



Ebbfleet Fibre to the Home Pilot

Consent for non-uniform pricing of retail telephony
services under Universal Service Condition 1

Statement

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Section 1

Summary

The Universal Service Conditions ensure that basic services are available across the UK at affordable prices

- 1.1 The Universal Service Conditions ('USCs') ensure that certain basic fixed line communications services are available at an affordable price to all citizens of the UK.
- 1.2 Under the USCs BT is required to provide fixed telephony services in all areas of the UK excluding the Hull area¹ in response to reasonable requests from end-users. BT must provide these services at a uniform price throughout the UK (again excluding the Hull area), unless Ofcom consents otherwise.

We proposed that BT Retail should be allowed to charge non-uniform prices for certain telephony services when it pilots the delivery of telephony services over optical fibre cables at Ebbsfleet

- 1.3 On 9 June 2008 Ofcom (the Office of Communications) published a consultation ('the Consultation') proposing to consent to a request from BT for permission under USC 1 to charge non-uniform prices for certain telephony services. BT sought this permission in connection with a pilot of the use of optical fibre cables to deliver telephony services at a housing development in Ebbsfleet, Kent.
- 1.4 We received 7 responses to the consultation.

Following consideration of the responses, we have decided to grant the request

- 1.5 Following consideration of the responses, we have decided to confirm the proposal subject to including an additional condition requiring that customer contracts should not contain minimum contract terms that extend beyond the term of the Pilot.
- 1.6 This document contains the legal notification granting the Consent and also:
 - a summary of the responses to the consultation and our comments;
 - a summary of our Impact Assessment and our response to comments made by stakeholders about the Impact Assessment; and
 - a final review of the legal tests.

Terms of the Consent

- 1.7 The Consent, which takes effect on publication of this statement, gives BT permission to charge non-uniform prices for telephony connection and line rental at no more than 300 homes at the Ebbsfleet Development between 1 August 2008 and 31 December 2009 subject to certain conditions.

¹ Under the USCs KCOM (formerly Kingston Communications) is required to provide fixed telephony services in the Hull area.

Section 2

Introduction

Legal Framework for the Universal Service Conditions

- 2.1 The USCs ensure that certain basic fixed line services which are considered essential for everyone are available at affordable and uniform prices to all consumers in the UK. This especially assists consumers who live in areas of the UK where services are more expensive to provide (generally rural areas).
- 2.2 Requirements for universal services are set out in Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services ('the Universal Services Directive'). The Universal Services Directive was implemented in the UK amongst others in the Communications Act 2003 ('the Act') and the Electronic Communications (Universal Service) Order 2003 ('the Order'). The Order specifies the services which must be provided throughout the UK ('USO Services'). It also provides that such services have to be offered at prices that are uniform throughout the UK unless Ofcom has determined there is clear justification not to do so.
- 2.3 The Order has been implemented by Ofcom through specific conditions (the USCs) which are applied to communications providers designated by Ofcom as Universal Service Providers. Currently these are BT and KCOM. BT is required to provide USO Services in all parts of the UK excluding the Hull area and KCOM is required to provide USO Services in the Hull area.
- 2.4 The USCs are specified in a Notification published on 21 July 2003 by the Director General under Regulation 4 (10) of the Electronic Communications (Universal Service) Regulations 2003. These automatically entered into force by virtue of the transitional powers in the Act.
- 2.5 Under USC 1, BT is required to provide fixed telephony services in all areas of the UK excluding the Hull area in response to reasonable requests from end-users. BT must provide these services at a uniform price throughout the UK (again excluding the Hull area) unless Ofcom consents otherwise. USC 1 states:

Condition 1: Provision of telephony services on request

- 1.1 *At the reasonable request of any End-user, BT shall provide Telephony Services, including the ability to make and receive calls employing facsimile and data communications, at data rates that are sufficient to permit functional internet access, to that End-user at any place in the UK except for the Hull Area, and BT shall ensure that its Electronic Communications Networks are installed, kept installed and run for those purposes.*
- 1.2 *Unless the Director consents otherwise, BT shall provide the services referred to in paragraph 1.1 on the basis of uniform prices throughout the UK except for the Hull Area.*

BT's Request

- 2.6 Our consultation considered a request from BT Retail dated 29 April 2008.

- 2.7 Until now BT has connected homes to its network using conventional metallic cables. However at a large housing development at Ebbsfleet in Kent, BT Openreach intends to provide services using optical fibre cables. This technology is commonly known as Fibre to the Premises or FTTP.
- 2.8 This is an example of a Next Generation Access or NGA network technology which will support the delivery of broadband services with much greater bandwidth than conventional metallic cables. The optical fibre cables will also be used to deliver telephony services and may also be used to deliver TV services.
- 2.9 BT Retail plans to treat the first homes connected using this new method as a pilot and asked Ofcom for permission (under USC 1.2) to offer pilot customers discounts on connection and line rental charges for fixed telephony services which may include offering connection and rental without charge.
- 2.10 BT's request does not include fixed telephony call charges so customers participating in the Ebbsfleet FTTP Pilot would pay the same call charges as BT customers in other parts of the UK.
- 2.11 BT Retail is seeking permission to offer these discounts to no more than 300 customers connected using FTTP technology at the Ebbsfleet FTTP Pilot for the period from August 2008 to December 2009.

