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Dear Nic

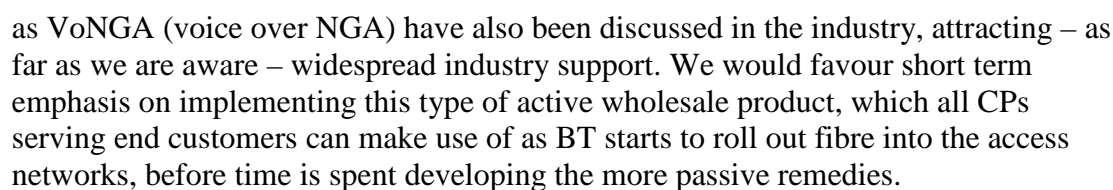
Review of the wholesale local access market

As you may know, SSE is primarily an energy company. We do have interests in the communications market and, in particular, have developed a retail business over the last few years, based on the available wholesale products. We also have an operator business that is currently focussing on connectivity services to the wholesale market and to some larger business customers.

We believe that the wholesale local access market is very important for development of the retail markets and the maintenance of the competitive forces that have developed there. This is particularly the case as the major technology shift of fibre networks begin to be introduced to the “mass market” of domestic and smaller business end customers, providing the greater bandwidths of “next generation access” (NGA).

In this response, we have addressed the specific consultation questions in the appendix and summarise our main points below.

1. We support Ofcom’s intention to promote both investment and competition in wholesale and retail markets. We are particularly interested in the continuation of support for competition in the supply of services to end customers, i.e. the retail market where both vertically integrated operators and “resellers” such as ourselves compete to serve end customers. The wholesale line rental (WLR) family of products have been designed to support resellers in the current copper technology world and we need to see this type of active access continued in the NGA world in order to avoid shocks to reselling suppliers and their customers (around 6 million end users are served using WLR-based products) in the transitional period while NGA technologies are rolled out. In this context, we note that passive access remedies, of use only to vertically integrated communications providers (CPs) are emphasised in the consultation with short-run timescales proposed for some. More active remedies such



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4. It is also worth noting that this multi-channel model, together with appropriate charging methodology for the infrastructure (i.e. a “pay-as-you-go” charge proportional to the use being made of the infrastructure) allows the prospect of a greater return to the infrastructure provider as more and more services use the capacity available. As revenues to the NGA infrastructure providers increase, this raises the prospect of more commercial roll-out with less need for public intervention to meet coverage targets.
5. To support this multi-channel vision, which we believe would be in the best interest of consumers and citizens, we believe there needs to be a way of managing the capacity of the link independently of any entity which might want to provide services over the link. We see this management extending to developing interface arrangements with other providers of NGA networks such that a “patchwork” of differently owned but logically interconnected NGA networks can form a cohesive national whole. Establishing processes, standards and documentation for this needs a coordinated industry approach, in our view, that should be put in place on a co-regulatory basis involving the relevant CPs that provide communications infrastructure or services to the mass-market of domestic and small business users. The methodology used for charging for access to the link is also important and we discuss this in our response to question 4.
6. Against this background, some of the comments and proposals in this consultation give us cause for concern about how Ofcom perceives an enduring role for resellers going forward. We discuss our concerns about the proposed “equivalence of inputs” status of VoNGA in response to question 11. Ofcom appears to see less of a requirement for non-discrimination between BT Retail and resellers than between BT Retail and operators who seek to unbundle the new NGA capacity at a more passive level – using the VULA (virtual unbundled local access) product discussed below.
7. We are concerned that the “low-level” active VULA product proposed in the consultation might allow non-BT operators to take over the entire capacity of the BT communications link to a premises and potentially control of the customer’s equipment as well in a way that would undermine competition in the provision of retail services. There does not appear to be any way for Ofcom to require these CPs to provide active access to the lines that they, rather than BT, control. This approach would therefore cut across the multi-channel approach we set out above and we believe it would lead to serious competition issues in the retail markets.
8. We are not against the more passive VULA remedies proposed in principle, but believe there should be safeguards and process development put in place first before this type of product is developed. For example, we believe there should be:
 - A migrations process to enable customers to move readily from a VULA supported retail product to, for instance, an Openreach active-access supported product before migrations to such retail products are allowed;
 - A defined role for Openreach or some other independent party to manage the capacity of the “superfast” link so that multiple products can co-exist on the link

