed in the manner set out in this document.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

## Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 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](mailto: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, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 020 7981 3601

Email [Graham.Howell@ofcom.org.uk](mailto:Graham.Howell@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

## Before the consultation

A2.2 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

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 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 Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom 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. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

## After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 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 complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other 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

Please tick below what part of your response you consider is confidential, giving your reasons why

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 not to be published, 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)?

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

## Annex 4

# Draft Consent

**[Proposed] Consent pursuant to SMP services condition FAA6 imposed on BT as a result of the analysis of wholesale local access market in which BT has been found to have significant market power**

### BACKGROUND:

1. As a result of a market analysis carried out by OFCOM, OFCOM issued a Statement on 7 October 2010 in accordance with section 79 of the Act that BT has significant market power in the market for wholesale local access services in the UK except the Hull area and imposed certain SMP services conditions on BT, including Condition FAA6;
2. This Consent concerns matters to which Condition FAA6 relates;
3. For the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM is satisfied that, in accordance with Section 49(2) of the Act, this Consent is:
  - (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
  - (c) proportionate to what it is intended to achieve; and
  - (d) in relation to what it is intended to achieve, transparent.
4. For the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
5. On 4 September 2012, OFCOM published a notification of the proposed Consent in accordance with section 49A of the Act;
6. OFCOM has considered every representation about the proposed Consent duly made to it; and

### [PROPOSAL]

NOW, therefore, in accordance with section 49 of the Act and pursuant to Condition FAA6, OFCOM gives the following Consent:

7. For the purposes of complying with its obligations under Condition FAA6.2, OFCOM consents that BT shall not be obliged to give 90 days' notice in respect of the proposed price changes set out in Access Charge Change Notice OR264 Revised issued on 22 August 2012 which relates to the Special Offer (Simultaneous Provide) Generic Ethernet Access – Fibre to the Cabinet.
8. For the purposes of interpreting this Consent, the following definitions shall apply:



- (a) **“Act”** means the Communications Act 2003
  - (b) **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006; and
  - (c) **“OFCOM”** means the Office of Communications.
- 3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 above.
- 4. For the purpose of interpreting this Consent:
  - (a) headings and titles shall be disregarded; and
  - (b) the Interpretation Act 1978 shall apply as if this Consent were an Act of Parliament.
- 5. This Consent shall take effect on the day it is published.

**Marina Gibbs**  
**Competition Policy Director**

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

XX September 2012

## Annex 5

# List of Local Exchanges subject to the proposed offer

### Exchange Name

Accrington	Ealing	Lytham	Shepherds Bush
Acton	Earby	Macclesfield	Shoreditch
Adlington	Earls Court	Maghull	Simonswood
Ainsdale	East	Maida Vale	Skelmersdale
Aintree	Eastham	Manley	Skyport
Albert Dock	Eccles	Manor Park	Slaidburn
Alderley Edge	Eccleston	Marple	Sloane
Allerton	Edgware	Marshalls Cross	Soho Aka Gerrard St
Altrincham	Egham	Marton	South Harrow
Anfield	Ellesmere Port	Marton Heath	South Kensington
Appley Bridge	Elstree	Marylebone	South Shore
Ardwick	Euston	Mayfair	Southall
Arley	Failsworth	Mellor	Southbank
Arrowebrook	Faraday	Mercury	Southport
Ashford	Farnworth	Middleton	Southwark
Ashton	Feltham	Middlewich	St Annes
Ashton In Makerfield	Finchley	Mile End	St Michaels
Ashton On Ribble	Fleet	Mill Hill	St Pauls
Aspull	Fleetwood	Mobberley	Staines
Astley Bridge	Formby	Monument	Stalybridge
Atherton	Freckleton	Moore	Stamford Hill
Aughton Green	Frodsham	Moorgate	Standish
Bacup	Fulham	Moss Side	Stanley
Bamber Bridge	Fulwood	Mossley	Stanmore
Barnoldswick	Garstang	Mottram	Stepney Green
Battersea	Garston	Mountwood	Stepping Hill
Bayswater	Gateacre	Muswell Hill	Stockport
Belgravia	Gatley	Nelson	Stockton Heath
Belmont	Gisburn	Neston	Stoneycroft
Bermondsey	Glossop	Netherley	Stonyhurst
Billinge	Golders Green	New Cross	Stratford
Birkdale	Great Crosby	New Mills	Sutton
Birkenhead	Great Eccleston	New Southgate	Swinton
Bishopsgate	Great Harwood	Newton-Le-Willows	Taddington
Blackburn	Greenford	Nine Elms	Telephone Buildings York
Blackfriars	Hackney	Norcott Brook	Tideswell