Section 3

Summary of responses the consultation and Ofcom's comments

Overview

- 3.1 Ofcom received 7 responses to the consultation. One of the respondents asked for its name to be withheld and two others asked Ofcom not to publish their names or responses. The non-confidential respondents are listed below:
- BT;
 - Communications Management Association;
 - Nettek Limited; and
 - Scottish and Southern Energy ('S&SE').
- 3.2 Five of the respondents gave permission for their responses to be published. These are published on Ofcom's website at the following location:
- http://www.ofcom.org.uk/consult/condocs/ebbsfleet_fibre/responses/
- 3.3 The Communications Management Association, Nettek Limited and another respondent submitted brief responses supporting the proposal because it would facilitate the pilot of FTTP technology.
- 3.4 BT welcomed Ofcom's proposal to consent to its request. It also said it wanted to speak to Ofcom about adopting a more flexible approach to the uniform pricing requirements in the USCs.
- 3.5 Two respondents did not support the proposal and S&SE would support it only if Ofcom added additional conditions to the Consent as safeguards.
- 3.6 S&SE and the other two respondents had several concerns:
- Two respondents felt Ofcom had not given sufficient justification for consenting to BT's request;
 - S&SE and another respondent were concerned about the potential impact of the Ebbsfleet FTTP Pilot on retail competition and also that the discounts that BT might offer during the pilot might amount to an abuse of a dominant position under the Competition Act;
 - one respondent was concerned about the potential impact of the Ebbsfleet FTTP Pilot on competition in the provision of optical fibre based access networks. This respondent was also concerned about the impact of incentives proposed by BT Openreach to encourage other communications provider to trial its fibre based wholesale services.

3.7 These three respondents asked Ofcom to attach additional conditions to the consent to address their concerns if it decided to confirm the proposal. In particular, S&SE indicated that the following conditions should be attached to the consent:

- any discounts offered by BT should stem directly from discounts to wholesale inputs from BT Openreach that would be available to other CPs;
- BT Retail should be required to tell its customers that the pilot discounts are sourced from BT Openreach;
- BT Retail should not be permitted to tie-in customers with contracts that extend beyond the end of the pilot; and
- BT Openreach should be required to publicise that discounts to its wholesale products are available to other CPs.

3.8 None of the respondents raised any concerns about the impact of the proposed consent on the effectiveness of the USCs.

3.9 The main points raised by respondents are discussed below.

Justification for granting the Consent for non-uniform pricing

3.10 One respondent believed there is no need for a pilot as telephony services are basic services and would be no different to those offered elsewhere on copper cables. The respondent also pointed out that BT already offers telephony service to businesses on fibre optic cables.

3.11 The other respondent argued that BT would not need permission for non uniform pricing of telephony services to ensure the success of the pilot since high-bandwidth broadband services would provide a good incentive for consumers to participate in the pilot and BT could offer other incentives to encourage customers to give BT feedback about the services. This respondent also argued that the reasons given by Ofcom for proposing to grant the request were insufficient justification for granting it (Ofcom proposed to grant the request amongst others on the basis that it encourages investment and innovation and the availability of high speed data transfer services and would facilitate the pilot in recognition of the fact that the services may be delivered and operate differently from standard fixed telephony services and that customers may be asked to provide BT with feedback about the services).

Ofcom's comments

3.12 Ofcom considers that although the telephony services offered at Ebbsfleet are likely to be similar to those delivered by more conventional means elsewhere, some aspects of the services may differ from standard telephony services. BT will also be using a fibre technology which is different from the one it has used in the past. Services at Ebbsfleet will be delivered using GPON² point to multipoint fibre technology rather than the point to point technology used to deliver business telephony services elsewhere.

3.13 In effect, these respondents argue that Ofcom should refuse the request because BT would probably be able to conduct the Ebbsfleet FTTP Pilot successfully without permission for non-uniform pricing for telephony services. Ofcom disagrees with this

² Gigabit Passive Optical Network

view and considers that facilitating the pilot whilst not undermining the effectiveness of the USCs is consistent with the USCs and Ofcom's duties under the Act and the relevant legal tests for granting the Consent.

Impact on retail competition

- 3.14 S&SE and another respondent were concerned about the potential impact on retail competition of the discounts to telephony rental and connection charges that BT might offer during the Ebbsfleet FTTP Pilot.
- 3.15 One respondent argued that it would be reasonable to assume that the proposed discounts would effectively exclude other communications providers from providing retail services at Ebbsfleet for the duration of the pilot. S&SE thought that the discounts would result in BT Retail establishing a dominant position in the provision of voice services at the Ebbsfleet FTTP Pilot area.
- 3.16 S&SE also argued that the discounts would undermine the effectiveness of BT Openreach's efforts to encourage providers other than BT Retail to pilot services using its FTTP based wholesale services. S&SE therefore thought that BT Retail should only be permitted to offer discounts that stemmed from discounts to the underlying wholesale products provided by BT Openreach which would be available to all providers.
- 3.17 S&SE and another respondent further noted that:
- telephony services form part of the Fixed Narrowband Retail Services Market in which BT has been found by Ofcom to have a position of Significant Market Power (SMP); and
 - if BT were to offer connection and/or line rental below standard prices, especially free-of-charge then those charges would be likely to be below the marginal cost of provision.
- 3.18 On this basis S&SE and the other respondent argued that the discounts would be harmful to competition and would constitute an abuse of a dominant position under Chapter II of the Competition Act 1988 (either predatory pricing or a margin squeeze). They therefore recommended that Ofcom should not grant the proposed consent.