under a multi-channel model without interfering with each other; and

- Following on from this, VULA products should not be allowed unrestricted access to the whole capacity of the line – other services from other CPs, including re-sellers, should also be commercially viable; and
 - The development of an equitable charging methodology for use of capacity on the NGA link, which avoids high upfront costs for access as further discussed in response to question 4 of the consultation.
9. As a final observation on the development of the WLA market, we note that NICC was tasked with developing technical standards to underpin Ofcom's "active line access" (ALA) standard issued in March 2009. From early attendance at the NICC discussions, we are aware that multiple access supporting a number of connections at a single premises was envisaged, following the ALA requirement for support for multiple CPs providing products to end users. With the further evolution of discussions at this grouping we are concerned to note that the NICC standards are now tending towards only supporting a single CP on "day 1" of the live standard. We believe that such compromising of the ALA standards, where Ofcom was explicitly supportive of the multi-user model¹ risks adversely affecting competition in the market by allowing significant "first-mover" advantage with the new technology.
10. As discussed above, technical choices can have a profound effect on competition and market processes and we therefore believe that the developing technical standards should be subordinate to the market principles, defined and maintained by a representative industry body, acting in concert with the regulator. Then the sequence of events for adapting to any technology change would logically run as follows:
- the principles on how the new technology will be accommodated would be agreed at the industry body – to some extent, for NGA, this was achieved with Ofcom's statements on NGA matters in March 2009, although there is still no single industry body to own and maintain these market principles;
 - technical standards would be developed in a governed manner to ensure they support the above principles – it being important to give all relevant parties a voice in how proposed technical standards will affect their business models, in order to ensure that relevant considerations are taken into account; and then
 - market processes based on the technical specifications and standards would be developed in a governed and co-regulatory manner to ensure that they also support and continue to support the above principles as the market evolves.

¹ 'Ethernet Active Line Access: Updated Technical Requirements' published by Ofcom on 3 March 2009. For example, paragraph A2.23 "Ofcom continues to hold the view that multiple ALA-users (i.e. more than one) serving a customer premises should be supported by ALA."

In conclusion, we support Ofcom's comments in paragraph 2.8 of the document about seeking a regulatory approach that is "flexible enough to allow for experimentation in innovative new products and services, whilst at the same time preventing consumer detriment as a result of firms exploiting market power". We believe that the reseller model allows for a great deal of innovation in service provision and urge Ofcom to consider the benefits of this sector of the market as it considers remedies in the WLA market. At this significant stage in the technological development of the communications market, we hope that Ofcom sees some merit in the model we have proposed to allow the industry to take advantage, in a coordinated manner, of the enhanced bandwidth of NGA access for the benefit of consumers and citizens. In particular, we hope that Ofcom's "significant discretion" (paragraph 2.4) can be used to design appropriate remedies in the WLA market review that do not undermine the wider market evolution that we have discussed above.

I hope this response is a helpful contribution to Ofcom's deliberations about the WLA market and should you require any clarification of our views or proposals, please do not hesitate to contact me.

Yours sincerely

Aileen Boyd
Regulation Manager.

Consultation Questions

Question 1 Do you agree with our proposed product market definition? If not, please explain why.

We are content with Ofcom's proposed definition, set out and discussed in section 3 of the consultation document. At paragraph 3.122, this is summarised as being "loop-based, cable-based and fibre-based local access at a fixed location". In particular, we agree that it is appropriate to start to consider that non-physical elements can form part of the characteristics of "local access" products, as technology develops.

Question 2 Do you agree with our proposed geographic market definition? If not, please explain why.

We agree that the market is largely national in scope with a distinction to be made in relation to the Hull area.

