



**Draft Determination to resolve
a Dispute between Cable &
Wireless Access Limited and BT
Group plc relating to BT's charges
for connecting new customers to
fully unbundled local loops**

Consultation

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Section 1

Determination

DRAFT DETERMINATION UNDER SECTIONS 188 AND 190 OF THE COMMUNICATIONS ACT 2003 FOR RESOLVING A DISPUTE BETWEEN CABLE AND WIRELESS LIMITED AND BT GROUP PLC RELATING TO BT'S CHARGES FOR CONNECTING NEW CUSTOMERS TO FULLY UNBUNDLED LOOPS

WHEREAS:

- A. Section 188(2) of the Communications Act 2003 (the "Act") provides that where there is a dispute between different communications providers and Ofcom has decided pursuant to section 186(2) of the Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the Act, together with a full statement of the reasons on which the determination is based.
- B. Section 190 of the Act sets out the scope of Ofcom's powers when resolving a dispute which may include, in accordance with section 190(2) of the Act;
 - (i) making a declaration setting out the rights and obligations of the parties to the dispute;
 - (ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - (iii) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - (iv) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.
- C. On 16 December 2004 Ofcom published its *Review of the Wholesale Local Access Market* ("RWLAM"), determining that BT Group plc ("BT") has significant market power ("SMP") in the wholesale local access market in the UK excluding the Hull Area. Ofcom imposed conditions on BT in the wholesale local access market:
 - (i) to provide Network Access (as defined in the RWLAM) on reasonable request;
 - (ii) not to unduly discriminate;
 - (iii) to charge prices that were oriented to costs; and
 - (iv) governing requests for new Network Access.

- D. Ofcom also imposed charge ceilings on specific local loop unbundling (“LLU”) services, including a charge ceiling of £168 per connection for the service known as ‘MPF new provide’ (the “New Provide” service). BT’s published service description for this service includes a visit by a BT engineer to the premises where the service is to be connected (a “site visit”). Ofcom’s published decision made it clear that the cost of a site visit was included in the setting of the connection charge ceiling.
- E. On 1 and 18 August 2005, Ofcom published its conclusions in both the cost of capital and cost of copper studies. As a result the connection charge for a New Provide was reduced in December 2005 to £99.95 per line (as it is currently) as the cost of the site visit is now recovered in the rental charge.
- F. On 1 July 2006, BT commenced providing another LLU-based service, known as the “Stopped Line Provide”. One of the features of this service is that it did not include a site visit.
- G. On 22 November 2006 Cable & Wireless Access Limited (“C&WA”) referred to Ofcom for resolution a dispute between it and BT relating to the connection charges paid by C&WA to BT for the New Provide service during the period leading up to 1 July 2006.
- H. On 5 January 2007 Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of its decision.
- I. On 5 January 2007, following representations received from both parties, Ofcom published the scope of the dispute.
- J. In order to resolve this dispute, Ofcom has considered, among other things, the current regulatory framework for LLU charges, the SMP conditions imposed upon BT in the wholesale local access market, the information supplied by BT and C&WA and the relevant duties set out in the Act applicable to the resolution of regulatory disputes.
- K. A fuller explanation of the background to the dispute and Ofcom’s reasons for making this determination is set out in the explanatory statement accompanying this determination.
- L. This draft determination is published on 4 April 2007, for which responses are invited by 20 April 2007

**NOW, THEREFORE, PURSUANT TO SECTION 186 AND 190 OF THE ACT OFCOM
MAKE THE FOLLOWING [DRAFT] DETERMINATION:**

1. It is hereby declared that BT’s charge of £168 (as charged between 16 December 2004 and 14 December 2005) for the New Provide service and specifically the inclusion of a site visit within that charge, is consistent with its obligations under FA 1, FA 3 and FA 9 and is to be regarded as having been provided at a fair and reasonable charge under FA 1.2 and FA 9.2 and at a charge which is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach under FA 3.1.
2. The charge of £99.95 (as charged between 15 December 2005 and 30 June 2006) for the New Provide service does not include the cost of a site visit. As the main issue submitted by C&WA is whether the inclusion of a site visit in the New

Provide charge was consistent with the above mentioned SMP conditions, Ofcom has not taken a view, in reaching a decision on this dispute, on the cost orientation of this charge.

3. Ofcom considers that BT provided network access and local loop unbundling services in the form of the Stopped Line Provide service as soon as reasonably practicable in accordance with its obligations under FA 1.2 and FA 9.2.
4. The final Determination shall take effect on [] May 2007.

David Stewart

Director of Investigations

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

[] May 2007

Section 2

Summary

- 2.1 This dispute concerns BT's charges for connecting new customers' sites of Cable & Wireless Access Limited ("C&WA") to fully unbundled local loops between 16 December 2004 and 30 June 2006 and specifically whether BT over-charged C&WA in relation to site visits carried out by BT engineers to establish those connections. Ofcom has also considered whether BT failed to offer a variant of the service that enabled C&WA's customers to be connected to fully unbundled local loops without needing a site visit "as soon as reasonably practicable".
- 2.2 C&WA referred this dispute to Ofcom for resolution on 22 November 2006.
- 2.3 According to C&WA, when it purchased network access to connect new customers during the period 16 December 2004 to 30 June 2006, it submitted an order for the service known as 'MPF new provide' to BT (the "New Provide" service). BT's service description for the New Provide service specifies that an engineer visit will occur for each site connected to the service to install a new line. C&WA alleges that BT's charge for the New Provide service during this period did not reflect BT's costs (whether as they were actually incurred or, in the alternative, efficiently incurred and/or fair and reasonable).
- 2.4 C&WA consider that it had long requested a new service from BT which reactivates an existing line and does not require an engineer's visit (the "Stopped Line Provide" service), and that BT has unreasonably delayed providing this service, contravening BT's regulatory obligations. The Stopped Line Provide service was provided by BT from 1 July 2006.
- 2.5 Ofcom decided that it was appropriate for it to handle the dispute and opened a formal investigation on 5 January 2007. Following submissions from both parties, Ofcom published the scope of the dispute in its Competition Bulletin:

"Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Condition FA1, FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and

*Whether BT has breached Condition FA1 and FA9 by not providing the stopped line provide service to C&WA as soon as reasonably practicable, as required by Condition FA1 and FA9 respectively."*¹
- 2.6 In summary, based on the evidence gathered in this dispute and set out further in this draft Determination, Ofcom's provisional conclusion is that BT's charge of £168 for the New Provide service over the period 16 December 2004 to 15 December 2005 is consistent with its obligations under FA 1, FA 3 and FA9. In addition, Ofcom considers that BT provided the Stopped Line Provide Service as soon as reasonably practicable in accordance with its obligations under FA1 and FA9.
- 2.7 In reaching this view, Ofcom has had regard to BT's obligation to offer a cost-oriented charge based on long-run incremental costs under SMP Condition FA 3.1, to

¹ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_0cases/open_all/cw_935/

offer fair and reasonable charges under SMP Conditions FA 9.2 and FA 1.2 and also its obligation to provide network access and local loop unbundling services as soon as reasonably practicable under SMP Conditions FA 1.2 and FA 9.2².

