



Waiver of BT's price notification requirements for wholesale analogue exchange line (basic and premium) and LLU metallic path facility services rental charges

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

Consultation

Publication date: 12 September 2011

Closing Date for Responses: 19 September 2011

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Section 1

Request to waive a notice period

Introduction

- 1.1 This document sets out Ofcom's proposal to waive the price notification requirement in relation to wholesale line rental (WLR) and metallic path facility (MPF) rental prices, which will allow BT (i.e. Openreach) to introduce its Copper Incentive Scheme offer (as set out in Annex 6) in advance of the normal 90 days' written notice period so that it will become effective if and when we confirm our proposal. We invite comments from interested parties on whether it would be appropriate for Ofcom to accept BT's request and grant the proposed consents set out in Annexes 4 and 5 of this document. Interested parties have until Monday 19 September 2011 to provide their views.
- 1.2 Significant Market Power (SMP) services condition AAAA6(a) Requirement to notify charges ('Condition AAAA6(a)') was imposed on BT by Ofcom's 2010 statement *Review of the wholesale fixed analogue exchange lines markets*¹ (the '2010 Exchange Lines Market Review'). In particular, Condition AAAA6(a).2 requires BT to give not less than 90 days' notice of any amendment to the Wholesale Line Rental Charge before any such amendment comes into effect.
- 1.3 SMP services condition FAA6 Requirement to notify charges, terms and conditions ('Condition FAA6.2') was imposed on BT by Ofcom's 2010 statement *Review of the wholesale local access market*² (the '2010 WLA Market Review'). In particular, Condition FAA6.2 requires BT to give not less than 90 days' notice before any amendment to the charges, terms and conditions for Network Access, including MPF, before any such amendment comes into effect.
- 1.4 In the remainder of this document we refer to Openreach instead of BT, as this is the operating division within BT responsible for running the BT Group local access network.
- 1.5 On 22 August 2011 Openreach requested that Ofcom consent to a waiver of the notification periods referred to above to enable it to give effect to a temporary special offer price incentive scheme earlier than 90 days. Openreach subsequently published Access Charge Change Notice OR249 ('ACCN OR249') on 24 August 2011, which sets out the details of its Copper Incentive Scheme offer. ACCN OR249 can be found in Annex 6 of this document.
- 1.6 ACCN OR249 sets out the details of Openreach's Copper Incentive Scheme to its wholesale customers. The scheme consists of cash incentive payment of £50 for each WLR analogue (Basic and Premium) and LLU MPF lines activated³ during the offer period⁴ that is incremental to a Communication Provider's (CP's) prevailing 'Background Threshold' run-rate of activations. The number of incremental copper line activations made during the offer period is to be measured against the average

¹ <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf>

² http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf

³ Activated lines are defined as those obtained as 'Started' lines that have been stopped for longer than 3 months and 'New Provide'. Table 1 shows the connection services included in the scheme.

⁴ The Offer Period is presently set to last from 23 November 2011 to 22 May 2012.

monthly run-rate for 1 April 2011 – 31 August 2011 for each registered CP. The average prevailing run-rate will be adjusted for historic seasonal changes using 2010/11 data to give two Background Thresholds for the first three months of the offer and the second three months of the offer respectively.⁵ ACCN OR249 provides that at the end of the offer period appropriate rebates will be credited to CPs' relevant bills within 60 calendar days.

- 1.7 Openreach has explained that the objective of the scheme is to encourage CPs to grow their customer base by acquiring new lines.
- 1.8 Table 1 shows products in scope of Openreach's Copper Incentive Scheme and the payment incentive awarded to CPs for each copper line activation incremental to their prevailing run-rate.

Table 1 – Products and payment incentive under the Copper Incentive Scheme

Growth during Offer Period	Incentive payment (Excluding VAT)	Connection services in scope
Average Background Threshold or Less	Not applicable	
Activated WLR analogue lines above the Background Threshold	£50 per line	<ul style="list-style-type: none"> • WLR 3 Basic & Premium supply of new line • WLR 3 Basic & Premium Line (Starting of Stopped lines) – only applies where a line has been stopped for longer than three months • WLR 3 Basic & Premium supply of additional line
Activated MPF lines above the Background Threshold	£50 per line	<ul style="list-style-type: none"> • MPF Stopped Line Provide – where a line has been stopped for longer than three months • MPF New Provide

- 1.9 Openreach considers that the terms of the Copper Incentive Scheme require 90 days' written notice in accordance with SMP services conditions AAAA6(a) and FAA6.2.
- 1.10 However, Openreach wishes to bring forward the date on which the Offer Period starts to 22 September 2011, or as soon as possible thereafter. To do this, Openreach needs Ofcom to consent to a reduction in the notification periods. Ofcom may consent to a reduction in the notification periods set out in the SMP services conditions referred to above, SMP conditions AAAA6(a).1 and FAA6.1 provide that:

“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.”