Blackpool	Hale	North	Todmorden
Bloomsbury Aka Howland St	Halsall	North Edgware	Tottenham
Bollington	Hambleton	North Finchley	Tottington
Bolton	Hammersmith	North Paddington	Trafford
Bolton By Bowland	Hampstead	North Rode	Turton
Bootle	Harefield	North Shore	Twickenham
Bowes Park	Harlesden	North Wembley	Upholland
Bramhall	Harrow	Northolt	Upper Holloway
Brinscall	Hartford	Northwich	Upton Park
Brixton	Hartington	Northwood	Urmston
Brock	Hatch End	Oldham	Uxbridge
Bromborough	Hayes North	Ormskirk	Vauxhall
Broughton - Manchester	Heaton Moor	Orrell	Walkden
Broughton - WLancs	Helsby	Paddington	Wallasey
Bucklow Hill	Hendon	Padgate	Walthamstow
Burnley	Hesketh Bank	Padgate Park	Walworth
Burscough	Heswall	Padiham	Wanstead
Bury	Heywood	Parbold	Wapping
Bushey Heath	Highams Park	Parsons Green	Warrington
Buxton	Higher Bolton	Pendleton	Waterloo
Caldy	Hightown	Penketh	Watford
Canary Wharf	Hindley	Penwortham	Weaverham
Canonbury	Hoghton	Perivale	Weeton
Catforth	Holborn	Pickmere	Wembley
Chapel-En-Le-Frith	Hooton	Pilling	West Drayton
Chatburn	Horwich	Pimlico	West Kensington
Cheetham Hill	Hounslow	Pinner	Westhoughton
Chelford	Hoylake	Platt Bridge	Westminster
Chelsea	Hulme Hall	Pleasington	Westwood
Childwall	Hunts Cross	Poplar	Whaley Bridge
Chinley	Huyton	Poulton-Le-Fylde	Whalley
Chipping	Hyde	Poynton	Whitefield
Chiswick	Irby	Prescot	Whitehall
Chorley	Irlam	Prestbury	Whitworth
Chorleywood	Isleworth	Preston	Widnes
Chorlton	Kensal Green	Prestwich	Wigan
Churchtown	Kensington Gardens	Primrose Hill	Willesden
Clapton	Kentish Town	Radcliffe	Wilmslow
Cloughton	Kenton Road	Radlett	Wilpshire
Clerkenwell	Kings Cross	Rainford	Windle
Cleveleys	Kings Langley	Ramsbottom	Winsford
Clitheroe	Kingsbury	Ribbleton	Wood Green
Colindale	Kingsland Green	Ribchester	Wood Street
Collyhurst	Kingsley	Rickmansworth	Woodley
Colne	Kirkham	Ringway	Wraysbury
Comberbach	Kneller Hall	Rochdale	Wythenshawe

Congleton	Knott End	Rock Ferry
Coppull	Knutsford	Rossendale
Covent Garden	Lancaster House ATE	Royal
Cressington	Lark Lane	Rufford
Cricklewood	Layton	Ruislip
Croston	Leigh	Runcorn East
Crouch End	Leyland	Runcorn Main
Culcheth	Leytonstone	Rusholme
Darwen	Littleborough	Rushton Spencer
Daubhill	Longford	Saddleworth
Denham	Longnor	Saint Helens
Denton	Longridge	Sale
Didsbury	Longton	Samlesbury
Disley	Lords	Sandiway
Docklands Zone Two	Lower Holloway	Scarisbrick
Droylsden	Lower Peover	Sefton Park
Dunsop Bridge	Lymm	Shaw

## Annex 6

# Access Charge Change Notice OR 264 Revised

## Openreach ACCN:OR264 Revised

Change: **Change**

Effective Date(s): **The special offer for the FTTC products is being extended to 30/11/2012. However, from 01/10/2012 it will only be available at the specified exchanges.**

Notification Date:  
**22/08/2012**



## OPENREACH ACCESS CHARGE CHANGE NOTICE

ACCN NUMBER:OR264 Revised

DESCRIPTION:Special Offer (Simultaneous Provide) Generic Ethernet Access 01/04/2012 - 30/11/2012

EFFECTIVE DATE(S):

The special offer for the FTTC products is being extended to 30/11/2012. However, from 01/10/2012 it will only be available at the specified exchanges.