Question 3 Do you agree with our proposals that BT and KCOM have SMP in their respective geographic markets? If not, please explain why.

Yes.

Question 4 Do you agree with our proposals for the general access requirements that should apply to BT and KCOM respectively? If not, please explain why.

We are largely in agreement with the package of measures proposed for BT but have two observations on detailed matters within the proposals.

Firstly, we have some concerns around the proposal that new NGA access remedies such as VULA would not be subject to a "basis of charges obligation" as discussed at paragraph 6.55. We understand that the products will be new and volumes uncertain in the period covered by the current review and that this would make charge controls difficult to apply. However, the methodology used to set prices for new access products and services is vitally important to the development of competition between CPs using those products. For example, high initial charges lead to high customer acquisition costs. This, in turn, leads to retail products that tie customers in for significant periods. A number of detrimental consequences flow from this including:

- More concerns about "mis-selling" when customers are tied-in than when they can readily move to competing retail products;
- A significant "first-mover advantage" for those CPs in a position to tie customers in first; and
- A chilling of the retail market activity as customer movement slows and competing suppliers find it difficult to attract customers, thus affecting their appetite to invest in providing alternative retail market offerings.

We would therefore like to see some regulatory action in the area of charging methodology, whether or not as part of this market review, so that the above problems could be addressed before the new NGA access products are launched.

The second matter relates to the proposal for BT to provide quality of service information. We support the general intention here and our comment relates only to making the proposed reporting more flexible. Rather than specifying the precise

measures to be reported on in an SMP-related condition, we wonder whether it would be possible to refer instead within the condition to a specific document generated by the OTA in which the required reporting is described in detail. Then, rather than using the text of the condition to formalise what already exists, it could instead be used to allow the detail of the required reporting to be developed more flexibly within the industry community, overseen by the OTA.

We have no comment on the general access requirements proposed for KCOM.

Question 5 Do you agree that Ofcom should impose a new network access obligation on KCOM, that would require it to follow a statement of requirements process to handle requests for new network access in this market? If not, please explain why.

This appears reasonable.

Question 6 In relation to LLU, do you agree with the assessment and options set out?

We agree with Ofcom's assessment on LLU – particularly supporting the comments in paragraph 7.24 about the broadband migration issues that emerged for customers. We believe that this highlights the importance of ensuring, through the regulatory framework, that migration arrangements are considered and implemented for any new wholesale platform before it is implemented and associated retail products offered to end customers. As we have noted in response to many individual consultations, we consider that this is best achieved by means of a co-regulatory approach that requires appropriate levels of coordination between the industry players involved, whether at wholesale or retail level, in providing communications services to end customers.

Question 7 In relation to fibre access, do you agree with the potential unbundling arrangements for the different fibre architectures and the positions/options set out given the current and expected future availability of fibre within BT's access network?

No comment.

Question 8 In relation to SLU, do you agree with the assessment and options set out?

No comment.

Question 9 In relation to PIA, do you agree with the proposed PIA obligation structure and the proposed implementation arrangements?

Ofcom's thoughts and plans in relation to PIA (physical infrastructure access) seem relatively advanced compared to other options presented in the consultation. As SSE is operating in the reseller area, PIA is not necessary for our business model and we do question whether the actual levels of demand for this type of access warrant specifications and actions on the rapid timescales (for example, paragraph 7.200 sets out a service implementation timescale of 8 months from publication of the final statement following this consultation) that Ofcom proposes. Given that Openreach has limited resources to progress access developments, we would favour greater emphasis on development of the active access remedies that all competing CPs can use on a continuing basis – resellers as well as vertically integrated CPs in areas where they have chosen not to roll out their own technology. We note the conclusion (referred to in paragraph 7.135) of Ofcom's consultants that, even with shared infrastructure access, other duplicated investment by other CPs would drive up the cost of competition. Paragraph 7.124 also comments that most CPs see active NGA remedies as more important.

Question 10 In relation to VULA, do you agree that VULA may be a necessary access remedy in the WLA market and if so, do you agree with the key characteristics identified and how these currently relate to BT's GEA products?