- 2.8 As explained further in this statement, Ofcom has not taken a view, in reaching a decision on this dispute, on the cost-orientation of the 99.95 charge for a New Provide service over the period 15 December 2005 to 30 June 2006. However, Ofcom notes that BT has stated that it aligned this charge with the connection charge for Wholesale Line Rental, which Ofcom has previously determined to be fair reasonable and cost-oriented.
- 2.9 The background to this investigation is set out in **section 3**. Ofcom's consideration of this dispute and proposed decision is set out in **section 5**.

² See paragraphs 5.6 to 5.24

Section 3

Background and history of the dispute

The parties to the dispute

BT/Openreach

- 3.1 BT is a communications provider whose principal activities include networked IT services, local, national and international telecommunications services, and higher-value broadband and internet products and services. In the UK, BT serves more than 20 million business and residential customers with more than 30 million exchange lines, as well as providing network services to other licensed operators.³
- 3.2 BT's local access network and, specifically, the copper pairs linking BT's exchange sites with the residential and business premises of its customers (known as the "local loop") is the only ubiquitous fixed access network for the provision of telecommunications in the UK.⁴
- 3.3 Openreach is a business unit within the BT group that is operationally separate from BT's other businesses (such as BT Retail and BT Wholesale). Openreach was established in January 2006 as one element of undertakings offered by BT, and accepted by Ofcom in lieu of a reference to the Competition Commission, on 22 September 2005 (the "Undertakings").⁵
- 3.4 The purpose of Openreach is to manage and operate BT's local access and backhaul network. Openreach provides access services to communication providers who require those services to enable those communications providers to offer their own downstream (eg. retail) services. The Undertakings specify that Openreach will offer those services to all communications providers (including BT Wholesale and BT Retail) on an equivalent basis (applying a principle known as "equivalence of inputs").
- 3.5 One of the services that Openreach provides is access to unbundled local loops pursuant to BT's SMP conditions FA1 to FA9.
- 3.6 References in this document are to either BT or Openreach, depending on the time period in question.

C&WA

- 3.7 C&WA is a wholly-owned subsidiary of Cable & Wireless plc, following the acquisition of Bulldog Communications in May 2004. Under its previous name of Bulldog Communications Ltd, C&WA was an early purchaser of local loop unbundling services offered by BT during the period when Ofcom intervened to give those services fresh momentum as a form of network access available to communications providers. C&WA provides wholesale services to Cable & Wireless and other wholesale customers (including retail ISPs). C&WA uses predominantly fully-unbundled loops rather than shared loops and since September 2004, has used fully unbundled loops for all new customers.

³ Source: BT's website see <http://www.btplc.com/Thegroup/Companyprofile/Companyprofile.htm>

⁴ http://www.ofcom.org.uk/consult/condocs/statement_tsr/

⁵ <http://www.ofcom.org.uk/telecoms/btundertakings/>

- 3.8 Although the old Bulldog retail customer base has now been sold to a retail communications provider (7 September 2006), C&WA retains all of the other assets and liabilities of Bulldog Communications Ltd. Services which were formerly provided directly to retail customers by Bulldog Communications Ltd are still provided over the infrastructure of C&WA, including unbundled local loops.
- 3.9 For ease of reference C&WA (rather than Bulldog) is used throughout this document.

The services relevant to this dispute

Unbundled Local Loops and MPFs

- 3.10 Ofcom has imposed a regulatory condition on BT that it must provide access to unbundled local loops, as a result of Ofcom's finding that BT has significant market power within the wholesale local access market.⁶
- 3.11 There are two types of access using local loop unbundling (or "LLU"): full and shared. In "full" unbundling, local loops are physically disconnected from BT's equipment and connected to another communications provider's equipment (ie. the LLU operator takes over control of the line). In "shared" unbundling, the line remains connected to the BT network but an additional connection is made to a competing provider's network to enable that provider to use that line to deliver services to customers. In essence, LLU enables competing providers partly or wholly to control a customer's access line and provide voice and/or data services directly to customers without further intervention by BT.
- 3.12 The requirement to provide LLU was imposed to promote competition in downstream electronic communications services (particularly the provision of broadband internet access and voice services). The advantages of LLU over other forms of network access include the ability of competing providers to innovate, differentiate their services to a greater extent and provide higher-bandwidth services, a better range of applications and improved service levels.
- 3.13 A metallic path facility ("MPF") is a form of full LLU comprising a 2-wire point to point metallic transmission path extending between a network termination point ("NTP") at the (end-user) customer's premises to the line side of a main distribution frame ("MDF") in the relevant BT exchange. Communications providers who purchase an MPF are therefore able to connect the MPF direct to their own communications network (assuming that it has a point of presence in the relevant local exchange), and provide services directly to end users who are connected to that loop.

Transfer

- 3.14 Prior to July 2006, communications providers who wanted to use MPF had two options in taking control of a specific loop.
- 3.15 The first was a process referred to as "transfer". Transfer occurs if a communications provider takes over service from an exchange to a site where the connection already exists – that is, the customer is already using the services of another provider over that access line (which have not been stopped). Transfers are suitable for a communications provider where the premises to be served currently have an active line.

⁶ <http://www.ofcom.org.uk/consult/condocs/rwlam/statement/> - please refer to section 7

- 3.16 This dispute concerns the cases where the customer is not currently taking service from an existing supplier or requires a new connection.

