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**BY EMAIL**

Dear Lawrence

**Dispute Consultation — MPF Rental Charge**

I refer to Ofcom's Dispute Consultation regarding the dispute between TalkTalk Group ("TTG") and Openreach relating to the MPF rental charge that was published on 14 November 2011.

Openreach fully supports Ofcom's provisional assessment in the Dispute Consultation that Openreach's MPF Rental charge is compliant with the relevant regulatory obligations.

The MPF Rental charge is not currently subject to a formal charge control obligation, however Openreach provided a voluntary commitment in December 2010 to adhere to a charge ceiling of £91.50 from 1 April 2011 until Ofcom concludes its consultation for the new LLU/WLR charge controls, or 31 March 2012, whichever is sooner ("Interim Price"). The voluntary commitment was designed to provide certainty to stakeholders, discussed with industry and Ofcom, and was based on a robust methodology to ensure regulatory compliance.

Given Openreach's compliance with all of the relevant regulatory obligations the only appropriate outcome is for Ofcom to conclude that TTG's dispute is baseless and without merit.

**Consultation process**

One of TTG's key arguments in its initial submission is that Openreach should have updated the MPF Rental charge to align with the mid-point in Ofcom's consultation range for the new LLU/WLR charge controls.

Ofcom is indeed required to consult with stakeholders on the SMP conditions that it proposes to apply to BT on an *ex ante* basis. The consultation process allows interested stakeholders to provide their views before Ofcom decides on a course of action to set prices on a going forwards basis. As Ofcom points out, the consultation document which it has

issued in relation to the new charge controls for LLU/WLR was based on many assumptions, on which Ofcom was seeking stakeholder feedback.<sup>1</sup>

It would, however, be completely inappropriate for Ofcom to require Openreach to move its prices in accordance to any point within its consultation range. If it did, the consultation would effectively become a pseudo determination, thereby providing no transparency or ability for stakeholders to provide views on that determination, and would arguably be contrary to Ofcom's duties. Such a proposition could have serious ramifications for the consultation process and would also hinder regulatory certainty for industry and stakeholders. As Ofcom also points out in the Dispute Consultation, the LLU/WLR charge control consultation is subject to a degree of uncertainty and the data on which it is based is not yet settled.

In fact TTG has used the consultation process for the proposed LLU/WLR charge control to challenge a myriad of inputs in Ofcom's LLU/WLR consultation, including the level and allocation of costs. TTG's initial 136 page response (July 2011), and its additional 19 page response (October 2011), are available from Ofcom's website.<sup>2</sup> It is clear from these that TTG does not agree with the proposals in Ofcom's LLU/WLR consultation which underpin its proposed MPF Rental price range. It therefore seems to be somewhat disingenuous for TTG to suggest that Openreach should charge the midpoint in Ofcom's range for MPF Rental services, whilst at the same time criticising Ofcom's methodology for calculating that range.

### **What is the best view of costs?**

TTG further argues that the mid-point of proposed range for MPF rental charges set out in Ofcom's 18 May 2011 LLU/WLR consultation contained Ofcom's best view of costs and is therefore the basis on which the MPF rental charge should have been set. Openreach notes that, as is inevitable during a consultation process, views on costs are continuing to change. For example:

- Ofcom published its first consultation for the LLU and WLR charge controls on 31 March 2011 — TTG has not indicated that it considered that the Interim Price was not appropriate following the release of this consultation document
- Ofcom updated the first consultation on 18 May 2011, which corrected some errors in the 31 March 2011 consultation — this revised consultation is the basis of the dispute
- Ofcom released a statement on the Weighted Average Cost of Capital ("WACC") on 20 July 2011, which provided a revised view of one of the key assumptions in the consultation. At the Enquiry Phase Meeting, TTG indicated that this could mean that the correct price could be raised to around £90.40 to take into account this updated information
- on 15 November 2011, the Office of National Statistics published the Retail Price Index figure for October 2011 of 5.4%, which is a key assumption in Ofcom's consultation
- Ofcom released a second consultation on 23 November 2011, however this only updated some, but not all, of the underlying cost factors, including that the WACC has not been updated to reflect the Ofcom statement of 20 July 2011.

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<sup>1</sup> Ofcom, *Dispute between TalkTalk Group and Openreach relating to the MPF Rental charge*, Dispute Consultation, 14 November 2011, paragraph 3.23.

<sup>2</sup> <http://stakeholders.ofcom.org.uk/consultations/wlr-cc-2011/?showResponses=true>.

As new information has continued to become available during the consultation process, the most “up-to-date” view of the price of MPF Rental based on Ofcom’s proposed methodology has continually shifted. Any suggestion that Openreach should continually update its price for MPF Rental to take account of relevant updated information — and observing the required 90 day price notification period — is untenable, particularly as it would not be clear what Ofcom’s view of the revised price would be at any given moment in time. Continual price changes would be disruptive to stakeholders and remove all regulatory certainty.

## **Compliance with regulatory obligations**

Notwithstanding the comments made above, Openreach agrees with Ofcom that the only relevant test in assessing this Dispute is whether the current charge complies with the relevant regulatory obligations, namely Condition FAA4.1 (“basis of charges”) and FAA1.2 (“fair and reasonable”) the basis of charges obligation. Openreach concurs with Ofcom’s analysis that the current MPF rental charge complies with these conditions and that the TTG case is unfounded and without merit.

