everything everywhere

<u>*Everything Everywhere's response to Ofcom's consultation:*</u>
<u>*'Draft Annual Plan 2011/12'*</u>

<u>Executive Summary</u>

Everything Everywhere welcomes the opportunity to respond to Ofcom's consultation on its draft Annual Plan 2011/12. We believe that it is important to ensure that all stakeholders have the opportunity to input into Ofcom's Annual Plan and for Ofcom to take due account of these comments. Ofcom is diligent in giving stakeholders the opportunity to comment each year, but every year we iterate our concerns that the consultation happens too late in the planning process. We are concerned this leaves Ofcom little or no time to fully digest and incorporate stakeholder views into the Plan, which somewhat undermines the process. For example, the consultation this year closes on 1 March; the new Plan comes into force just one month later.

According to the NAO report[1] competition in communications markets appears healthy, with increasing numbers of television and radio broadcasters, and a range of providers of fixed and mobile telephone and broadband services now in the marketplace. Ofcom's own consumer research[2] shows that levels of customer satisfaction are high (94% for mobile and 90% for broadband) and prices have fallen over the years (e.g. since 2004 a representative basket of mobile phone services has fallen in price from £36 per month to £15 per month in 2009).

Ofcom states that its proposed annual plan has been published in the context of a changing environment and that it will deregulate where appropriate. There is no evidence of this in the proposed plan; Ofcom has failed to describe its plans to withdraw from regulation, particularly in the mobile market - even though the Mobile Sector Assessment found this market to be competitive. Indeed recent evidence shows an increase in regulation, without any evidence being provided as to why this is necessary. An example is Ofcom's approach to 999 SMS where it has decided that this service should be made mandatory under the revised General Conditions[3]. We strongly believe that Ofcom should move away from formal regulation in areas where self and co-regulation can achieve the same, or indeed better, outcome. This is fundamental, given Ofcom's duty to regulate with a bias against intervention. In the case of 999 SMS, Ofcom's proposal to regulate comes despite the admission that the emergency SMS trial has only been viable and a success <u>because of</u> our voluntary support. Indeed, Ofcom says that regulation has come about as a result of the successes (not failures) of self-regulation.

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[1] Public Accounts Committee comments from its report: 'Ofcom: the effectiveness of converged regulation' -
(http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubacc/688/68802.htm
[2] 'Communications market Report 2009' -
(http://stakeholders.ofcom.org.uk/binaries/research/cmr/753567/CMR_2010_FINAL.pdf)
[3] 'Changes to General Conditions and Universal Service Conditions - Implementing the revised EU Framework' (http://stakeholders.ofcom.org.uk/consultations/gc-usc/)

The draft plan presents Ofcom's strategic purposes, proposed priorities and desired outcomes at a very high level with a lack of detail of proposed projects to deliver those outcomes. Everything Everywhere would like to see a more detailed programme of work, which should include timelines with review points and the contact details of policy owners and project managers. This is not only essential to help stakeholders comment meaningfully on your programme of work, but it will also enable us to prepare for the year ahead and to ensure that adequate resources are made available when required (as Ofcom is aware, even the simplest requests for information are extremely resource-intensive and other projects suffer as a result of diverting resources away to meet Ofcom's deadlines). Ofcom must also specify which projects are of the highest priority and allocate resources accordingly. By trying to focus on too much, Ofcom risks not achieving any of its objectives.

It is also essential that we have a clear indication of expected dates of publications (particularly consultations and statements). There are many cases where Ofcom has delayed issuing documents without communicating to stakeholders (examples include General Conditions consultation, the Devon coverage trial findings and results of the mobile broadband quality of service test). It is fundamental that where Ofcom does not adhere to original deadlines, delays are communicated to all stakeholders. Improvements in the way Ofcom communications with stakeholders could easily be done via the Ofcom website with little resource on Ofcom's part.

Comments on specific areas of work

Everything Everywhere has the following comments on specific priorities and the ongoing work areas that Ofcom has identified in the draft plan. However given that there is very little detail it is difficult to provide detailed comments.