The New Provide service

- 3.17 The second option available to communications providers to use MPF up until June 2006 was to purchase the New Provide service from BT.
- 3.18 The New Provide service comprises the provision of a new line (including the installation of a new physical connection and the installation of a new NTP in the customer's premises). BT's process documentation sets out the detailed specification for the steps comprising the New Provide service and is attached as Annex 2 to this explanatory statement.
- 3.19 BT submitted that the New Provide service was introduced by BT in May 2001, in consultation with the communications providers that were seeking to provide services direct to end-users via MPFs.⁷ For example, the resultant MPF was required to have certain minimum characteristics as specified by the DSL Task Group⁸ and documented within SIN349.⁹ In addition, communications provider's broadband equipment has to conform to the Industry agreed Access Network Frequency Plan.¹⁰
- 3.20 Ofcom understands that the provision of network terminal equipment (an "NTE")¹¹ as an element of the New Provide service was originally requested by communications providers because the service being carried over the MPF was primarily an SDSL ('Symmetric Digital Subscriber Line')¹² service. No communications provider was providing voice services using MPF at that time.

The Stopped Line Provide service

- 3.21 On 1 July 2006, BT commenced offering the Stopped Line Provide service.
- 3.22 Stopped Line Provide is a service that is suitable in situations where a stopped line could be re-activated (that is, a line that has previously been active and that could be re-activated without an engineer site visit) – if one already existed providing a complete uninterrupted loop from the exchange to the NTE at the customer's premises.
- 3.23 Therefore, the Stopped Line Provide service can only be provided when a communications provider orders a New Provide at their customer's premises, and there is an existing line serving the premises, which is not currently in use.

'Spare Pair'

- 3.24 A spare pair refers to the presence of existing copper capacity in the access network between the exchange and the distribution point (the "DP") to deliver service to an end user without requiring the deployment of new copper or infrastructure between the distribution point and the customer's premises (the cost of which would not be covered by the charge for the New Provide service but by the 'Excess Construction Charges').

⁷ Submitted in BT's response dated 19 February 2007 to Ofcom's information request under section 191 of the Act dated 13 February 2007

⁸ Digital Subscriber Line Task Group

⁹ Supplier Information Note about BT MPF Interface Description

¹⁰ http://www.btinterconnect.com/llunbundle/mpf/MPF_Product_Description_Issue4.7.pdf

¹¹ This allows the connection of the network to equipment such as normal analogue or ISDN telephones, ADSL- and PC modems

¹² SDSL provides fast access internet service existing copper links

- 3.25 The presence of a spare pair does not imply the same functionality associated with a 'stopped line'. The spare pair is simply a physical connection (a copper wire) joining the exchange and the DP that is not currently in use as an active or stopped line. It does not imply that a drop wire (the physical connection between the DP and the customer's premises) is necessarily in place. A 'stopped line' also implies that other capability is also present (for example, a working NTE at the customer's premises) sufficient to avoid the need for an engineering site visit.
- 3.26 Therefore availability of a spare pair alone does not enable Openreach to deliver the New Provide service without a site visit to complete the work between the DP or street cabinet and the customer's premises.
- 3.27 For example, Oftel's description of the New Provide service when it was introduced in May 2001 describes how that service may use a spare pair where it exists:

"It is expected that, in general, BT will be able to meet the obligation to provide this service in all circumstances where there is a connection which:

(i) is spare or has become available through cancellation of existing services by a customer;

(ii) extends (or could readily be made to extend) between the MDF and at least the relevant distribution point (DP) and where any connection between the DP and NTP could readily be provided;

(iii) is of the relevant quality or reasonably capable of being made so.

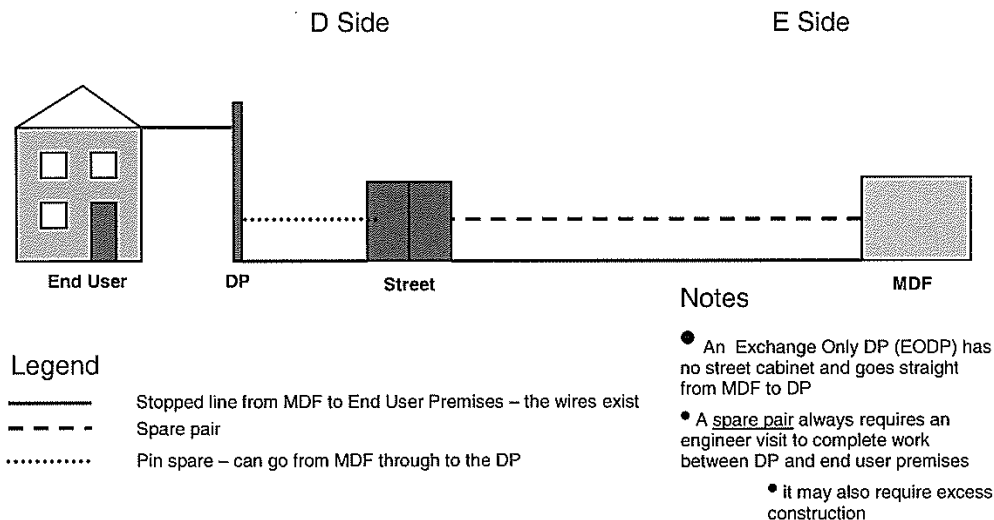
MPFs may be provided over existing lines or new lines (spare pairs), where a connection is or can be made available." (emphasis added).¹³

- 3.28 Figure 1 below was provided by Openreach in the course of this investigation, and provides an overview of spare pairs in the Openreach network.

¹³ http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/lug0700.htm

Figure 1

Overview of spare pairs in the Openreach network



Source: Openreach/LRC/TEF/V1/Feb_07

The regulatory reviews relevant to this dispute

3.29 A number of Ofcom's previous regulatory proceedings are relevant to this dispute.

Wholesale local access market review

3.30 On 16 December 2004 Ofcom published the *Review of the Wholesale Local Access Market* ("RWLAM")¹⁴, which:

3.30.1 concluded that BT had significant market power ("SMP") in the wholesale local access market in the UK excluding the Hull Area. Ofcom also identified co-location as an appropriate technical area for the purposes of imposing appropriate regulatory remedies. LLU services fall within the wholesale local access market and co-location; and

3.30.2 imposed various SMP conditions on BT (amongst other things) to provide network access on fair and reasonable terms and as soon as reasonably practicable.

