

**Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of Independent Fibre Networks Limited**

**A Notification of this proposal was published on 19 February 2009**

Whereas:

- (A) On 12 January 2009, Independent Fibre Networks Limited made an application for the electronic communications code (the “Code”) for the purposes of the provision of an electronic communications network in the United Kingdom in accordance with section 107(1) of the Act and the notification published by Ofcom by virtue of the Transitional Provisions under section 107(2) of the Act on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 19 February 2009, Ofcom published a notification of their proposal to give a direction applying the Code to Independent Fibre Networks Limited in accordance with section 107 of the Act;
- (C) Ofcom did not receive any representations in relation to their proposal to give a direction applying the Code to Independent Fibre Networks Limited;
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

**NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-**

1. The electronic communications code shall apply to Independent Fibre Networks Limited for the purposes of the provision by Independent Fibre Networks Limited of an electronic communications network to have effect in the United Kingdom.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

“Act” means the Communications Act 2003;

“Independent Fibre Networks Limited “ means Independent Fibre Networks Limited (registered company number 5910724);

“Ofcom” means the Office of Communications; and

“Transitional Provisions” means sections 408 and 411 of the Act, the Communications Act 2003 (Commencement No.1) Order 2003 and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003.

3. Except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded

and expressions cognate with those referred to in this Direction shall be construed accordingly.

4. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published.

**Steve Unger**  
**Competition Policy Director**

**A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002**

**9 April 2009**

# Explanatory Statement

1.1 On 12 January 2009, Independent Fibre Networks Limited (“IFNL”) applied for the electronic communications code (the “Code”) for the purposes of the provision by it of an electronic communications network. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the Notification published by Ofcom (by virtue of the Transitional Provisions in the Act) on 10 October 2003 under section 107(2) of the Act.

1.2 On 19 February 2009, Ofcom published a notification of its proposal to give a direction applying the Code to IFNL in accordance with section 107 of the Act. Ofcom did not receive any representations in relation to its proposal and has therefore decided to proceed and grant Code powers to IFNL.

1.3 In considering IFNL’s application, Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty in section 3(1)(b) “to further the interests of consumers in relevant markets, where appropriate by promoting competition” and the first Community requirement set out in section 4(3)(a) to promote competition “in relation to the provision of electronic communications networks and services”.

1.4 IFNL is building a Next Generation Access Network which will ultimately extend to new-build town and urban developments approved by the UK Government and local planning authorities. The network will provide ‘open access’ wholesale capacity to communications providers who wish to provide high speed broadband connections to business and residential end-users. The high speed broadband network would therefore further the interests of consumers and support retail competition.

1.5 In addition to the requirements of sections 3 and 4 of the Act, Ofcom has also had regard to its duties set out in section 107(4) of the Act. These are set out below.

## **The benefit to the public of the electronic communications network by reference to which the Code is to be applied to the applicant**

1.6 As explained in paragraph 1.4, IFNL’s application explains that the network concerned will provide wholesale ‘open access’ Next Generation Access Network high speed broadband to communications providers who wish to serve end-users. IFNL explained that the network will be provided on a carrier-neutral basis and therefore any communications providers would be able to purchase wholesale capacity from IFNL and deliver end-user services. IFNL also explained that a core principle of its basic business model is to provide active line access (‘ALA’)-based services and these will take the form of low level, high quality Ethernet based services.

1.7 Wholesale ALA-based services give much of the control to the interconnecting communications provider and therefore in the absence of competing infrastructure are the most likely alternative to readily support retail competition and differentiation.

1.8 The types of retail applications that IFNL’s network will support include high quality voice telephony and sustained high speed broadband Internet services. The network will also support high definition TV signals to the customer premises.

1.9 For these reasons, Ofcom considers that IFNL's network will benefit the public and support retail competition in the provision of high speed broadband services.

### **The practicability of the provision of the network without the Code**

1.10 The Code enables, amongst other things, operators to construct their networks and, in particular, states that they "shall, for the statutory purposes, have the right to....(a) install electronic communications apparatus, or keep electronic communications apparatus installed, under, over, [in, on] along or across...a street." The Code is therefore a means by which these networks could be deployed quickly. The alternative would be to seek specific licences under the New Road and Street Works Act 1991 as amended by the Traffic Management Act 2004 and this could serve to delay deployment.

1.11 IFNL explained that its network will serve predominantly new housing developments and therefore there will be co-ordination with the developer in deploying the network. Nonetheless, it explained that there will be an amount of build that will need to take place on public land and also after initial deployment require maintenance. In the absence of Code powers, IFNL considered that network would be hampered. Code powers would, it explained, facilitate build more quickly and efficiently. IFNL further noted that it would be placed at a competitive disadvantage in the absence of Code powers.

1.12 For these reasons, Ofcom considers that it should grant Code powers to IFNL and that, in doing so, IFNL would be better placed to deploy and maintain its broadband network.

### **The need to encourage the sharing of the use of electronic communications apparatus**

1.13 As explained in paragraph 1.6, IFNL will provide wholesale ALA access to communications providers wishing to provide high speed retail broadband services to end-users. Its network will therefore offer opportunities for retail communications providers to enter into an interconnect agreement to serve end-users in areas in which in the absence of wholesale ALA access they would not choose to provide services. The network will serve to substitute for direct provision of other infrastructure.

1.14 IFNL further explained that it recognised that where its network would be the sole means of direct infrastructure to end-users it would have specific responsibilities in relation to its availability.

### **Whether the Applicant will be able to meet liabilities as a consequence of:**

**(i) the application of the Code; and**

**(ii) any conduct in relation to the application of the Code**

1.15 IFNL is a subsidiary company of Inexus Group Holdings Ltd which already owns and runs a number of utility provision companies specialising in the design, build and maintenance of distribution networks. IFNL considers therefore that the group is fully aware of its obligations in carrying out street works and would seek to minimise use

of Code powers wherever possible by co-ordinating with relevant local highways authorities. It also understands its obligations under the Traffic Management Act 2004 and would aim to strictly adhere to these. IFNL further stated that the Inexus Group has been accredited by the British Standards Institute in relation to quality, environment and Health and Safety parameters and IFNL would work to these standards.

1.16 IFNL also provided Ofcom with details in relation to the provisions that it would put in place to meet the requirements of the Electronic Communications (Conditions and Restrictions) Regulations 2003 ('the Regulations') which require Code operators to ensure sufficient funds are available to meet any liabilities should they arise.

1.17 Ofcom is satisfied that IFNL would use the Code responsibly and be able to put in place sufficient securities to meet its obligations under the Regulations specifically those relating to potential liabilities.