We agree that some form of virtual local access product would be appropriate for the developing local access market but have some concerns over the direction and detail of the debate on what the product should look like.

As mentioned in our covering letter, SSE provides services in retail markets using active wholesale products provided largely by BT Openreach on a regulated basis. CPs who use the current generation local loop unbundling (LLU) products do not have any obligations to provide access to resellers on the access lines that they have unbundled. As Ofcom is aware, there have been problems for customers who initially used retail products based on LLU migrating to other CPs providing alternative broadband retail products, including those provided over BT's non-unbundled local infrastructure i.e. BT's own products and those of the BT-based resellers. We see the potential for similar problems to occur with the proposed introduction of VULA products.

In particular, we are concerned about any vertically integrated CP being able to take control of the entire capacity of the communications link to a customer's premises, especially since that capacity will be significantly greater than that provided by current copper-based technology. It appears that the proposed VULA remedy could allow this, thus removing that premises from the pool of those that can economically be offered a retail service by BT-based resellers. There appear to be various technical ways in which this control could be offered: "wires only access"; "open ATA"; and versions of the "multi-port" model – all discussed to some extent in the consultation document. Technical and commercial discussions have been taking place between BT Openreach and other CPs who would like unbundled access to the new fibre networks as industry makes ready for BT's planned fibre roll-out. In essence, our concern is that these discussions seem unlikely to preserve the ability for resellers to serve end customers on an economic basis. Our wish is for a forum to exist where all parties, including resellers, can comment and have those comments taken into account in the development of the technical and commercial aspects of wholesale products to support competition in the NGA world.

The methodology for charging for access products is also a key element in considering the competitiveness of the market. The consultation mentions some considerations around this at paragraph 7.285. In general, high upfront wholesale charges will lead to a need for retailers to tie end customers in to long term contracts, as discussed in our response to Q4 above. It also provides a climate of significant advantage for the "first-movers" who are able to sell the first retail product set on the new technology at a particular premises. We therefore believe that charging methodologies for wholesale products should fall within the scope of the forum we have suggested above.

Against this background, considering the list of key characteristics put forward in paragraph 7.233 of the consultation for a VULA product, we support the proposals for it being local and providing un-contended access. We also agree that the product should be service agnostic and are particularly keen to see it being able to support multiple products – as discussed in our covering letter. However, we have reservations about the characteristics of providing control of access and of

customer premises equipment. As discussed further in our covering letter, we do not believe that these characteristics should be absolute; they should be secondary to the overall management of the products on the line by an independent third party such that a customer can migrate between different retail service offerings efficiently and economically.

Question 11 Do you agree with the framework for considering specific access remedies on BT?

We believe the points addressed in the framework for considering access remedies on BT, as set out in the early paragraphs of section 8 are all appropriate. We particularly agree that support for the contestability of investment in NGA is important and have some further thoughts on this in our response to Q12.

However, when considering the maintenance of effective competition in markets downstream from the local access market, we would like to see consideration of the reseller market, which uses the wholesale line rental family of products. These serve similar number of customers to those supplied using LLU remedies and are actually used by hundreds of reseller companies compared to the handful of LLU operators.

In this context, we note that Ofcom asks for views at paragraphs 8.73 and 8.75 about the interpretation of the proposed non-discrimination requirement on BT in relation to the VULA product and the more active, downstream wholesale Voice of Next Generation Access (VoNGA) product that is also being developed. Ofcom proposes that the more onerous requirement of “equivalence of inputs” (Eol) applies to VULA, so that BT’s operator-level competitors can provide retail voice services on the same basis as BT Retail because BT Retail will also “consume” VULA in order to provide its retail voice products – just as other CP operators will have to do. In relation to VoNGA, however, Ofcom suggests that there are 2 scenarios: either BT Retail also consumes VoNGA (which is likely to be a required regulated product as a result of the wholesale narrowband exchange line market review) directly or it only consumes VULA in order to provide its voice services, thus providing VoNGA only for active-level competitors or resellers. In the former situation Ofcom is minded to require VoNGA to consume VULA on an Eol basis whereas in the latter case it is inclined to relax the requirement.