3.31 These SMP conditions included:

3.31.1 Condition FA 1 (requirement to provide Network Access (as that term is defined in the RWLAM) on reasonable request);

3.31.2 Condition FA 3 (basis of charges);

3.31.3 Condition FA 8 (requests for new Network Access); and

¹⁴ <http://www.ofcom.org.uk/consult/condocs/rwlam/statement/>

3.31.4 Condition FA 9 (requirement to provide Local Loop Unbundling Services (as that term is defined in the RWLAM)).

3.32 Under Condition FA 1.2, BT must provide:

... Network Access as soon as reasonably practicable on fair and reasonable charges and on such terms, conditions and charges as Ofcom may from time to time direct.

3.33 Under Condition FA 3.1 BT shall secure that each charge payable for Network Access under FA1 or FA 9 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach.

3.34 Condition FA 9.2 states that BT must provide Local Loop Unbundling Services as soon as reasonable practicable and on fair and reasonable charges, and on such terms, conditions and charges as Ofcom may from time to time direct.

3.35 Conditions FA 1, FA 3 and FA 9 contain a direction-making power for Ofcom to set terms, conditions and charges for Network Access and LLU services which would include New Provide services.

3.36 The RWLAM set charge ceilings for fully unbundled and shared access connection and rental charges. In the case of the New Provide service the charge ceiling was set at £168 to be effective from 1 January 2005. The service to which this ceiling applied included a site visit by an engineer.

Cost of Copper

3.37 Ofcom deferred setting the charge ceiling for the fully unbundled rental charge at the time the other LLU charge ceilings were set in December 2004 under the RWLAM. This was because a high proportion of the total cost of this charge was determined by the cost of laying and maintaining the copper loop, the costs for which Ofcom was in the process of reviewing.

3.38 On 18 August 2005 Ofcom published its statement entitled *Valuing copper access* and therefore Ofcom was able to set a ceiling for the fully unbundled rental charge.¹⁵

LLU: setting the fully unbundled rental charge ceiling

3.39 On 30 November 2005 Ofcom published *Local loop unbundling: setting the fully unbundled rental charge ceiling* (the "November 2005 LLU Statement"). In the November 2005 LLU Statement, Ofcom decided that the costs for new drop wire installation for fully unbundled loops should be recovered in the rental charge in order to achieve consistency between LLU, wholesale line rental and BT's retail products.

3.40 As in the RWLAM, Ofcom considered it preferable to set charge ceilings as opposed to exact charges. In calculating the proposed ceiling, Ofcom made a number of assumptions, which are set out in the November 2005 LLU Statement. A charge ceiling, as opposed to an exact charge, provides BT with the flexibility to charge below the proposed ceiling in the event that its own assumptions are different to those Ofcom has applied and if costs move over the period in which the ceiling is in place.

¹⁵ <http://www.ofcom.org.uk/consult/condocs/copper/value2/statement/>

- 3.41 On 15 December 2005 the cost of a New Provide service was reduced by BT to £99.95. From this date the cost of the engineering visit associated with the New Provide service has been recovered in the rental charge.¹⁶

Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services

- 3.42 Wholesale Line Rental ("WLR") enables telephone companies to rent lines from BT Wholesale and resell these to their customers. This means consumers and businesses can choose from a range of competing telephone companies offering a single bill for both voice calls and line rental.
- 3.43 In January 2006, Ofcom published the statement *Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services* (the "January 2006 WLR Statement")¹⁷. In this Statement, following its cost analysis Ofcom reduced the annual rental charges that communications providers pay for WLR. Ofcom determined the ceiling for the WLR connection charge should be £88 per line, and confirmed that the approach to setting this ceiling "reasonable". In this document Ofcom emphasised that it intended to set WLR and LLU charges on a consistent basis:

"[Ofcom has] used the same methodology for projecting cost as used in setting the charges for local loop unbundling"

History of this dispute

- 3.44 On 22 November 2006 C&WA referred a dispute between C&WA and BT to Ofcom for resolution, citing BT's charges to C&WA for connecting new customers to fully local unbundled loops as being in dispute.
- 3.45 On 5 and 12 December 2006, BT submitted comments on C&WA's dispute referral.
- 3.46 On 5 January 2007, after holding discussions with each of the parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision.
- 3.47 Ofcom published the scope of the dispute in its Competition Bulletin on 5 January 2007 as being:

'Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Condition FA1, FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and

Whether BT has breached Condition FA1 and FA9 by not providing the Stopped Line Provide Service to C&WA as soon as reasonably practicable, as required by Condition FA1 and FA9 respectively.'

Information sought by Ofcom

- 3.48 During its investigation Ofcom has sought information, referred to throughout this document, from the sources described below.

¹⁶ Furthermore, in June 2005 BT stated "In addition, BT today commits to align LLU New Provide charges with Wholesale Line Rental (WLR) connection charges. This alignment is likely to take place in the same timeframe as Ofcom's final statement on the Cost of Copper consultation" (published August 2005)

¹⁷ See <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/statement.pdf>

- 3.49 First, Ofcom has sought relevant information from BT and C&WA. Specifically, Ofcom used its powers under section 191 of the Act:
- 3.49.1 on 13 February and 16 March 2007, requiring C&WA to provide further information on the C&WA orders of the New Provide service over the period in dispute and its request to BT for the development of the Stopped Line Provide product; and
 - 3.49.2 on 13 February and 16 March 2007, requiring BT to provide further information on the orders of the New Provide service over the period in dispute, the way in which New Provides are provided, and the development of the Stopped Line Provide product.
- 3.50 During the course of the investigation, Ofcom has also met with BT and C&WA.
- 3.51 In reaching its proposed decision, Ofcom has used additional information in the public domain and analysis previously undertaken by Ofcom.
- 3.52 Finally, Ofcom has discussed this dispute with the staff of the Office of the Telecoms Adjudicator ("OTA"). The OTA was appointed by Ofcom in July 2004 as an industry facilitation entity, independent of Ofcom and of communications providers. The purpose of the OTA is to facilitate swift implementation of the processes necessary to enable competitors to gain access to BT's local loop on an equivalent basis to that enjoyed by BT's own businesses.