⁵ The offer will run for six months. Openreach retains the right, however, to assess the performance of the offer and end it after three months. In this eventuality Openreach will provide CPs with at least 28 days' notice.

Openreach wishes to bring forward the Offer Period

- 1.11 Openreach explained that it wishes to bring the benefits of this pricing incentive scheme to its customers as early as possible given the current economic climate. The cash incentive offer is to help CPs to encourage end users to use Openreach copper access lines for their communication requirements and would further the interests of consumers by stimulating retail level price competition. In particular, Openreach believes that the granting of the waiver would allow CPs to make use of the incentive scheme during the return to university period (September / October) which is usually an active time of the year.

Ofcom's view

- 1.12 On 20 December 2010, we published the *2010 Exchange Lines Market Review* in which we set out the markets definitions, market power findings and remedies in the wholesale fixed analogues exchange line services markets. We set out in that statement our finding that Openreach retains SMP in the market for wholesale analogue exchange line services and set a number of SMP services conditions on Openreach, including Condition AAAA6(a). Condition AAAA6(a).2 requires Openreach to give not less than 90 days' written notice for any amendment to the Wholesale Line Rental Charge before any such amendment comes into effect.⁶
- 1.13 On 7 October 2010, we published the *2010 WLA Market Review* in which we set out the market definition, market power findings and remedies in the wholesale local access market. We set out in that statement our finding that Openreach retains SMP in the market for wholesale local access services and set a number of SMP services conditions on Openreach, including Condition FAA6. Condition FAA6.2 requires Openreach to give not less than 90 days' written notice before any amendment to the charges, terms and conditions for Network Access, including MPF, to come into effect.
- 1.14 Nonetheless, we consider in this case that the shortening of the notice period from 90 to 28 days is likely to bring forward any benefits to wholesale purchasers of WLR and MPF, as they will be able to compete more effectively, and possibly to end users, if incentive payments are passed on to consumers. We also believe that the shorter notification period could be useful to CPs as it will allow them to make use of the scheme during the period when students are entering and/or returning to university, which we understand is a particular busy period. We therefore consider that we should proceed to grant consent in this case and enable Openreach to introduce the scheme earlier than it would otherwise be able to do.

Statutory requirements to be met before giving a consent

- 1.15 Section 49 of the Communications Act 2003 ('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:

⁶ Wholesale Line Rental Charge means the annual charge levied by the Openreach for Wholesale Line Rental including packages containing a line rental charge and any included levels of service sold as part of a single marketed product.

- 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.
- 1.16 Openreach submitted a letter to Ofcom on 22 August 2011 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.
- 1.17 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.

- 1.18 Openreach believes that the Copper Incentive Scheme will be beneficial to wholesale purchasers of WLR and MPF and that it is also likely to be of benefit to end users. Openreach has stated that the scheme is constructed in such a way as to incentivise CPs to expand their customer base using the Openreach copper network and that this would be best achieved if the incentive payments were (in whole or in part) passed on to consumers. 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 28 day notification period would enable CPs to make use of the scheme during the September / October period in which students are returning / entering university.
- 1.19 We consider that granting a consent to a shorter notice period in this case is objectively justifiable since this would enable any benefits of the scheme to be experienced earlier by CPs and also by end-users to the extent that the incentive payments are used to enhance retail competition. Bringing forward the start of the scheme in this case may also increase its effectiveness if it enables CPs to undertake any marketing activities during the period in which students are returning to university.

The waiver is not unduly discriminatory

- 1.20 We do not consider that the granting of a consent to a shorter notice period in this case would not discriminate unduly against particular persons or against a particular description of persons. Openreach consider that this scheme meets the non-discriminatory SMP condition for both WLR and MPF in that:
- It is available to all CPs purchasing WLR or MPF.
 - It applies equally and objectively to all CPs – CPs simply need to register their interest and Openreach will provide the CPs with a list of potential target customers.
 - Is intended to be beneficial to all CPs, irrespective of size (by virtue of the use of bespoke Background Threshold run rates).
- 1.21 Ofcom notes that SMP conditions AAAA2 and FAA3 impose obligations on Openreach not to unduly discriminate in the provision of WLR and MPF 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. Openreach has explained that shorter notice period for this particular scheme will not result in discrimination in favour of BT.