SUBMITTED TO OFCOM ON:22/08/2012

### Price list

Product line:

**Special Offers**

Level one product:

**Super-fast Fibre Access**

Level two product:

**Special Offer (Simultaneous Provide) - Fibre to the Premises - Generic Ethernet Access at Brownfield Sites 01/04/2012 - 30/09/2012**

Version:

N/A



***Special Offer (Simultaneous Provide) - Fibre to the Premises - Generic Ethernet Access at Brownfield Sites 01/04/2012 - 30/09/2012***

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## Existing prices - Generic Ethernet Access Connection and Rental Charges - 'Transition Product' variants

<b>Feature</b>	<b>Note</b>	<b>Operative Date</b>	<b>Connection £Exc Vat</b>	<b>Annual Rental £Exc Vat</b>
Product variants				
Up to 40Mbit/s/2Mbit/s 'Transition product'	Special Offers Available	01/09/2011	80.00	82.80
Up to 40Mbit/s/10Mbit/s 'Transition product'	Special Offers Available	01/09/2011	80.00	88.80
Up to 40Mbit/s/15Mbit/s 'Transition product'	Special Offers Available	01/09/2011	80.00	119.40
Up to 100Mbit/s/15Mbit/s 'Transition product'	Special Offers Available	01/09/2011	80.00	154.80
Up to 110Mbit/s/15Mbit/s 'Transition product'	Special Offers Available	01/09/2011	80.00	157.80
Up to 100Mbit/s/30Mbit/s 'Transition product'	Special Offers Available	01/09/2011	80.00	436.32

## Special Offer price - Generic Ethernet Access Connection and Rental Charges - 'Transition Product' variants

<b>Feature</b>	<b>Operative Date</b>	<b>Until Date</b>	<b>Special Offers Available</b>	<b>Connection £Exc Vat</b>	<b>Annual Rental £Exc Vat</b>
Product variants					
Up to 40Mbit/s/2Mbit/s 'Transition product'	01/04/2012	30/09/2012	Special Offers Available	30.00	82.80
Up to 40Mbit/s/10Mbit/s 'Transition product'	01/04/2012	30/09/2012	Special Offers Available	30.00	88.80
Up to 40Mbit/s/15Mbit/s 'Transition product'	01/04/2012	30/09/2012	Special Offers Available	30.00	119.40
Up to 100Mbit/s/15Mbit/s 'Transition product'	01/04/2012	30/09/2012	Special Offers Available	30.00	154.80
Up to 110Mbit/s/15Mbit/s 'Transition product'	01/04/2012	30/09/2012	Special Offers Available	30.00	157.80
Up to 100Mbit/s/30Mbit/s 'Transition product'	01/04/2012	30/09/2012	Special Offers Available	30.00	436.32

## Note:

The special offer price will be applicable where the service is provided as part of a new copper line provision on either MPF or WLR with the same CCD as a new provisions of the GEA FTTP Transition Product.

There is no limit on the number of new lines a single CP (GEA FTTP Openreach customer) can provision in the period.

Openreach reserves the right to withdraw or limit the scope of this Special Offer at any time. The Offer is subject to the terms and conditions of service. In the event of any inconsistency between those terms and conditions of service and the terms and conditions of this Special Offer, the terms and conditions of service will prevail.

A CP (GEA FTTP (Brownfield) Openreach customer) will benefit from this offer only when the number of new connections on GEA FTTP at Brownfield sites exceeds 750 new provisions, as these initial 750 connections will be free under the terms of the "Introductory Offer" shown in section 7.4.6. of the Openreach Price List.

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## Price list

Product line:

### Special Offers

Level one product:

### Super-fast Fibre Access

Level two product:

### Special Offer (Simultaneous Provide) - Fibre to the Cabinet - Generic Ethernet Access 01/04/2012 - 30/11/2012

Version:

N/A



### *Special Offer (Simultaneous Provide) - Fibre to the Cabinet - Generic Ethernet Access 01/04/2012 - 30/11/2012*

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#### Existing Price - for Fibre to the Cabinet (FTTC)

Feature	Operative Date	Connection £Exc Vat	Annual rental £Exc Vat
Product variants			
Up to 40Mbit/s downstream and up to 2Mbit/s upstream (including Simultaneous Provide)	01/09/2011	80.00	82.80
Up to 40Mbit/s downstream and up to 10Mbit/s	01/09/2011	80.00	88.80



upstream (including Simultaneous Provide)

Up to 80Mbit/s downstream and up to 20Mbit/s upstream (including Simultaneous Provide)	10/04/2012	80.00	119.40
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## Special Offer price