Section 4

Submissions of the parties

Cable and Wireless Access Ltd

Charges for the New Provide service

- 4.1 In referring this dispute C&WA alleges that BT has been over-recovering for the New Provide Service on one or both of the following grounds:

“Overcharging: that BT has not in reality incurred the costs it has charged to C&WA -- it has charged as if a completely new line were required, whereas in fact BT has merely reactivated an existing line; and/or

Gold-plating: even if BT has in fact installed a new line in every case, it should only be allowed to recover the efficiently-incurred portion of its cost. Where there was a workable line already serving the premises, that should be the cost of re-activating the existing line, rather than the cost of a full new installation.”¹⁸

- 4.2 C&WA also queries the work that BT needed to undertake in order to install a NTP at the customer's premises, stating that:

“It also appears that in some cases BT may have installed a new Network Termination Point (NTP or sometimes NTE). However, since it seems unlikely that BT would send out an engineer with instructions to unscrew an NTP and replace it with one either exactly or substantially the same, we do not believe that this work can have been done in all cases; nor are we aware of any reason why the work would have been necessary even if it was actually carried out”.

- 4.3 C&WA submits that in the majority of cases, there is a copper pair (i.e. a spare pair) available for use, meaning that a new line was not required in all cases. C&WA's submission was that, based on C&WA's interpretation of information made available by BT in 2002, this was the case in around 95% of cases.¹⁹
- 4.4 However C&WA also states that the proportion of New Provide connections that should properly be carried out by reactivating the existing line could vary, depending on the source. For example, C&WA states the most recently available data was BT data from the Stopped Line Provide service trial in 2006-2007, which suggested that the figure could be 36%.²⁰ C&WA further states that a September 2005 Openreach presentation (in the context of new installations for BT retail in WLR) suggested the figure could be 68%.
- 4.5 C&WA also alleges that the New Provide service was implemented and charged for in a manner that was “grossly inefficient”. C&WA argues that this was the case because BT subsequently introduced the Stopped Line Provide service which re-activates the existing line, at a price that was “very much cheaper” than the New Provide service.

¹⁸ C&WA's dispute referral of 22 November 2006

¹⁹ *ibid*

²⁰ *ibid*

The provision of the Stopped Line Provide service

- 4.6 C&WA also alleges that BT did not provide network access (in the form of the Stopped Line Provide service) as soon as reasonably practicable, despite repeated requests from C&WA that it do so.
- 4.7 In referring the dispute, C&WA divides the history of commercial negotiations between C&WA and BT in relation to the provision of the Stopped Line Provide service into three separate phases:
- Phase 1 – bilateral discussions. C&WA considers that the components of this phase were:
 - 2002 - discussions through industry groups and bi-lateral meetings.
 - 30 April 2003 – letter from C&WA’s CEO to BT identifying 12 issues, issue 4 of which was the *“High cost of provisioning fully unbundled line based on spare pair (£265) compared to no cost for PSTN service”*.
 - March 2004 – dispute sent to Ofcom which included the *“reactivate issue”*.
 - Phase 2 – OTA facilitation/industry discussion: C&WA states that during this time the *“issue sat on the OTA’s list of industry requirements for much of 2004 under the generic banner of pricing issues”*
 - Phase 3 – Joint approach: C&WA state that by mid 2005 C&WA concluded that an industry-wide OTA approach was *“not likely to produce a result on the ‘reactivate issue’ and recommenced discussions with BT (with ongoing assistance from the OTA). C&WA states that the document that triggered this C&WA’s list of issues for the OTA of 7 June 2005. C&WA state that “it does appear to have been at around this time that serious discussions began which ultimately resulted in today’s Stopped Line Provide product”*.
- 4.8 C&WA submits that, by virtue of its SMP condition FA1, BT was obliged to begin developing the Stopped Line Provide service no later than April 2003.²¹
- 4.9 C&WA also argues that the position in relation to WLR is a relevant consideration in assessing the current dispute. In particular, C&WA state that BT had treated the LLU New Provide process differently than that of WLR, and that for WLR the replacement of an NTP did not count as a New Provide’, with the New Provide’ charge only being levied where *“wiring is replaced and even then only in certain circumstances”*.

BT

The level of the charge for the New Provide Service

- 4.10 BT notes that the New Provide product was introduced in May 2001 following the coming into effect of a new line licence condition (Condition 83) in August 2000.²² BT’s position is that the provision of an NTE on New Provide connections was introduced in response to the requests of industry at that time.
- 4.11 BT states that the charge for the New Provide service was subject to a charge ceiling that was determined by Ofcom in December 2004 following the conclusion of the

²¹ C&WA’s submission of 19 February 2007

²² BT’s submission of 19 February 2007

RWLAM. BT states that it initially charged that price until December 2005, when the price was reduced to take into account Ofcom's conclusions in both the cost of capital and cost of copper studies.

- 4.12 Responding to C&WA's submission regarding the availability of spare pairs, BT states that it was correct that a spare pair was available for use in the majority of cases.²³ However, BT stated that this does not mean that an engineering visit is not required, submitting that:

"Spare pair relates to instances where there is copper capacity in the access network to deliver service to an end user without requiring the deployment of new copper or infrastructure (the cost of which would be covered by Excess Construction Charges). The availability of a spare copper pair does not in itself enable Openreach to deliver an MPF provision without incurring network costs as the use of a spare pair always entails a field engineering visit to complete work between the Distribution Point (DP – or the street cabinet as the case may be) and the end user's premises"

- 4.13 BT states that the availability of a spare pair is different from the use of a stopped line where a line has been provided and terminates on a working NTE at the given end user's premises. BT stated that *"C&WA is incorrectly equating spare pairs with stopped lines"*.²⁴
- 4.14 BT also queries C&WA's figures from the Stopped Line Provide service trial regarding the percentage of orders for the New Provide service that could have been carried out as reactivations (and therefore suitable for the Stopped Line Provide service), BT stated that this figure was "just over 21% (varying between 15% and 34% depending on the month)".²⁵
- 4.15 BT states that since the current arrangements came into effect (in the form of the end to end process for New Provides which were introduced in June 2006 with EMP Release 2000):

"an engineering visit is required in every instance (including where there is a spare pair) unless there is a stopped line, and then even if there is a stopped line, the Communications Provider may nonetheless ask for the engineering visit to be restated".²⁶

The provision of the Stopped Line Provide service

- 4.16 BT submits that it took an action to consider development of the Stopped Line Provide service on 6 June 2005, following a direct request from C&WA.²⁷ BT states that *"no formal SoR was submitted by C&WA, however, this was not unusual for the period, as many of the products and process developments were dealt via the OTA facilitation"*.²⁸
- 4.17 BT states that following the request by C&WA, BT's standard process for reviewing such requests was activated.²⁹ BT submits that the matter was taken to its Strategic Change Control Board, and as the initial trial showed benefits to all parties, the service move straight into the 'Solution Design' phase (skipping the standard Rapid

²³ BT's submission of 19 February 2007, pages 9-10

²⁴ BT's submission of 19 February 2007, pages 9-10

²⁵ BT's submission of 19 February 2007, page 11

²⁶ BT submission of 19 February 2007, page 13

²⁷ BT submission of 19 February 2007, page 15

²⁸ BT's submission of 16 March 2007, page 3

²⁹ BT's submission of 16 March 2007, page 6

Impact Analysis and feasibility study phases), so that the standard steps for introduction of the service would be:

"The product would enter a solution or process design stage. If the product requires system changes this would need to be scoped and the processes developed.