The waiver is proportionate

- 1.22 Openreach considers that granting the waiver request would be proportionate. Requiring Openreach to meet the requirements of SMP services conditions AAAA6(a) and FAA6 in this particular case would delay the introduction of the Copper Incentive Scheme and therefore delay any rebate payments being made to qualifying CPs. This would, in turn, delay any resulting price competition at the retail level and associated benefits to end-users. Openreach believe that the granting of consent in this case will achieve Ofcom's aim of ensuring that retail price reductions may be passed on to consumers at the earliest opportunity and is considered to be proportionate in this case.
- 1.23 We believe that the shortening of the notice period is proportionate as it will not cause any material disadvantage to downstream CPs as they have been informed of this scheme since 24 August 2011 which should give them sufficient time to prepare their response to the scheme.

The waiver is transparent in relation to what it is intended to achieve

- 1.24 This consultation sets out why we are intending to grant a consent in this case. The terms and conditions of the Copper Incentive Scheme have been communicated to all CPs in ACCN OR249. We therefore consider that this proposed waiver is transparent in what it is intended to achieve.
- 1.25 Also, Openreach considers that the granting of this consent 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 and encourage retail level price competition by making the incentive offer available at an earlier date.

Consultation details and Notification of a proposal to give consent

- 1.26 Following the entering in to force of the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI 2011/1210) in May 2011, new 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.
- 1.27 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.
- 1.28 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.
- 1.29 The new provisions of the Act provide Ofcom with a discretion not to issue a notification where, in its opinion, the consent being granted would not have a significant impact on a market. 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.”
- 1.30 Ofcom is seeking comments on its proposal to grant a consent in this particular case by 19 September 2011. We note that this gives little time for respondents to consider the proposal but in this case we consider that exceptional circumstances exist to justify a shorter consultation period of five days.
- 1.31 A further change is that new 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. Section 150A of the Act sets out the criteria for when a proposal will be of EU significance. A provision will only 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.

- 1.32 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 waiver the notification period in this particular case? If not, please explain why.

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 19 September 2011**.
- 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 filomena.ciccarelli@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.
- Filomena Ciccarelli
4th 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 questions asked in this document, which are listed together at Annex X. 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 Filomena Ciccarelli on 020 7783 4177.

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, 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

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 . 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

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.
- 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/.
- 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 Notification – proposed consent

NOTIFICATION UNDER SECTION 49A OF THE COMMUNICATIONS ACT 2003

Proposal to grant a consent to British Telecommunications plc (“BT”) under SMP services condition AAAA6(a), imposed on BT as a result of the analysis of wholesale analogue exchange line services markets in which BT has been found to have significant market power

1. OFCOM hereby make, in accordance with section 49A of the Act, a proposal to give a consent under SMP services condition AAAA6(a), imposed on BT as a result of the analysis of wholesale business analogue exchange line services markets in which BT has been found to have significant market power.
2. The proposed consent is set out in the Annex to this Notification.
3. The effect of the proposed consent, and the reasons for making the proposal, are set out in the accompanying Explanatory Statement.
4. In making the proposal set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying Explanatory Statement by **5pm on 19 September 2011**.
6. In this Notification—
 - (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.

Marina Gibbs
Competition Policy Director

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

12 September 2011

Annex

[Proposed] Consent under SMP services condition AAAA6(a) imposed on BT as a result of the analysis of wholesale fixed analogues exchange line services 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 Notification on 20 December 2010 in accordance with section 79 of the Act that BT has significant market power in the market for wholesale analogue exchange line services in the UK except the Hull area and imposed certain SMP services conditions on BT, including Condition AAAA6(a);
2. this Consent concerns matters to which Condition AAAA6(a) 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 12 September 2011, 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 sections 49 and 49A of the Act and pursuant to Condition AAAA6(a), OFCOM gives the following Consent:

7. For the purposes of complying with its obligations under Condition AAAA6(a), 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 OR249 issued on 24 August 2011 which relates to the Wholesale Line Rental Charge.
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 company, all as defined by Section 1159 of the Companies Act 2006;
 - (c) **"Consent"** means the Notification proposing to give consent to BT for a waiver of its required notice period as set out in paragraph 7;
 - (d) **"Hull Area"** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunication Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc (now KCOM);
 - (e) **"Notification"** means the notifications referred to in paragraph 1; and
 - (f) **"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 and otherwise any word or expression shall have the same meaning as it has in the Notification as appropriate.
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

12 September 2011

Annex 5

Draft Notification – proposed consent

NOTIFICATION UNDER SECTION 49A OF THE COMMUNICATIONS ACT 2003

Proposal to grant a consent to British Telecommunications plc (“BT”) under SMP services condition FAA6.2, 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

1. OFCOM hereby make, in accordance with section 49A of the Act, a proposal to give a consent under SMP services condition FAA6.2, 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.
2. The proposed consent is set out in the Annex to this Notification.
3. The effect of the proposed consent, and the reasons for making the proposal, are set out in the accompanying Explanatory Statement.
4. In making the proposal set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying Explanatory Statement by **5pm on 19 September 2011**.
6. In this Notification—
 - (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.