Ofcom's Comments

- 3.19 Whilst acknowledging these concerns, Ofcom remains of the view that the discounts to telephony services that BT might offer during the Ebbsfleet FTTP Pilot would be unlikely to have an appreciable effect on competition given that the Pilot will be limited to no more than 300 homes in a small geographic area. In reaching this view, Ofcom is also mindful that no other communications provider has notified BT Openreach of its intention to offer services at Ebbsfleet and inevitably the preparations would take several months. It is therefore likely that for at least part of the pilot no other communications provider would be offering telephony services at Ebbsfleet.
- 3.20 Ofcom notes that the Competition Act 1998 will continue to apply to BT during the Ebbsfleet FTTP Pilot. The Consent does not in any way grant or imply any waiver to BT under competition law and does not in any way fetter Ofcom's discretion to consider a complaint under the Communications Act 1988 about BT's conduct in

relation to the Ebbsfleet FTTP Pilot. Also, pursuant to section 49 of the Act Ofcom may at any time during the period of the Consent modify or withdraw the Consent.

Impact on access network infrastructure competition

- 3.21 One respondent was concerned that the Ebbsfleet FTTP Pilot would give BT Openreach a competitive advantage over other providers who wished to provide optical fibre based access networks in competition with BT. The respondent argued that other providers would not be able to run large scale pilots offering free connection and line rental particularly if they don't have large fixed line businesses or a partner that has.

Ofcom's comments

- 3.22 Ofcom acknowledges that it would be useful for access network infrastructure providers to be able to demonstrate that their networks have been used to successfully deliver retail telephony services. The Ebbsfleet FTTP Pilot may therefore give BT Openreach a competitive advantage in negotiations with property developers compared with other providers that cannot demonstrate similar experience.
- 3.23 Ofcom estimates that the value of the discounts that BT Retail would be able to offer under the terms of the proposed consent would not exceed £80,000³. In the context of the costs associated with an access network deployment, pilot discounts of this size would be unlikely to prevent BT's competitors from piloting their services.
- 3.24 Ofcom considers that the best way to address this concern would be for other providers to pilot their own services rather than for Ofcom to refuse BT Retail permission for non-uniform pricing during the Ebbsfleet FTTP Pilot in the hope that it would impede BT's ability to pilot its own services.

Concerns about the wholesale incentives proposed by Openreach

- 3.25 One respondent was concerned about the potential impact on competition of an incentive package recently proposed by BT Openreach to encourage communications providers to purchase its FTTP based wholesale telephony and broadband services. BT Openreach has offered up to 10,000 free wholesale FTTP connections to encourage communications providers to try those services. The respondent felt the incentives might amount to an abuse of a dominant position under chapter 2 of the Competition Act 1988.

Ofcom's comments

- 3.26 Ofcom shares BT Openreach's aim of encouraging communications providers to take-up FTTP based wholesale services because it encourages retail competition. However, Ofcom believes it is important that any incentives offered by Openreach do not harm other forms of competition such as the deployment of fibre based access networks by other suppliers.
- 3.27 Ofcom acknowledges the concerns raised by the respondent but considers the Openreach incentives to be a separate matter that is outside of the scope of this

³ Assuming current connection and line rental charges for 300 homes over the full term of the consent. In practice the value of the discounts may be less since the number of houses is unlikely to reach 300 until towards the end of the term of the consent.

statement which deals specifically with the non-uniform pricing consent requested by BT Retail for the Ebbsfleet FTTP Pilot. Ofcom will therefore engage in further dialogue with the respondent and BT Openreach about the best way to achieve these aims.

Ofcom should consider a more flexible approach to the uniform pricing requirements

- 3.28 BT felt that the process of consulting on each request for non uniform pricing under the USCs is unwieldy and bureaucratic and out of step with the underlying objective of the USCs. BT stated that local variations in its pricing for USC services would not be detrimental to consumers or anti-competitive provided the overall principles of the USCs continue to apply. BT believed that the regulatory framework would permit Ofcom to adopt a more flexible approach and proposed to discuss this further with Ofcom.

Ofcom's Comments

- 3.29 Ofcom's view is that a USC consent should only be granted where there is clear justification in accordance with the Order and the consent would be consistent with Ofcom's duties under the Act. Ofcom considers that this issue is outside the scope of this statement. Ofcom would be happy to discuss this matter further with BT.