Following this in-depth analysis, the product will enter the delivery phase, which would include pricing and any required trials.

The product is then launched according to the appropriate regulatory timescales, dependent on any required software upgrades"

- 4.18 BT states that following what it considered to be a reasonable request for the provision of the Stopped Line Provide service:

"the pace of the development of a stopped line provide product once agreed in October 2005 was dictated by both BT and Bulldog Communications Limited (Bulldog) with whom a trial was to be conducted. Following several requests from Bulldog to stop, restart and extend the scope of the trial and change the process design, the current product was finally launched on 1st July 2006".

Section 5

Ofcom's analysis and decision

Ofcom's legal powers

- 5.1 Sections 185 to 191 of the Act give Ofcom the power to resolve disputes submitted to it. Section 186 of the Act requires Ofcom to resolve disputes referred to it under section 185 where Ofcom has determined that it is appropriate for it to resolve the dispute.
- 5.2 Ofcom has general duties under the Act in relation to all of its activities in particular under section 3 of the Act which include:
 - 5.2.1 the principal duty to further the interests of citizens in relation to communications matters (section 3(1)(a)); and
 - 5.2.2 to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1)(b)).
- 5.3 The current dispute relates to obligations imposed under SMP Conditions FA1, FA3 and FA9 (i.e. obligations to ensure that network access and the provision of LLU services occurs as soon as reasonably practicable on fair and reasonable terms and that charges are cost-oriented and based on long run incremental cost ("LRIC")).
- 5.4 The obligations in SMP Conditions FA1, FA3 and FA9 came into force on 16 December 2004.

Issues to be resolved

- 5.5 In resolving this dispute Ofcom sets out its reasoning in accordance with the following two issues, in line with the scope of the dispute:

'Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Condition FA1, FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and

Whether BT has breached Condition FA1 and FA9 by not providing the Stopped Line Provide Service to C&WA as soon as reasonably practicable, as required by Condition FA1 and FA9 respectively'.

Whether BT's charge for New Provides from 16 December 2004 to 30 June 2006 was consistent with Conditions FA1, FA3 and FA9.

- 5.6 As noted above, FA1, FA3 and FA9 require, in summary, that BT ensure that network access and the provision of LLU services occurs as soon as reasonably practicable on fair and reasonable terms and that charges are cost-oriented and LRIC-based.
- 5.7 In referring this dispute C&WA consider that BT has contravened these conditions because, C&WA alleges:

- 5.7.1 BT overcharged for a New Provide service because a new line was not in fact required and a site visit by an engineer was therefore unnecessary;
 - 5.7.2 even where a new line was required, it was provided in an inefficient manner; and
 - 5.7.3 in certain cases BT may not actually have made a site visit but CWA were still charged as if there had been a site visit.
- 5.8 In assessing BT's charge for the New Provide service to C&WA, Ofcom has considered the following questions:
- 5.8.1 In general terms, is BT's conduct in including the cost of a site visit in the charge for the New Provide services consistent with what constitutes fair and reasonable and efficient costs to be recovered from the charge for that service? and
 - 5.8.2 Does the evidence demonstrate that BT did, in fact, conduct a site visit in providing the New Provide service to C&WA?
- 5.9 Each of these questions will now be considered in turn.

Is charging for a site visit consistent with what constitutes fair and reasonable and efficient costs of providing the New Provide service?

The period from 16 December 2004 to 14 December 2005

- 5.10 As noted in paragraph 3.36, the New Provide service charge ceiling (of £168) during this period was set by Ofcom in the RWLAM, which was published on 16 December 2004.
- 5.11 Given that the service had been developed on the basis that a site visit was necessary, as discussed from paragraphs 3.17 onwards, Ofcom considered during the RWLAM that it was appropriate for this cost to be included within the New Provide charge.
- 5.12 Ofcom consulted on its proposals in the RWLAM twice before making its final determination. C&WA's response of 19 February (in this dispute) states that its response at the time to the RWLAM:
- "identifies [C&WA's] concern with the inclusion of the engineering visit in the charge for the new provide product".*
- 5.13 Ofcom has considered C&WA's response to the RWLAM and notes it in fact states that:
- "Bulldog believes that the cost of the site visit for the standard new provide category of MPFs must reflect the fact that over 90 percent of standard new provides are in fact provisioned over spare pairs".*
- 5.14 Ofcom considers that C&WA's response to the RWLAM does not query the inclusion of the engineering visit in the New Provide charge, rather that the cost should take into account the existence of spare pairs (the relevance of the availability of spare pairs is considered further at paragraph 5.26 onwards).
- 5.15 In the final statement concluding the RWLAM, Ofcom confirmed that:

"[t]he cost of the site visit reflects the number of new provides that are provisioned over spare pairs."

- 5.16 In other words, the ceiling set by Ofcom for the charge for a New Provide service is based on the proportion of New Provide connections that are provisioned over spare pairs (meeting the concern that C&WA had raised).
- 5.17 The RWLAM imposed on BT a requirement to charge for the provision of network access in the wholesale local access market (which includes the provision of New Provide services) on the basis of LRIC.
- 5.18 Furthermore, in setting the charge ceiling in the market review, Ofcom considered the question of whether the costs had been incurred efficiently, considering BT's estimates for the average length of time spent by engineers during site visits.
- 5.19 Therefore, in the RWLAM, Ofcom set a cost-oriented charge ceiling of £168 for the New Provide service. The average cost of the site visit was included in the charge, and reflects the proportion of all New Provide connections that are provisioned over spare pairs. As noted in the RWLAM, that cost-oriented charge reflects the LRIC of providing the elements of the service to be recovered from the connection charge, plus a mark-up using the average costs across all New Provide connections.
- 5.20 Ofcom has not received any evidence in this investigation to suggest that the charge of £168 was not fair or reasonable, cost-oriented, or efficiently incurred as it concluded in the RWLAM. As a result Ofcom is applying the decision on the reasonableness of the charge, as taken during this market review, in the context of this dispute.
- 5.21 Therefore:
- 5.21.1 BT charging for the cost of the site visit was a fair and reasonable course to pursue in general terms, since a site visit would be required to provide the service (even where a spare pair was present); and
 - 5.21.2 The price charged by BT (which in turn reflected the charge ceiling imposed by Ofcom) already accounted for the extent to which spare pairs were available in calculating that price in the RWLAM.