Marina Gibbs
Competition Policy Director

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

12 September 2011

Annex

[Proposed] Consent under SMP services condition FAA6.2 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 Notification 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;
2. this Consent concerns matters to which Condition FAA6.2 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 12 September 2011, 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 FAA6.2, 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 OR249 issued on 24 August 2011 which relates to the MPF rental charge service.
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) **"Consent"** means the Notification proposing to give consent to BT for a waiver of its required notice period as set out in paragraph 7;
 - (d) **"Hull Area"** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunication Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc (now KCOM);
 - (e) **"Notification"** means the notifications referred to in paragraph 1; and
 - (f) **"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 and otherwise any word or expression shall have the same meaning as it has in the Notification as appropriate.
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

12 September 2011

Annex 6

Access Charge Change Notice OR 249

Customer briefing

Copper Incentive Scheme

Issue date: **24/08/2011**

Status: **Action**

Ref: **XXX000/11**

This briefing is for all WLR and LLU Communications Providers.

Openreach is delighted to announce a Copper Incentive Scheme offer for Communications Providers (CPs) which will run from 23 November 2011 to 22 May 2012 (inclusive). The purpose of the offer is to encourage CPs to grow their customer base by acquiring new lines through the restarting of stopped lines and additional lines via the new provision process. The products in scope for the Incentive Scheme are WLR Analogue (Basic and Premium) and LLU MPF.

We are keen to bring the benefits of this offer to our customers as soon as possible and have requested from Ofcom a waiver to reduce the standard price notification period from 90 to 28 days. If Ofcom approve our request, then the offer would run from 22 September 2011 (i.e. 28 days from today).

Purpose of Offer

This offer is intended to incentivise Communication Providers (CPs) to utilise lines that have previously been installed but where use has now been stopped or to provide additional lines to existing customer premises. It is based on incremental growth net of early cancellations above a pre-determined Background Threshold run-rate and for each incremental line CPs will receive a £50 incentive payment. Start orders and new lines to a premise will be validated to ensure that there is not a current cease or stop order within the last 3 months to demonstrate genuine incremental growth. The purpose of the offer is to help CPs encourage end users to use Openreach copper access lines for their communication requirements.

How to Participate & Terms of Offer

To benefit from the offer, CPs will be required to register, in advance of the offer period commencing, by contacting their Sales and Relationship Manager. For the CPs that register:

1. Openreach will:
 - a. Calculate participating CP's Background Threshold run-rate as the sum of seasonally adjusted run rates for "New Provision" and "Starts" of lines that have been "Stopped" for longer than 3 months. The base run rate will be calculated

for each registered CP by taking the average monthly run rate for 1 April 2011–31 August 2011. This will be adjusted for historic seasonal changes using 2010/11 data to give Background Thresholds for a) the first three months of the offer and b) the second three months of the offer.

For example, a CP with a run rate of 50,000 in the five months April – August 2011 would have a monthly run rate of 10,000 equating to a three month run rate of 30,000. If the seasonal adjustment for the first three months were, for example, +5%, the Background Threshold for that CP for the first three months would be 31,500. In this instance, this CP would qualify for incentive payments for the incremental volume above 31,500.

- b. Inform participating CPs of this Background Threshold in advance of the offer period commencing.
2. If a shorter notification is granted, Openreach will refresh the seasonal adjustment in the Background Threshold as appropriate.
3. Registered CPs will also be supplied a list of copper lines that are identified by Openreach as “Stopped” for longer than 3 months. This will help in identifying premises where there are currently inactive Openreach access lines.
4. At the end of the offer, Openreach will measure each CP’s sales performance of “Started” lines that have been “Stopped” for longer than 3 months and New Provides, and compare this with the CP’s Background Threshold to determine incremental growth and the level of incentive payment. A billing credit will be issued to each CP within 60 calendar days or as soon as reasonably possible.
5. This offer will run for six months, however, Openreach will assess the performance of the offer and may end the offer after three months. In this eventuality CPs will be advised accordingly with at least 28 days notice
6. This offer cannot be used in conjunction with any other Openreach offer.
7. Use of this offer contrary to the purpose set out above may result in the suspension or ending of participation of a CP in the offer and/or disqualify a CP in part or in whole from receiving the incentive payment.
8. This offer is subject to the terms and conditions of service. In the event of any inconsistency between those terms and conditions and the terms and conditions of this offer, the terms and conditions of service will prevail.
9. The offer is to remain entirely within the discretion of Openreach on the basis of any relevant regulatory, legal, technical, financial or other considerations. Openreach reserves the right to withdraw or limit the scope of this offer at any time.