1. Budget

Ofcom states that it will reduce its budget by 28% over the next 4 years, with the majority of savings being realised in the first year by substantially reducing some activities, cutting overheads and completely changing what Ofcom does and how it does it. However, while the consultation refers to significant changes to Ofcom's governance structure and supporting advisory bodies to deliver savings, it does not set out the changes that will be made to working practices and policy formation and delivery. Ofcom needs to articulate how it plans to change its operations in response to these budgetary constraints, with due regard to Ofcom's regulatory principles, including the requirement of proportionality, the 'bias against intervention' and the obligation to make the 'least intrusive' form of regulation. Everything Everywhere supports the following comment made by the Public Accounts Committee in its report: "Value for money is the optimal use of resources to deliver the intended outcomes. Ofcom does not articulate the outcomes it expects to deliver, which means it is not possible to assess value for money." This statement of outcomes needs to be supported by a clear project and delivery plan to be meaningful. We would like to see details of the achievements/outcomes from the previous year included in future plans. That way

stakeholders can measure the year-on-year effectiveness of the plan. Otherwise, there is a risk that the same outcomes can be quoted every year, with little indication of the success of the steps that were taken to achieve these outcomes in the previous year. Similarly we would like to see what the changes in governance and advisory bodies are, and how the changes permit Ofcom to deliver its statutory duties.

2. Understanding the changing behaviour of citizens and consumers

Everything Everywhere is concerned that certain aspects of the Annual Plan do not actually match Ofcom's stated aim of ensuring that its consumer research underpins its strategic purposes and priorities in 2011/12. In particular, we note that Figure 5. in the Annual Plan discloses that complaints about non-geographic call charges/transparency/complexity do not rate at all as a current significant source of consumer complaints. In our view, given Ofcom's current resource constraints and its stated aim of maximising the consumer benefit from its regulatory initiatives, this would tend to suggest that implementation of wide ranging non-geographic numbering changes may not be the best use of Ofcom (and industry's) resources in 2011/12.

In relation to the data in this section of the Annual Plan regarding the increasing availability of broadband to consumers, we simply note that Ofcom should take care to factor this increasing availability into its forward looking regulatory impact assessments – for example, by examining the likelihood that particular customer groups who do not currently have Internet / broadband access will have such access in the short to medium term, when designing remedies tailored only to meet the needs of customers without such access.

3. Implement new regulatory responsibilities, including EC Framework

We understand that one of Ofcom's duties is to comply with specific provisions of the revised EC Communications Framework, including revision of the General Conditions of Entitlement. However, on reviewing the changes to the Conditions published last week (and subject only to a short consultation), we believe that Ofcom has missed a big opportunity to shorten and simplify the General Conditions which have over the years become lengthy and complicated (an example is General Condition 14 which is some 21 pages long!). Indeed, Ofcom has said that it will review and simplify the General Conditions at various intervals over recent years and we understand projects have been kicked off. The most recent explanation for not completing these projects was the imminent implementation of the new EU framework. It is therefore disappointing that Ofcom has not conducted a more thorough review at this stage.

That being said, we understand the time constraints that Ofcom is under to implement the new EU Framework. We will set out our views on these related changes in our response to that specific review. At this time, we would just flag our concerns that industry has been left with an extremely short amount of time to implement some fundamental changes (for example, changes to terms and conditions and the MNP compensation scheme). This could have a significant cost impact.

4. Charge controls

Ofcom expects to make amendments to market review processes, e.g. the requirement for market reviews in certain markets to be conducted every 3 years. We expect that, rather than conducting costly and time intensive reviews as a matter of routine, as in the past, price controls should be rolled over if there is no change in the market necessitating a new market review.

This is also an area where Ofcom should not be mechanistic. For example in the area of mobile call termination Ofcom should commence work to examine capacity-based-charging (CBC) methodologies for setting mobile termination rates in the period 2014/15 and beyond. Particularly in an environment where project resources are scarce, Ofcom should prioritise economic regulatory projects which will have the greater net welfare implications for consumers and industry alike. On the other hand, Ofcom should move to de-prioritise its review of historic DCC rates.

5. Spectrum

Everything Everywhere requires clarification on the timetable for the auctioning of the 600 MHz band in light of the public timetable for the auction of the 800 MHz and 2.6 GHz bands (para 5.16). The length of the 600 licences is material for 800 valuations.

6. Leased lines and Business Connectivity Market Review

We are pleased that Ofcom is prioritising this and urge Ofcom to proceed more quickly than the current planned review. We urge Ofcom to thoroughly review BT's Ethernet pricing, particularly for mobile backhaul, and consider implementing a price cap. This should not be delayed by the current dispute referred by Talk Talk/Sky and Virgin and BT's subsequent appeal to the CAT. BT has a near monopoly in this market at the moment and we expect Ofcom to take this into account in its determination of the ongoing dispute.