The period 15 December 2005 to 30 June 2006

- 5.22 On 15 December 2005, BT's charge for New Provide services dropped from £168 to £99.95. Two regulatory reviews are relevant to the New Provide charge during this period.
- 5.23 In the November 2005 LLU Statement Ofcom confirmed that the costs for new drop wire installation for fully unbundled loops were henceforward to be recovered in the rental charge. In addition, it is stated that "to reflect this change, BT has notified a new connection charge for fully unbundled new provides which will apply from 15 December 2005" (this was the £99.95 charge). BT submits that since 15 December 2005 the cost of the engineering visit associated with New Provide has been recovered in the rental charge.
- 5.24 This review followed a commitment made by BT in June 2005 to align LLU New Provide charges with WLR connection charges. WLR connection charges have

previously been determined by Ofcom in the context of regulatory reviews.³⁰ In the January 2006 WLR Statement, Ofcom determined the ceiling for the WLR connection charge at £88, and confirmed that the approach to setting this ceiling was reasonable.

- 5.25 In the light of the fact that the £99.95 New Provide charge does not include the cost of a site visit, and also the previously noted relationship between this charge and the WLR connection charge, Ofcom has not investigated this charge further in the context of this dispute.

The availability of spare pairs during the period

- 5.26 C&WA has argued that BT has breached its regulatory obligations as it has provided the New Provide service to C&WA in an inefficient manner, in particular that it has required that a site visit take place in situations where such a visit was not necessary.
- 5.27 In section 2.2 of C&WA's dispute referral of 22 November, C&WA addresses the question of "what work is actually involved in a new provide?" C&WA states that "in the majority of cases, it seems clear that there is a copper pair (often called a "spare pair") available for use" and this meant (in C&WA's view) that BT could have provided the service more cheaply.
- 5.28 Ofcom's provisional conclusion is that C&WA's characterisation of a 'spare pair' mischaracterises the impact of the presence of a spare pair on the need for a site visit. As noted in paragraphs 3.24 to 3.28 above, an important distinction is made between a spare pair and the use of a stopped line (ie. where a drop line has already been provided and terminates at the end user's premises). Ofcom's provisional finding is that the availability of a spare pair still involves network costs entailing an engineering site visit to complete the work between the street cabinet and the end user's premises.
- 5.29 In the light of this, it appears to Ofcom that the core of C&WA's dispute seeking compensation for over-payment is based on an (erroneous) premise: that the presence of a spare pair means that a connection exists between the exchange through to the customer's premises and therefore no site visit is necessary.
- 5.30 In the same vein, C&WA's claim for repayment draws its conclusions on the number of (notional) stopped line provides that could have been delivered during this period based on its estimate of the number of spare pairs.

Does the evidence demonstrate that BT did, in fact, conduct a site visit in providing the New Provide service to C&WA?

- 5.31 As part of its investigation, Ofcom gathered evidence from BT about the provision of the New Provide service to C&WA, in order to examine whether BT had charged for a site visit without actually having carried out such a visit.
- 5.32 Ofcom first required that BT provide evidence of the number of engineering visits taking place for New Provide service orders, provisioned in the time period prior to the introduction of the Stopped Line Provide product by BT.³¹

³⁰ For full details please see section 1 of the document Wholesale Line Rental: Reviewing and setting charge ceilings for WLR Services at footnote 17.

³¹ Ofcom request for information under section 191 of the Act dated 13 February 2007

- 5.33 BT provided a sample of 230 C&WA New Provide orders during the relevant period. BT stated the sample showed that in every case, the provision order was subject to an appointment and that in every case except one (where the order was cancelled before the engineering site visit took place), an engineering visit took place.
- 5.34 Ofcom then required BT to undertake a further sampling exercise, requiring that BT provide a sample of at least 2000 C&WA orders for MPF new provides between 16 December 2004 and 30 June 2006 with the sample of orders:
- 5.34.1 chosen from each month of the dispute period, with the sample size in each month proportionate to the share of the total population of orders placed in that month;
 - 5.34.2 randomly chosen from all the orders for that month, i.e. not weighted for a particular time of the month; and
 - 5.34.3 representative of the geographical locations of all orders with the sample size in each geographical area proportionate to the share of the total population of orders placed in that geographical area.³²
- 5.35 BT provided a second sample of 3217 orders from the total of C&WA orders completed during the period of this dispute. BT has stated that the sample selected meets the criteria set out above.
- 5.36 At the time of writing this Draft Determination, Ofcom's analysis of the samples provided by BT is still ongoing.³³ Ofcom's preliminary view is that, on the basis of the information provided by BT, the second sample shows that for every complete order request for a New Provide in the sample, an engineering site visit took place, unless there was a legitimate reason as described below. The 317 cases where an engineering visit did not take place relate to:
- 5.36.1 orders that have been fulfilled as an existing line reactivation under the reactivate trial (please refer to paragraph 5.57 onwards) being run with C&WA where an engineering visit is not required (16 cases); and
 - 5.36.2 orders that have been cancelled by C&WA on behalf of its end-users before the engineering activity took place (301 cases).
- 5.37 Ofcom intends to confirm its preliminary view subsequent to the issuing of this Draft Determination. In the event that further analysis confirms Ofcom's preliminary view, then we will make a Final Determination (after considering in full all submissions made in relation to the Draft) in the usual way. In any other scenario, Ofcom will provide the parties an opportunity to consider any further analysis and make further submissions on these points prior to a Final Determination being made to resolve the dispute.
- 5.38 On the basis of this sample and the evidence available at the time of writing, Ofcom concludes provisionally that instances where a site visit did not actually take place were limited and occurred in specific circumstances, each of which appears to be objectively justifiable based on the evidence provided to Ofcom in the dispute (eg. cancelled by C&WA) and Ofcom's preliminary analysis.