This revised ACCN serves as notification that Openreach intends to extend the Special Offer (Simultaneous Provide) –Fibre to the Cabinet – Generic Ethernet Access by two months to 30 November 2012. This extension is subject to a waiver request submitted by Openreach to Ofcom on 22 August 2012. If this request is not granted the special offer will not be extended beyond 30/09/12

Feature	Note	Operative Date	Until Date	Connection £Exc Vat	Annual Rental £Exc Vat
Product variants					
Up to 40Mbit/s/2Mbit/s - where the service is provided as part of a new copper line provision on either MPF or WLR		01/04/2012	30/09/2012	30.00	82.80
Up to 40Mbit/s/2Mbit/s - where the service is provided as part of a new copper line provision on either MPF or WLR	Note a	01/10/2012	30/11/2012	30.00	82.80
Up to 40Mbit/s downstream and up to 10Mbit/s upstream - where the service is provided as part of a new copper line provision on either MPF or WLR		01/04/2012	30/09/2012	30.00	88.80
Up to 40Mbit/s downstream and up to 10Mbit/s upstream - where the service is provided as part of a new copper line provision on either MPF or WLR	Note a	01/10/2012	30/11/2012	30.00	88.80
Up to 80Mbit/s downstream and up to 20Mbit/s upstream - where the service is provided as part of a new copper line provision on either MPF or WLR		10/04/2012	30/09/2012	30.00	119.40
Up to 80Mbit/s downstream and up to 20Mbit/s upstream - where the service is provided as part of a new copper line provision on either MPF or WLR	Note a	01/10/2012	30/11/2012	30.00	119.40

The special offer price will be applicable where the service is provided as part of a new copper line provision on either MPF or WLR with the same CCD as a new provisions of the GEA FTTC Product.

There is no limit on the number of new lines a single CP (GEA FTTC Openreach customer) can provision in the period.

Openreach reserves the right to withdraw or limit the scope of this Special Offer at any time. The Offer is subject to the terms and conditions of service. In the event of any inconsistency between those terms and conditions of service and the terms and conditions of this Special Offer, the terms and conditions of service will prevail.

**Note:**

**a) From 1 October 2012 to 30 November 2012 the offer will only be available from the following qualifying exchanges (See Annex 5 above)**

**Date:22/08/2012**

British Telecommunications plc

Registered office:

81 Newgate Street

London EC1A 7AJ

Registered in England and Wales No. 1800000

**[www.openreach.co.uk](http://www.openreach.co.uk)**



## Annex 7

# Openreach's letter to Ofcom



Mr Keith Hatfield  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

22 August 2012

Dear Keith,

Request for waiver of the 90 day notification period for the extension of the special offer (Simultaneous Provide) – Generic Ethernet Access product provided over Fibre to the Cabinet (GEA-FTTC).

Further to our meeting on 21 August, I am writing to request that Ofcom consent to Openreach extending the special offer covering GEA-FTTC Simultaneous Provide without having to comply with the 90 days' advance written notification requirement imposed on BT as part of its SMP-based obligations. Openreach is seeking to reduce the offer extension notice period from 90 days to a period that will enable the offer to be extended by two months without any break (i.e. from 1 October 2012 to 30 November 2012 inclusive). We understand, based on previous discussions, that Ofcom considers that it needs to consult on such a request and this letter has been written on this understanding.

In order to meet CP marketing needs whilst ensuring alignment with Openreach operational requirements, getting the right timing window for the offer extension is essential. Consequently, running the proposed offer extension will be contingent on obtaining the waiver.

### Offer details

The existing special offer has been running since 1 April 2012 and is scheduled to end on 30 September 2012. The special offer discounts by £50 the GEA-FTTC and GEA-FTTP at Brownfield sites connection prices when service is ordered simultaneously with a new copper line. The discount applies when the FTTC / FTTP at Brownfield sites is ordered with either a) new provide WLR or MPF or b) start of a stopped line (WLR or MPF) where the line has been stopped for greater than 90 days.

Following feedback from the CP community about how they currently use and intend to use the offer, we are seeking to extend the GEA-FTTC element of the special offer by a period of two months. The GEA-FTTP at Brownfield sites element of the offer has attracted very low volumes, and we are not proposing to extend this element of the current offer beyond 30 September 2012. Further, in view of the currently challenging service delivery environment, Openreach is proposing to limit the geographies in which the GEA-FTTC offer would be available in October and November – this is to ensure that the incremental demand associated with the offer can be accommodated without adverse impact on Openreach's broader service delivery responsibilities. The geographies selected are in London and North West England and will enable Openreach to meet its operational priorities whilst still offering attractive marketing opportunities for CPs. Full details of the exchanges where the offer will be available in October and November are included in Annex A to this letter. All other details of the current offer, including terms and conditions, remain unchanged.