Ofcom should apply additional conditions to the consent to address stakeholder concerns

- 3.30 Three of the respondents asked Ofcom to attach additional conditions to the consent to address their concerns. These are:
- i) The scope of the Consent should be strictly limited to the terms proposed (i.e. line connection and rental for no more than 300 homes at the Ebbsfleet development during the period August 2008 to December 2009) and Ofcom should not grant any extension for example if the houses are built later than expected;
 - ii) The geographic reach of the Ebbsfleet FTTP Pilot should be more tightly defined to prevent BT from offering Pilot services across the whole development;
 - iii) The amount by which BT could discount telephony charges should be limited;
 - iv) BT Retail should not be permitted to tie-in customer with contracts that extend beyond the end of the pilot;
 - v) BT Retail should not be allowed to discount other unregulated products such as broadband during the Ebbsfleet FTTP Pilot;
 - vi) Given the industry wide importance of FTTP technology BT Retail should be required to share the results of any customer feedback that it gathers during the Ebbsfleet FTTP Pilot;
 - vii) Any discounts offered by BT Retail should stem directly from discounts to wholesale inputs from BT Openreach that are available to other CPs;

- viii) BT Openreach should be required to publicise that its proposed incentive package would be available to other CPs that participate in the Ebbsfleet FTTP Pilot; and
- ix) BT Retail should be required to tell its customers that the discounts are sourced from BT Openreach.

Ofcom's Comments

i) The scope of the Consent should be strictly limited to the terms proposed and Ofcom should not grant any extension for example if the houses are built later than expected

- 3.31 The terms of the Consent explicitly limit its scope to no more than 300 homes at the Ebbsfleet development during the period August 2008 to 31 December 2009.
- 3.32 Ofcom has granted the Consent on the terms requested by BT Retail (with only minor amendments) and therefore assumes that the terms give BT sufficient scope to successfully complete the Ebbsfleet FTTP Pilot. Ofcom's current view is that it therefore unlikely that an extension to the Consent for the same purpose would be justified. However, Ofcom would consider any request on its merits.

ii) The geographic reach of the Ebbsfleet FTTP Pilot should be more tightly defined to prevent BT from offering Pilot services across the whole development

- 3.33 Ofcom understands that during the early stages of the Ebbsfleet development, the number of homes constructed would increase quite slowly. Further limiting the geographic reach of the pilot within the Ebbsfleet development might therefore limit the number of homes that BT could include in the Pilot to less than the target of 300. Ofcom will not therefore limit the Pilot to a part of the Ebbsfleet development.

iii) The amount by which BT could discount telephony charges should be limited

- 3.34 Respondents request this condition in order to address their concern that discounts offered by BT Retail would be harmful to competition. As noted in paragraph 3.19 above, Ofcom considers that because of its limited scale and scope, the Ebbsfleet FTTP Pilot would be unlikely to have an appreciable effect on competition at the retail level. Ofcom does not therefore propose to limit the discounts to telephony services that BT Retail may offer during the Ebbsfleet FTTP Pilot.

iv) BT Retail should not be permitted to tie-in customer with contracts that extend beyond the end of the pilot

- 3.35 The concern expressed here is that the impact on competition in the Ebbsfleet development might extend beyond the pilot if BT used the discounts to encourage customers to sign up to contracts that extend beyond the end of the pilot. Ofcom considers this to be a valid concern and has decided it would be appropriate to add an additional condition to the Consent to reassure stakeholders. The additional condition requires BT to ensure that contracts for the Ebbsfleet FTTP Pilot service do not contain minimum contract terms that extend beyond the term of the Pilot.
- 3.36 BT Retail has explained to Ofcom that contracts for the pilot service will not prevent customers from switching to other providers during or at the end of the pilot. After the

end of the pilot customers that choose to remain with BT would revert to BT Retail's standard contract terms.

v) BT Retail should not be allowed to discount other unregulated products such as broadband during the Ebbsfleet FTTP Pilot

- 3.37 BT Retail has indicated to Ofcom that it intends to offer participants in the Ebbsfleet FTTP Pilot discounts on broadband services to encourage participation in the pilot. This may include offering broadband connection and/or rental free of charge.
- 3.38 Ofcom considers that it would be inappropriate for it to impose a condition as part of the Consent that would in effect regulate retail prices of other types of services such as broadband services. As previously noted the Competition Act 1998 will continue to apply to BT during the Ebbsfleet FTTP Pilot and should any competition concerns arise in relation to BT's pricing of broadband services it would provide a mechanism for addressing them.

vi) Given the industry wide importance of FTTP technology BT Retail should be required to share the results of any customer feedback that it gathers during the Ebbsfleet FTTP Pilot

- 3.39 Whilst the customer feedback would undoubtedly be of interest to other communications providers, Ofcom can see no reason why it should require BT Retail to share the feedback with its competitors.
- 3.40 BT Retail has informed Ofcom that it does not intend to share its customer feedback with other communications providers or BT Openreach.

vii) Any discounts offered by BT Retail should stem directly from discounts to wholesale inputs from BT Openreach that are available to other CPs