We also support the extension of the scope of the Physical Infrastructure Access (PIA) remedy imposed on BT following the Wholesale Local Access (WLA) market review and the same principle should apply to leased lines.

7. Disputes and investigations under the Competition Act

We broadly welcome the proposed changes to Ofcom's dispute resolution procedures which should lead to greater transparency of Ofcom's process. We refer you to Everything Everywhere's response to that consultation. Ofcom continues to play a crucial role in resolving inter-operator disputes and any proposed changes to this role must be closely

scrutinised - the costs to fair competition would far outweigh any superficial cost savings from plans to limit Ofcom's role in this regard.

In terms of Ofcom's concerns about the resources required to defend appeals, greater and more in-depth input from senior members of the legal team earlier in the process might help reduce the risk of subsequent appeals. An effective right of appeal is an essential part of the regulatory process. The appeals process has led to noticeable improvements in Ofcom's procedure in recent years as Ofcom responds to criticism in appeals it has lost (e.g. the Termination Rate Disputes appeals, Vodafone's mobile number portability appeal) and those which it has chosen not to defend.

It is not immediately clear why the proposed changes to the scope of regulatory disputes brought about as a result of changes to the EC framework should lead to a significant increase in Ofcom's legal workload. That said, there are some improvements that can be made to the appeal procedure (e.g. greater clarity on the admissibility of new evidence on appeal and whether special rules are required for appeals from dispute determinations).

8. Simplify regulation of Non-Geographic Numbers

We note that Ofcom has listed this initiative in its work plan under the work-stream "Promote effective and sustainable competition", yet we are disappointed to see that the proposals in Ofcom's consultation fundamentally fail in this objective by leaving the issue of non-geographic call termination at the wholesale level unregulated. Ofcom should amend the scope and focus of this work area to conduct and finalise the NTS market review that was started in 2004 and never completed. Further comments on this issue will be included in our detailed response to the consultation.

9. Switching

Ofcom states that switching is a key priority for 2011/12. Whilst we understand the details are being discussed as part of a separate work stream, we still believe that it is important for the Ofcom Annual Plan to detail the priorities, milestones, deliverables for this project area so that stakeholders have a clear idea of Ofcom's work plan.

Where services are technologically connected, it is obvious that those services should utilise the same migration process. The anomalous disparity in switching processes between services provided using metallic path facility (MPF) and shared metallic path facility (SMPF) must be removed, as well as the discrepancy in process when customers are switching to and from cable based services. We therefore support Ofcom's prioritisation of fixed/broadband switching in 2011/12. There is currently consumer confusion and a competitive imbalance caused by a lack of consistency in switching processes between MPF and SMPF providers. This must be resolved as a matter of urgency. The full benefits of this single switching process for fixed/broadband customers will only be fully be achieved once cable is also brought into scope – consumers do not consider the underlying technology (cable or copper) when switching the same service (fixed line/broadband). We are pleased that Ofcom plans to commence this work under the 2011/12 Annual Plan, although we would not want to see any

significant time lag between phases 1(a) (fixed and broadband using NoT and MAC) and 1(b) (fixed and broadband using C&R). Everything Everywhere would like clarification on the timetable for fixed/broadband implementation in the Annual Plan.

Mobile number portability rules have already been amended in 2010/11, with implementation due in April. We agree that there is no evidence that the mobile porting process needs to be reviewed again and that Ofcom must focus scarce resources on areas where there is evidence of consumer and market harm.

10.   Net neutrality and broadband speeds

Under paragraph 5.48 Ofcom states "We believe that greater transparency of traffic management practices is a necessary part of a well-functioning broadband market". Everything Everywhere supports this view and is committed to this principle. We believe that it is important that full and proper research is conducted into what information customers would actually value. Simply providing technical information without this understanding may fulfil the principle on paper, but would not deliver real benefit to consumers. We are pleased that Ofcom also sees this as an area where industry can and should take the lead rather than being subject to stringent regulation from the outset.
On the related topic of quality of service information, Ofcom has been undertaking research to explore the mobile broadband speed information which consumers may value and which would provide meaningful, independent comparison. Fixed broadband speed metrics are already being published, and our concerns about the methodology have been shared with the project team. Pilot tests on mobile broadband speeds took place late last year and we engaged with Ofcom and Epitiro on these. However, we have not been contacted since then and are yet to receive the results of the further tests. In order to ensure the results are fit for purpose and do not mislead consumers, Ofcom must continue to work closely with operators on this project, as well as further iterations of the fixed broadband research.