Full details of the proposed extension to the special offer are shown in ACCN OR264 (revised).

#### Legal and regulatory basis for the request

Openreach notes that there is scope in the relevant SMP Conditions for Ofcom to waive the relevant notification period: "Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below<sup>6</sup>". Furthermore, in paragraph 6.50 of the Wholesale Local Access Market Review statement, published on 7 October 2010, Ofcom indicated that modifications to the notice period could be considered: "We would, however, note that we are able to consent to modifications to this, on a case-by-case basis."

As you will be aware, Section 49 and 49A of the Communications Act 2003 impose obligations on Ofcom when considering whether to give a consent that affects the operation of a condition, including SMP conditions. In particular, Ofcom must publish a notification setting out its proposals to give consent and must provide an opportunity for interested parties to comment on the matter. Whilst section 49A(4) provides that the consultation period must not be less than one month after the day that Ofcom publishes the notification, where Ofcom is satisfied that there are exceptional circumstances justifying the use of a shorter period then the period may be whatever shorter period it considers reasonable in those circumstances (section 49A(5)). Openreach considers that this particular case does warrant a shorter consultation period and would suggest that a 5 day consultation period is sufficient.

The recently added new Section S49A of the Communications Act places the obligation on Ofcom to consult, as specified above, if the consent requested has a significant impact on the market. If this is not the case, Ofcom is not required to consult but must still satisfy itself that the requirements of section 49(2) are met, i.e.

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<sup>6</sup> Wholesale Local Access Market Review Statement 7 October 2010

that the waiver is objectively justifiable, does not discriminate against particular persons or against a particular description of persons, is proportionate and transparent.

However, if Ofcom considers that it must consult, a five day consultation period is consistent with the Ofcom letter of 11 October 2004 that was sent to BT and other CPs to explain how it intends to apply the provisions of Section 49 of the Communications Act relating to consent for shorter notification periods. Ofcom stated:

"In the circumstances of a proposed consent to a waiver of a 28 day notice period, it would not be appropriate to consult on the proposition for 1 month, and unhelpful even in the context of a 90 day notice period. In such cases Ofcom will take into consideration its duties under Sections 3 and 4 of the Communications Act, in particular the promotion of competition, in deciding whether a case is justified. Ofcom also notes that proposals to implement a price change with shorter than usual notice may not be likely to affect trade between member states. The period for consultation may vary according to the significance of complexity of the proposed price change, but in most of these particular cases, Ofcom will consult for 5 working days only, unless there are particular reasons for allowing a longer period. Ofcom will endeavour to adopt a very concise and standardised format for such consultations, to minimise the time which it will take for interested parties to consider the proposition. Ofcom will also aim to consider responses and publish its consent, or a refusal, within a few days of the consultation period ending unless, the nature of the responses received requires more extended analysis."

Openreach considers that the criteria set out in section 49(2) of the Communications Act are satisfied and Ofcom should consent to this waiver request. Our reasoning is as follows:

Firstly, we consider that granting this waiver is objectively justifiable as this offer is beneficial to industry. Openreach would like to extend the economic benefits of this offer to its customers at the earliest possible opportunity, especially given the current difficult economic climate.

Secondly, granting this waiver would not discriminate unduly against particular persons or against a particular description of persons as the price reductions could benefit all Openreach CPs who purchase Superfast Fibre Access services. Moreover, the structure of the offer is intended to make it attractive and possible for all CPs (irrespective of size) to benefit.

Finally, the granting of consent will be transparent, if Ofcom consult on this request for a waiver and publish its decision for all of industry to see.

Also, we consider that the granting of this waiver request would be consistent with Ofcom's obligations under section 3 and 4 of the Communications Act in that it would further the interests of consumers. In particular, we consider that extending the offer as requested will provide an important platform for greater retail level competition in the provision of Superfast broadband services, and this is likely to be of benefit to consumers.

As previously noted, the extension of the current offer will be contingent upon Openreach being able to run the new offer from 1 October 2012. If this is not possible Openreach will withdraw the offer.

We look forward to Ofcom publishing its consultation document on this waiver request.

Regards

Gill Ayres  
Openreach Manager, Operational Regulation  
Openreach