- 3.41 Respondents requested this condition in order to address their concern that discounts offered by BT Retail during the Ebbsfleet FTTP Pilot would be harmful to retail competition. Such a condition would mean that BT Retail would not be able to offer discounts to telephony services independently and would only be able to pass on discounts to the underlying wholesale services offered by BT Openreach as part of its proposed incentive package referred to at paragraph 3.26 above. As noted in paragraph 3.18 above, Ofcom considers that due to its limited scale and scope, the Ebbsfleet FTTP Pilot would be unlikely to have an appreciable effect on competition at the retail level. Ofcom does not therefore propose to link the discounts provided by BT Retail to discounts to the underlying wholesale services.

viii) BT Openreach should be required to publicise that its proposed incentive package would be available to other CPs that participate in the Ebbsfleet FTTP Pilot

- 3.42 Ofcom notes that BT Openreach has been working for some time to encourage other CPs to trial its fibre based wholesale services at Ebbsfleet. It has also publicised its proposed incentives package for its FTTP services referred to at paragraph 3.26 above both on its website and at industry meetings. Ofcom does not therefore consider it necessary to add an additional condition to the Consent.

ix) BT Retail should be required to tell its customers that the discounts are sourced from BT Openreach

- 3.43 As noted above, Ofcom does not propose to require any linkage between BT Retail discounts and BT Openreach discounts during the Ebbsfleet FTTP Pilot. Ofcom also doubts whether information about the ultimate source of BT Retail discounts would be particularly useful to consumers.

Section 4

Ofcom's decision

- 4.1 Ofcom has considered stakeholders' responses to its consultation on the proposed Consent and has decided to grant the request with one modification as specified below.
- 4.2 The notification and Consent to non-uniform pricing is set out in Annex 2. The Consent takes immediate effect on publication of this statement.
- 4.3 In making this decision, Ofcom has taken into account the following factors.

Communications Act Tests

- 4.4 Ofcom regulates the communications sector under a framework established by the Act. The Act grants Ofcom the power, for the purposes of securing compliance with Community obligations in relation to universal services to designate undertakings as Universal Service Providers and to specify USCs with which designated undertakings must comply.
- 4.5 The tests that Ofcom must apply to give, modify or withdraw a direction, approval or consent are those specified in section 49(2) of the Act. Ofcom must also take account of its general duties in section 3 of the Act and the European Community requirements for regulation as specified in section 4 of the Act. Each of these requirements is considered in this section.

Requirement to publish a notification

- 4.6 Under section 49(4) of the Act, before a direction, approval or consent is given, modified or withdrawn, Ofcom is required to publish a notification:
 - a) stating that there is a proposal to give, modify or withdraw it;
 - b) identifying the person whose proposal it is;
 - c) setting out the direction, approval or consent to which the proposal relates;
 - d) setting out the effect of the direction, approval or consent or of its proposed modification or withdrawal;
 - e) giving out the reasons for making this proposal; and
 - f) specifying the period within which representations may be made about the proposal to the person whose proposal it is.
- 4.7 The consultation period must not be less than one month after the day of publication of the notification.
- 4.8 The Consultation, in conjunction with the Impact Assessment, set out in detail the effects of the proposed consent and the reasons for the proposed consent.
- 4.9 Annex 6 of the Consultation contained the notification of the proposed consent.

- 4.10 Ofcom invited written views and comments by 5pm on 10 July 2008 on the proposed consent.

Consideration of responses

- 4.11 Ofcom gave careful consideration to all comments received during the consultation period. Section 3 contains a discussion of the main points raised by respondents and Ofcom's comments.
- 4.12 In light of the comments received, and as discussed in paragraph 3.35, Ofcom has modified the proposed consent with the addition of a condition requiring that customer contracts for telephony services must not contain minimum contract terms that extend beyond the term of the Ebbsfleet FTTP Pilot.

Impact Assessment

- 4.13 Under section 7 of the Act, Ofcom has a duty to undertake impact assessments when it proposes to do anything in connection with carrying out its functions and it considers that its proposals are important. Ofcom's impact assessment for the proposed consent was contained in Annex 5 of the Consultation and a summary is included in Annex 1 of this document.

Test for granting consent

- 4.14 As set out under section 49 of the Act, when granting consent, Ofcom must be satisfied that the test set out under section 49(2) has been met. The test is that the granting of the consent is:
- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b) not unduly discriminatory against particular persons or against a particular description of persons;
 - c) proportionate to what it is intended to achieve; and
 - d) transparent in relation to what it is intended to achieve.
- 4.15 Ofcom considers that the Consent meets the test set out in section 49 being:
- a) **Objectively justifiable:** in that the Consent:
 - is consistent with Ofcom's general duties in that it supports the objectives of encouraging investment and innovation and encouraging the availability of high speed data transfer services;
 - will facilitate the Ebbsfleet FTTP Pilot without undermining the overall effectiveness of the USCs, (the purpose of which is to ensure that consumers are able to obtain certain basic fixed line services at affordable and uniform prices throughout the UK) since the Consent:
 - relaxes the uniform pricing requirement only to the extent strictly necessary for the Ebbsfleet FTTP Pilot and is therefore restricted to no more than 300 households for a limited period only; and