### *Basis of charges obligation*

Ofcom interprets SMP Condition FAA4.1 as that BT’s prices must be between DLRIC and DSAC.<sup>3</sup> TTG’s view that the correct standard to apply is “*RAV-adjusted FAC*”<sup>4</sup> is clearly not consistent with Ofcom’s interpretation of Openreach’s cost orientation condition, and therefore is irrelevant to the Dispute.

Openreach considers that the MPF Rental price of £91.50 is below the unaudited DSAC in the 2010/11 Regulatory Financial Statements, and therefore passes the first-order test for cost-orientation.

Openreach agrees with Ofcom’s provisional view that the Interim Price is compliant with the cost orientation obligation on the basis that:

- Ofcom considers that the voluntary price ceiling is “*based on Ofcom’s estimated FAC for 2011/12 and is at a level similar to that which might have been expected had the charge control run into the 2011/12 financial year*”<sup>5</sup>
- and that in this case Ofcom considers “*a charge based on FAC is highly likely to be below DSAC*”<sup>6</sup> and therefore is likely to satisfy the first order test for cost-orientation.

### *Fair and reasonable obligation*

TTG argues that in the absence of a formal charge control condition, the mid-point of Ofcom’s range for MPF Rental in its 18 May 2011 consultation is the “fair and reasonable” price that should be charged by Openreach, and that which would be compliant with Openreach’s regulatory obligation to offer MPF Rental services on fair and reasonable terms, conditions and charges. However, as noted above, the consultation process is just that, a consultation, where as Ofcom correctly notes “*the data is not settled*”.<sup>7</sup>

TTG also argues that in order for Openreach’s MPF Rental price to be “fair and reasonable”, the price must be “*cost-reflective*”<sup>8</sup>. While we agree with Ofcom’s dismissal of this argument

<sup>3</sup> Ofcom Dispute Consultation, paragraph 3.9.

<sup>4</sup> Ofcom Dispute Consultation, paragraph 3.10.

<sup>5</sup> Ofcom Dispute Consultation, paragraph 3.17.

<sup>6</sup> Ofcom Dispute Consultation, paragraph 3.18.

<sup>7</sup> Ofcom Dispute Consultation, paragraph 3.23.

<sup>8</sup> TalkTalk Group plc, *Dispute relating to BT’s MPF Rental Charge*, 2 September 2011, page 13.

on the basis that it has already determined that our prices are cost-orientated,<sup>9</sup> Openreach considers it important to emphasise that we do not recognise, nor consider ourselves required to comply with, any obligation for “cost-reflective” pricing — this is not an established SMP regulatory obligation nor one provided for in the Communications Act 2003 (“the Act”).

Finally, we agree with Ofcom that the Interim Charge provided stakeholders with beneficial certainty about pricing in the period between the old and new charges.<sup>10</sup> That was the intention of Openreach when providing the voluntary commitment to Ofcom and industry. We agree with Ofcom that it would be detrimental to industry if that certainty was unpicked, as TTG proposes, and that it could reduce Openreach’s incentives to provide such commitments in analogous circumstances in the future.

## **Repayments**

Openreach agrees that it not necessary for Ofcom to consider whether it would be appropriate for it to exercise its discretion under section 190(2)(d) of the Act to require Openreach to make repayments to TTG by way of an adjustment for alleged “overpayments” made.

As outlined above, Openreach agrees with Ofcom’s provisional view that the MPF Rental charge is compliant with the relevant regulatory obligations, and as such, no overpayment was made by TTG to Openreach and no repayment from Openreach to TTG is necessary or appropriate in the circumstances.

## **Process**

As an aside to the issues in dispute, Openreach wishes to take the opportunity to comment on the process that has been followed by Ofcom in assessing this Dispute, which we understand to have been the first to follow Ofcom’s new Dispute Resolution Guidelines.<sup>11</sup> In particular we are concerned that Openreach has been afforded only a very limited opportunity to formally comment on the merits of the TTG case prior to the publication of Ofcom’s Dispute Consultation.

In fact Openreach was only provided with a single opportunity to make a formal response prior to publication of the Dispute Consultation and that was in response to Ofcom’s letter dated 6 September 2011 enclosing a copy of the Dispute. Ofcom then gave Openreach just under a week to provide comments. Openreach did provide in passing a few preliminary observations about the merits of TTG’s submission but, since this was part of Ofcom’s Enquiry Phase, we focused our comments on the issues being considered by Ofcom at this time, namely (a) whether the statutory grounds for a dispute referral under the Act have been met, and (b) whether it is appropriate for Ofcom to handle the dispute.

Openreach observes that we did not have any subsequent formal opportunity to comment on the merits of the issues raised by TTG prior to the publication of the Dispute Consultation. In this case the Dispute is of a relatively straightforward nature. More generally, however, we consider it important that the Openreach (or any other Communications Provider in a similar position) should be provided with sufficient and meaningful opportunity to provide more than its “initial thoughts” on a dispute in which it is involved prior to Ofcom issuing any consultation so that its right to respond to any allegations is not prejudiced before a

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<sup>9</sup> Ofcom Dispute Consultation, 3.26.

<sup>10</sup> Ofcom Dispute Consultation, paragraph 3.28.

<sup>11</sup> Ofcom, *Dispute resolution guidelines*, 7 June 2011.

preliminary view is reached by Ofcom. We hope that Ofcom finds these comments helpful when considering future disputes.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mark Shurmer'.

Mark Shurmer  
Director of Regulatory Affairs and Deputy Managing Director  
Openreach

[Copy to: Julia Jackson, Senior Competition Lawyer, Openreach]