Details of the offer can be found in the Special Offer Section of the Openreach prices list available at : <http://www.openreach.co.uk/orpg/home/products/pricing/loadPricing.do>

For further queries please contact your Sales and Relationship Manager.

Annex 7

Openreach's letter to Ofcom

Mr Dave Clarkson
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

22 August 2011

Dear Dave,

Request for waiver of the 90 day notification period for a special offer covering MPF and WLR Analogue products

Further to our conversation earlier today, I am writing to request that Ofcom consent to Openreach introducing a special offer covering MPF and WLR Analogue products without having to comply with the 90 days advance written notification requirement imposed on BT under the relevant SMP conditions FAA6 of the Wholesale Local Access Market Review published October 2010 and AAAA6(a) of the Wholesale Fixed Analogue Exchange Lines Market Review published December 2010. Openreach is seeking to reduce the notice period for the offer from 90 days to 28 days which, if granted, would make the offer effective on 20 September 2011 rather than 21 November 2011. Openreach will give 90 days notice via ACCN on 23 August 2011. 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. We would be grateful for your confirmation that this remains Ofcom's view.

Offer details

The offer, titled the "Copper Incentive Scheme," is designed to encourage Communication Provider customers (CPs) to grow their copper business with Openreach, and is in response to requests from CPs for greater flexibility.

During the offer period, CPs can obtain a £50 incentive payment for activating MPF and WLR lines that are incremental to their prevailing run rate. The offer will be for a 6 month period with a 3 month "break clause" that would only be activated in the event of poor take up by CPs in the first three months of the offer period.

In order to incentivise genuine new business and appropriate use of order types, the offer will encompass the following scenarios:

- Start of stopped line order types where the stopped line is >3months old;
- new provide order types where there has not been a cease within the last 3 months, and
- new provide orders where the copper is new (e.g. second line or first copper into a site).

To assist CP marketing activity, Openreach will provide to CPs on a free of charge basis, a "Stopped Line" report detailing lines where copper has been present historically, but has been inactive for 3 months or greater.

The offer will be open to all MPF and WLR CPs and those interested will be required to formally register to participate. Having registered, CPs will be provided with their prevailing run-rate for incremental start / new provide type orders; this will be the basis against which Openreach will assess the level of incremental business that qualifies for the incentive payment. The level of payment due on a CP by CP basis will be assessed at the end of the offer period, and will be credited to the CP no later than 60 calendar days after the offer closes. The detailed terms and conditions of the offer will be set out in the CP briefing that will be sent out on 23 August.

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"*. 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 of the Communications Act 2003 imposes 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 49(5) 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 49(6)). Openreach considers that this particular case does warrant a shorter consultation period and would suggest that a 5 day consultation period is sufficient.

This 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 incentive scheme is beneficial to industry. Openreach would like to bring the economic benefits of this incentive scheme to its customers at the earliest possible opportunity, especially given the current difficult economic climate, and also to enable CP campaigns to be made during the period in which students are returning / entering university.

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 MPF and WLR Analogue services, albeit these services currently sit in separate economic markets. Moreover, the structure of the scheme is intended to make it attractive and possible for all CPs (irrespective of size) to benefit. We also note that in relation to the SMP condition itself, Ofcom outlines that the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider. A waiver of the required notification period for these particular price reductions will certainly not result in discrimination in favour of downstream BT. Accordingly, it cannot be argued that there has been any detrimental impact on the overriding purpose of this SMP condition.

Finally, the granting of consent will be transparent, as Ofcom will consult on this request for a waiver and will 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 and encourage retail level price competition on connection prices through the UK by making the pricing offer available at an earlier date.

Assuming Ofcom grants our request for a waiver; Openreach would plan to introduce the special offer on 20 September 2011. Should Ofcom consent not be granted by that date, Openreach would seek to introduce the special offer as soon as possible after that consent is granted.

We look forward to Ofcom publishing its consultation document on this waiver request and I look forward to discussing this matter with you tomorrow.

Regards

Matt Madden
Head of Operational Regulation
Openreach