- requires BT to charge pilot customers no more than standard rates for fixed telephony connection and line rental;
 - will permit BT to offer fixed telephony services to pilot customers at reduced prices in recognition that services may be delivered and operate differently from standard fixed telephony services and that customers may be asked to provide BT with feedback about the services.
- b) **Not unduly discriminatory** in that:
- communications providers not designated as Universal Service Providers have the commercial flexibility to charge non-uniform prices when piloting new access network technologies and the effect of the Consent would be to permit BT a similar flexibility for the Ebbsfleet FTTP Pilot; and
 - the Consent for non-uniform pricing for the Ebbsfleet FTTP Pilot is in recognition that services may be delivered and operate differently from standard fixed telephony services and that customers may be asked to provide BT with feedback about the services.
- c) **Proportionate** in that:
- the Consent relaxes the uniform-pricing requirement under the USCs only to the extent strictly necessary for the Ebbsfleet FTTP Pilot whilst maintaining the uniform pricing obligation elsewhere in the UK;
 - the Consent relates to a small number of homes for a limited time period only (no more than 300 homes in Ebbsfleet for the period between 1 August 2008 and 31 December 2009);
 - Ofcom's impact assessment demonstrates that the Consent will facilitate the Ebbsfleet FTTP Pilot whilst having little other impact; and
 - Ofcom has the power to modify or withdraw the Consent at any time should it consider it appropriate.
- d) **Transparent** insofar as the nature and obligations of Consent as well as the reason and effects of the Consent were clearly set out in the Consultation and this document.

Ofcom's general duties

- 4.16 Section 3(1) of the Act sets out the principal duty of Ofcom. That duty is to:
- a) further the interests of citizens in relation to communications matters; and
 - b) further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.17 Section 3 (2) of the Act further states that in fulfilling the principal duty specified in section 3 (1) Ofcom is required to secure the availability throughout the UK of a wide range of electronic communications services.
- 4.18 Section 3(3) of the Act requires Ofcom, when performing its duties, to have regard to the principles under which regulatory activities should be transparent, accountable,

proportionate, and consistent and targeted only at cases in which action is needed; and any other principles appearing to Ofcom to represent the best regulatory practice.

4.19 Ofcom considers that the Consent is in accordance with these duties and principles because facilitating BT's pilot deployment of NGA network technology at the Ebbsfleet FTTP Pilot will:

- further the interests of consumers and the aim of securing the availability of a wide range of electronic communications services by encouraging the development and deployment of NGA network technology which supports higher bandwidth broadband services than are available on conventional copper networks; and
- further the interests of customers who live in the Ebbsfleet FTTP Pilot area and who will have to participate in the pilot if they purchase fixed telephony services from BT during the pilot period.

4.20 Ofcom also considers that the Consent would be consistent with these duties and principles because:

- the Consent supports the Ebbsfleet FTTP Pilot without compromising the overall effectiveness of USCs (the purpose of which is to ensure that consumers are able to obtain certain basic fixed line services at affordable and uniform prices throughout the UK) since the Consent:
 - relaxes the uniform-pricing requirement only to the extent strictly necessary for the Ebbsfleet FTTP Pilot and is therefore restricted to no more than 300 households for a limited period only; and
 - requires BT to charge pilot customers no more than standard rates for fixed telephony connection and line rental;
- Ofcom's Impact Assessment demonstrates that the Consent would be likely to have a minimal impact; and
- the Consent is proportionate in that it delivers the minimum necessary additional regulation to achieve the policy objectives.

4.21 Section 3 (4) of the Act lists further factors that Ofcom must take into account to the extent they are relevant in each particular case when fulfilling its functions. Ofcom considers that the following are relevant to this Consent:

- the desirability of promoting competition in relevant markets;
- the desirability of encouraging investment and innovation in relevant markets; and
- the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.

4.22 Ofcom has taken these factors into account in reaching its decision and considers it is consistent with these considerations. Ofcom considers that the following factors are relevant in this case:

- Promoting competition: Ofcom considers that the Consent would be likely to have a minimal if any impact on competition.
- Encouraging investment and innovation in markets: Ofcom considers that the Consent furthers this objective by facilitating BT's pilot deployment of an NGA network for the delivery of fixed telephony, broadband and other services.
- Encouraging availability of high speed data transfer services: Ofcom considers the Consent furthers this objective by facilitating BT's pilot deployment of an NGA network that will support the delivery of high bandwidth broadband services.

European Community requirements for regulation

- 4.23 Section 4 of the Act requires Ofcom to act in accordance with the six European Community requirements for regulation, including the requirement to promote the interests of all persons who are citizens of the European Union. In summary, these requirements are to:
- a) promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;
 - b) contribute to the development of the European internal market;
 - c) promote the interests of all persons who are citizens of the European Union;
 - d) not favour one form of or means of providing electronic communications networks or services, i.e. to be technologically neutral;
 - e) encourage the provision of network access and service interoperability for the purpose of securing:
 - i) efficient and sustainable competition; and
 - ii) the maximum benefit for customers of CPs; and
 - f) encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of CPs.
- 4.24 In doing so, Ofcom has to read these requirements in accordance with the requirements of article 8 of the Framework Directive (Directive 2002/21/EC). These include, in particular, the obligation to:
- a) ensure that users, including disabled users, derive maximum benefit in terms of choice, price and quality (Article 8(2)(a));
 - b) ensure a high level of protection for consumers in their dealings with suppliers (Article 8(4)(b)); and
 - c) promote the provision of clear information, in particular requiring transparency on tariffs and conditions for using publicly available electronic communications services.
- 4.25 Ofcom considers that the proposed consent is consistent with these objectives in so far as they are relevant in this case.