We are concerned about the position of resellers in at least one of these scenarios: the one where BT Retail provides VoNGA but is not required to consume this product. This runs counter to the development of the wholesale market supporting current-generation products where BT has been required, under the terms of the Undertakings, to provide the active WLR3 wholesale product on an Eol basis such that BT Retail uses the same active wholesale product as its reseller competitors. It appears to us that a situation where BT does not have the obligation to provide VoNGA on an Eol basis (i.e. VoNGA is provided by BT but BT Retail does not have to use it) would significantly undermine the reseller business model.

Ofcom mentions the concept of a “level playing field for CPs purchasing VoNGA” in paragraph 8.74 and this is what we would like to see achieved. The sequence of market reviews are perhaps at odds with Ofcom being able to make definitive statements on both VULA and VoNGA at this time but the complexity of the overall industry supply chains and the importance of managing the technological change to NGA in our view require Ofcom to take an overview of the logical development of

the whole market in this review. We suggest that the fairest evolution of the NGA market would be for VoNGA to be developed first on an EOI basis, followed by exploration of the possibility of providing a VULA type product once further work has taken place on the technical standards and issues such as those raised in section 7. VoNGA will continue to have a role in the market after less active remedies such as VULA have been developed, as it will be available for use by operator CPs in areas where they do not have their own technology. It may be that Ofcom will have other relevant remedies available to it in due course when considering the role of VULA in the future – such as the further infrastructure sharing obligations that Ofcom mentions in paragraph 7.111.

Finally, echoing points made in response to Q10 above, we also believe that the charging methodology, as well as the overall charging arrangements – as discussed in paragraph 8.8 – can have a significant effect on both competition and investment. We would like to see an industry forum that allows comprehensive and transparent input into how charges are set.

Question 12 Do you agree that there is a need to have a complementary set of access remedies and if so, do you agree with the proposed set of remedies on BT?

We understand the rationale for Ofcom to propose a “mixed economy” of access remedies for the local access market due to the variety of scenarios where access might be needed by other CPs.

One area where we think that more attention is required is the situation in which other infrastructure providers – outside the traditional CPs – may be interested in providing fibre networks. It is noted in other Ofcom documents² that there are already other fibre network providers in specific geographical locations such as Dundee, Yorkshire and Bournemouth. We are aware, through involvement in discussions at the BSG COTS³ group that these providers are finding it difficult to establish interfaces such that multiple service providers can provide services to the customers attached to these networks. There are many issues to consider in this scenario, not least ensuring that connected customers have a good choice of service offerings and can migrate smoothly between them. It appears to us that there may be a case for requiring BT Openreach, as an operator with SMP in the local access market, to provide some “hosting” type of service that would allow the customers connected to these fibre networks to be accessed via Openreach service management systems. We would see this hosting service as being provided with industry input and oversight to ensure transparency of costs and quality. This would allow the fibre based wholesale access products being developed by Openreach at both active and the relatively passive levels of VULA to be available to other CPs to provide services on these newly provided networks.

Developing the market in this way to enable a “patchwork of networks”⁴ to interconnect and co-exist would appear to line up with Government objectives for cost-effective roll-out of next generation networks and with Ofcom’s intention to promote contestability of investment.

² Ofcom “Delivering super-fast broadband in the UK” published in March 2009

³ the Broadband Stakeholder Group “Commercial, Operational and Technical Standards for independent local open access networks” group

⁴ Department of Business, Innovation and Skills “Consultation on proposals for a Next Generation Fund” published January 2010 paragraph 58

Question 13 Do you agree that no specific access remedies should be imposed on KCOM in the WLA market at this time? Could any remedies on KCOM at the WLA market level address the competition issues that we have identified?

Ofcom's proposed approach seems reasonable in this area.

Question 14 Do you agree with our assessment against the legal tests for each specific remedy, as set out in Section 9?

No comment.