11.   Provision of services for hard of hearing

In last year's plan, Ofcom stated that it was considering the future of the text relay services used by hearing-impaired and speech-impaired consumers to make telephone calls and that it would explore the need for enhanced or additional text relay services to be provided as part of the USO obligation. Everything Everywhere is committed to ensuring access to our services by all consumers, and look forward to inputting to this review. We would point out that Ofcom's previous technology specific solutions, whilst incurring significant cost and resource to implement, have not been widely taken up by the target customers, because consumers prefer to use other services, such as text messaging. Ofcom must first understand the communications needs of customers with hearing difficulties - and identify any specific gaps in meeting these needs - before deciding on any specific intervention. Ofcom will be failing to ensure equal access by these consumers if it decides on a technological solution before understanding their requirements.

We are disappointed that Ofcom is proposing to make 999 SMS a mandatory service under General Condition 15. The trial has been running in the UK for over a year and is predominantly used by hearing-impaired and speech-impaired consumers who find it difficult to use the phone. The scheme has 14,500 registered users and is a good example of a voluntary scheme project that has worked well for all stakeholders. Despite this success, Ofcom has decided to make this scheme mandatory. This is extremely disappointing and surprising, considering Ofcom's duty only to regulate where there is market failure or evidence of consumer harm. Ofcom's failure to allow voluntary initiatives to prove their effectiveness is also illustrated by the imposition of General Condition 23 (mobile mis-selling) when Ofcom made the mobile network voluntary code of practice mandatory some two years after the cashback issue was resolved. Everything Everywhere will now think twice before taking forward any voluntary initiatives requested by Ofcom in the future. If formal regulation is the only possible outcome – even where self-regulation is successful – there is little incentive to put resource into developing more innovative responses to such important issues.

12. Promote investment in mobile 'not-spots'

Ofcom stated last year that it wanted to improve its understanding of the extent of not-spots and their causes and support initiatives aimed at tackling the problem. A pilot took place in Devon during the latter part of 2010 and results were due to be published in January. However, as with the mobile broadband speeds publication we have yet to see any results. This is another example of Ofcom missing its deadline and not keeping stakeholders informed of the reasons for the delay. This is despite the imposition of rigid deadlines on stakeholders to comply with formal and informal information requests.

13. Standards enforcement for protection of minors

This is an area which has been driven successfully by self regulatory initiatives such as the mobile code of practice and the location based services code of practice. We would like to understand why Ofcom feels it needs to be more active in this area. Is Ofcom being driven by the belief that convergence of technologies means that there should be a single approach to protecting minors? If so, any regulatory initiatives must be evidence-based and should take full account of existing self regulatory initiatives. It also needs to be more aligned with Government as to how this might be achieved

Everything Everywhere welcomes Ofcom's acknowledgement that ATVOD has not been entirely successful. In our view ATVOD has been a failure. It was put in place to meet the obligations in the AVMS directive, despite successful self regulatory bodies such as the original ATVOD and IMCB already being in place. Customers are no better protected, yet there are significant costs with running ATVOD as the Government overestimated the number of providers in scope and the running costs.

14. International Activities

We recognise that Ofcom needs to adopt a rigorous approach to prioritising its work and focusing efforts where it can make a beneficial change. However we are concerned that Ofcom may not be able to fulfil its international spectrum duties if cut backs in this area are carried out. As recognised in the Annual report 'the international harmonisation of spectrum can add significantly to its overall social value' and 'International engagement is essential for the effective management of the radio spectrum'. International spectrum decisions have a direct impact on the UK, in particular when technical measures developed in CEPT and other international bodies are then transposed into EC Decisions. Hence we would urge Ofcom to ensure that it sufficiently prioritises its international spectrum engagement.

15.   Other points

We would like to comment that following the re-launch of Ofcom's website it is much more difficult to navigate and far less consumer-friendly. Stakeholders are resorting to using search engines to find documents rather than trying to navigate through Ofcom's own website (and Ofcom's own staff suggest this!). Also, the pages are not up to date and there are many links on the website to other parts which are broken, for example in relation to the register of spectrum trades (paragraph 6.16).