Annex 1

Summary of Ofcom's Impact Assessment

Introduction

A1.1 This section contains a summary of Ofcom's impact assessment for the Consent.

A1.2 Please see Annex 5 of the Consultation for the full impact assessment.

The citizen and/or consumer interest

A1.3 There are three aspects to citizen/consumer interests associated with Ofcom's proposal to grant BT Consent for non-uniform charging of telephony services for the Ebbsfleet FTTP Pilot:

- USC 1 ensures that fixed telephony services are available to everyone at affordable and uniform prices throughout the UK. It is in consumers' interests that the effectiveness of the USCs in this respect is not undermined by the proposed consent;
- Encouraging the development and deployment of NGA network technologies that would support high bandwidth broadband services would be in the interests of consumers and citizens generally;
- Consumers that purchase fixed telephony services from BT at Ebbsfleet during the pilot period will have to participate in the pilot and it will be in their interests that BT be given the flexibility to offer discounts on fixed telephony line connection and rental in recognition that those services may be delivered and operated differently from conventional fixed telephony services and that customers may be asked to provide BT with feedback about the services.

Ofcom's Policy Objectives

A1.4 In considering whether to grant BT's request Ofcom sought to achieve a balance between two policy objectives:

- maintaining the effectiveness of the USCs which ensures that certain basic fixed line services are available at affordable and uniform prices (upon reasonable request) to all citizens and throughout the UK; and
- encouraging investment and innovation in NGA networks.

Assessment of Impacts

A1.5 Ofcom's assessment of the impact of the Consent is summarised below.

Impact on BT

A1.6 Granting the request would facilitate BT's pilot deployment of an NGA network by allowing BT to offer consumers participating in the Ebbsfleet FTTP Pilot fixed telephony connection and line rental at rates below the standard rates offered to BT customers elsewhere in the UK. This would allow BT:

- to vary prices to reflect differences in the way that services are delivered and operate compared with standard fixed telephony services; and
- to encourage pilot customers to provide BT with feedback on the pilot services.

Impact on Consumers

A1.7 The impact on consumers will be limited to those households that participate in the Ebbsfleet pilot. When it pilots NGA network technology to deliver fixed telephony and other services at Ebbsfleet BT will be able to offer fixed telephony connection and line rental at rates below the standard rates offered to BT customers elsewhere in the UK.

Impact on Competition

A1.8 The direct effect of the proposed consent would be to allow BT to set charges for fixed telephony line connection and rental for the Ebbsfleet pilot at rates below its standard rates offered to BT customers elsewhere in the UK under the USCs. The proposed consent is intended to encourage innovation in NGA networks by ensuring that the USCs do not present a barrier to BT's proposed pilot deployment of this technology. Such innovation may in the longer run be beneficial to competition by demonstrating the technical and commercial potential for new services and encouraging other providers to deploy similar networks and services.

A1.9 Given the limited scale and duration of the proposed consent Ofcom's view is that the direct impact on competition of any discounts (to fixed telephony connection and line rental charges) that BT might offer to Ebbsfleet customers would be minimal.

Stakeholder comments about impacts

A1.10 None of the respondents raised any concerns about the direct impact on consumers or about the effect of the proposals on the effectiveness of the USCs. However, some stakeholders argued that the discounts offered by BT during the Pilot would damage retail and/or wholesale competition both during the pilot and potentially afterwards. After carefully considering these comments, Ofcom remains of the view that the discounts would have a minimal if any impact on competition given the very limited scope of the pilot. Ofcom has not therefore revised its view of the impacts of the Consent but has included an additional condition which prevents the contract including a minimum term which expires beyond the end date of the Pilot.

Annex 2

Notification of Consent under section 49 of the Communications Act 2003

Consent to BT pursuant to section 49 of the Communications Act 2003 ('the Act') and Universal Service Condition 1.2 which is set out in the Schedule to the Notification published by the Director General on 21 July 2003 under Regulation 4 (10) of the Electronic Communications (Universal Service) Regulations 2003

Whereas

1. Ofcom hereby, in accordance with section 49 of the Act and under section 49 of the Act and Universal Service Condition 1.2, which is set out in the Schedule to the Notification published by the Director General on 21 July 2003 under Regulation 4 (10) of the Electronic Communications (Universal Service) Regulations 2003 gives Consent to BT to the extent set out in the Schedule to this Notification.
2. The Consent is set out in the Schedule to this Notification.
3. The effect of the Consent and the reasons for making the Consent are set out in the accompanying regulatory statement.
4. Copies of the Consent and the Notification under section 49 (4) of the Act have been sent to the Secretary of State in accordance with section 50 (1) (c) of the Act.
5. For the purposes of this notification:

"Act" means the Communications Act 2003;

"BT" means British Telecommunications plc, whose registered company numbers is 1800000, and any subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989 and the Companies Act 2006;

"Director General" means the Director General of Telecommunications;

"Ofcom" means the Office of Communications; and

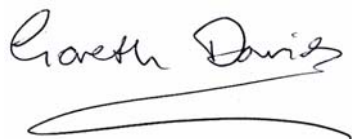
"Universal Service Conditions" means the conditions set out in the Schedule to the Notification published by the Director General on 21 July 2003 pursuant to Regulation 4(10) of the Electronic Communications Regulations 2003.

6. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Universal Service Conditions and otherwise any word or expression shall have the same meaning as in the Act.
7. For the purposes of interpreting this Notification:
 - i. Headings and titles shall be disregarded; and

- ii. The Interpretation Act 1989 shall apply as if this Notification were an Act of Parliament.

8. The Schedule to this Notification shall form part of this Notification.

Signed by

A handwritten signature in dark ink, appearing to read 'Gareth Davies', with a long, sweeping horizontal line underneath.

Gareth Davies

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2003

1 August 2008

Schedule

Consent given to BT under section 49 of the Communications Act 2003 ('the Act') and the Universal Service Condition 1.2 which is set out in the Schedule to the Notification published by the Director General on 21 July 2003 under Regulation 4(10) of the Electronic Communications (Universal Service) Regulations 2003

Whereas

- A) On 21 July 2003, the Director General published a Notification under Regulation 4 (10) of the Electronic Communications (Universal Service) Regulations 2003 setting out his proposals for the designation of universal service providers and the setting of Universal Service Conditions, including Universal Service Condition 1, that he intended to be given effect upon the coming into force of any enactment which implemented the Universal Service Directive 2002/22/EC;
- B) the proposals set out in the Notification dated 21 July 2003 under Regulation 4 (10) of the Electronic Communications (Universal Service) Regulations 2003 automatically entered into force by virtue of the transitional provisions in the Act;
- C) the Consent concerns matters to which Universal Service Condition 1 relates, in particular the requirement for BT to provide the Telephony Services referred to in Universal Service Condition 1 on the basis of uniform prices in the UK except for the Hull area (as defined in those conditions);
- D) for the reasons set out in the 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;
- E) for the reasons set out in the statement accompanying this Consent, Ofcom has considered and acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act;
- F) a notification of a proposal to give this Consent was given under section 49 (4) of the Act on 9 June 2008 ('the Notification')
- G) a copy of the Notification and accompanying consultation document was sent to the Secretary of State in accordance with section 50(1)(b) of the Act;
- H) in the Notification and accompanying consultation document Ofcom invited representations about any of the proposals therein by 5pm on 10 July 2008;
- I) by virtue of section 49(9) of the Act; Ofcom may give effect the proposal set out in the Notification, with or without modification, only if-

- they have considered every representation about the proposal that is made to them within the period specified in the Notification; and
 - they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- J) Ofcom received responses to the Notification and have considered every such representation made to them within the period specified in the Notification and accompanying consultation document and these representations are discussed in section 3 of the Statement accompanying this Consent; and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose;

NOW THEREFORE PURSUANT TO SECTION 49 OF THE ACT AND UNIVERSAL SERVICE CONDITION 1.2 OFCOM GIVES THE FOLLOWING CONSENT:

1. The obligation on BT in Universal Service Condition 1.2 to provide Telephony Services on the basis of uniform prices throughout the UK (except in the Hull Area) shall not apply in respect of connection and rental charges for Telephony Services for the Ebbsfleet Pilot with the proviso that:
 - a. connection and rental charges for Telephony Services for the Ebbsfleet Pilot shall not exceed those charged by BT on the basis of uniform prices elsewhere in the UK;
 - b. contracts for Telephony Services during the Ebbsfleet Pilot shall not include a minimum contract term that extends beyond the term of the Ebbsfleet Pilot; and
 - c. BT shall record and retain such records as is necessary to prove that it has complied with the terms of this Consent;
2. For the avoidance of doubt, the Consent specified in paragraph 1 does not include Telephony Services call charges.
3. Ofcom may, pursuant to section 49 of the Act, at any time during the period of this Consent modify or withdraw the Consent.
4. For the purposes of interpreting this Consent (including the recitals above), the following definitions shall apply:

“Act” means the Communications Act 2003;

“BT” means British Telecommunications plc, whose registered company number is 1800000, and any subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989 and the Companies Act 2006;

“Director General” means the Director General of Telecommunications;

“Ebbsfleet Pilot” means Telephony Services delivered over optical fibre cables to no more than 300 homes in Ebbsfleet Kent for a period from 1 August 2008 to 31 December 2009;

“Ofcom” means the Office of Communications;

“Telephony Services” means as set out in the Schedule to the Notification published by the Director General on 21 July 2003 pursuant to Regulation 4(10) of the Electronic Communications Regulations 2003; and

“Universal Service Conditions” means as set out in the Schedule to the Notification published by the Director General on 21 July 2003 pursuant to Regulation 4(10) of the Electronic Communications Regulations 2003.