³² Ofcom request for information under section 191 of the Act dated 13 February 2007

³³ Ofcom expects to complete its analysis before publication of its Final Statement in this matter.

- 5.39 C&WA also provided Ofcom with specific examples of instances where C&WA alleged that BT had not carried out a site visit in the provision of the New Provide service:
- 5.39.1 C&WA stated that in May 2006, they initiated a new complaints process for provisioning issues. During May and June of 2006, they logged 7 and 8 complaints respectively where the customer had required a new NTE or NTE shift as part of the installation of their new line, but the line had been reactivated without an engineer attending the customer's premises.
 - 5.39.2 C&WA provided 10 out of the 15 complaints logged where either the service was activated on an existing NTE (which C&WA claim suggest the engineer visit may have been unnecessary), or no engineer visit took place and C&WA consider relevant to this dispute.³⁴
- 5.40 BT was provided with an opportunity to respond to these allegations.
- 5.41 In response to the specific examples provided by C&WA, BT submitted that:
- 5.41.1 For each example provided by C&WA, BT provided details of the engineering site visit, including the time and date the field engineering visit was completed and any notes entered by the field engineer identifying the work that was carried out.
 - 5.41.2 BT has stated that a field engineering visit took place in every case however for 3 of the orders, the field engineer did not provide details of the work carried out.
- 5.42 Given that the number of complaints logged by C&WA is a small proportion of the total number of orders raised, and given that BT was able to provide records of those 'missing' visits put forward by C&WA, there is very little evidence to suggest that an engineering visit did not take place in those instances put forward by C&WA, Ofcom considers that it is reasonable to conclude that an engineering visit would have been planned to take place for every New Provide connection ordered during the period and that, where required, this would involve a site visit.
- 5.43 Furthermore, given the findings of the sampling exercise undertaken as set out above based on Ofcom's preliminary analysis, it appears that instances where a site visit did not actually take place are limited and, where they occurred, this was based on legitimate reasons as set out above.

Conclusion

- 5.44 In the light of the evidence above, Ofcom's provisional conclusion is that BT's charge for the New Provide service during the period 16 December 2004 to 30 June 2006 was consistent with BT's obligations as set out in Condition FA1, FA3 and FA9, subject to the qualifications set out in the paragraphs above.

³⁴ C&WA's submission of 19 February 2007

Whether BT breached Condition FA1 and FA9 by not providing the stopped line provide product to C&WA as soon as reasonably practicable?

- 5.45 In referring this dispute C&WA has argued that BT has contravened the relevant SMP conditions because:
- 5.45.1 BT should have begun development of a ‘stopped line’ no later than April 2003, when, according to C&WA, the parties had been discussing C&WA’s concerns regarding the pricing of new connections and the failure of BT to utilise existing spare pairs; and
 - 5.45.2 BT, as an SMP operator in the market(s) relevant to this dispute, is under an obligation to engineer new products in an efficient, innovative way and given C&WA’s conduct during this time, it should have begun development of the Stopped Line Provide service in advance of the formal request from C&WA (in particular given that it already provided a variant of the Stopped Line Provide service for WLR and PSTN).
- 5.46 In order to address C&WA’s first claim, it must be established when C&WA requested network access or local loop unbundling services. As to C&WA’s second claim that BT should have developed a form of the Stopped Line Provide product even before a request, we consider such issues to be outside of the scope of the dispute, given that BT’s SMP condition expressly refers to a “reasonable request” for Network Access.
- 5.47 Therefore in assessing whether BT has complied with its regulatory obligations to provide the Stopped Line Provide service to C&WA as soon as reasonably practicable, Ofcom has considered the following questions:
- 5.47.1 What is the date at which C&WA requested the Stopped Line Provide Service?
 - 5.47.2 Was the request reasonable?
 - 5.47.3 Does the evidence on the conduct of the parties indicate BT provided the product as soon as reasonably practicable from the date it was requested?

What is the date at which C&WA requested the Stopped Line Provide Service?

- 5.48 In considering this question Ofcom first examines the form that a “reasonable request for interconnection” may take. In general, Ofcom would not expect that a request for interconnection would have to be made in an unnecessary bureaucratic or rigid way. What is reasonable is likely to depend on the circumstances of each case.
- 5.49 In accordance with the Access Guidelines Ofcom will also consider the clarity of the request in assessing whether BT has acted in accordance with its SMP obligations. However we would not expect BT to refuse to consider a request solely on the grounds that the request is inadequately formulated.³⁵
- 5.50 On the basis of evidence gathered during the investigation, Ofcom considers that there are 3 possible request dates:
- 5.50.1 C&WA’s letter to BT of 30 April 2003;

³⁵ Please see paragraph 3.47 of the Access Guidelines

5.50.2 The meeting of 24 June 2003 between C&WA and BT; and

5.50.3 C&WA's email to BT of 7 June 2005.

The first two possible request dates are before the relevant SMP conditions came into force and are therefore outside the scope of the dispute.³⁶ Below we consider whether the third instance formed a reasonable request under FA1 and FA9.

The C&WA email of 7 June 2005

5.51 On 7 June 2005 C&WA requested via email that BT undertake development to reactivate existing lines at the end-user's premises:

"A lot of the new lines that Bulldog orders actually turn out to be the reactivation of an existing line. Where a line is re-activated rather than a new line being installed it can cause problems if the customer wanted the NTE moved and means that Bulldog incur an additional 'NTE shift' cost. Bulldog asked if a re-activation product could be made available as this would probably be less expensive and have a shorter leadtime and is effectively what they receive in a number of situations."

5.52 Ofcom considers this is a request for a new service (ie a new form of network access) and therefore the date of the request to BT for the purposes of assessing whether BT complied with its regulatory obligations to provide the product as soon as is reasonably practicable under FA1 and FA9.

Was the request reasonable?

5.53 Recital 19 of the Access and Interconnection Directive explains that an obligation to meet all reasonable requests means that requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity:

".....Where obligations are imposed on operators that require them to meet reasonable requests for access to and use of networks elements and associated facilities, such requests should only be refused on the basis of objective criteria such as technical feasibility or the need to maintain network integrity....."

5.54 In addition, operators should not be compelled to provide services which are not in their powers to provide.

5.55 The Access Guidelines note that when considering the reasonableness of a request, Ofcom is likely to consider whether a request is reasonable by considering whether it represents an 'undue burden' on the operator supplying it (taking account of any specific action and expense that may be incurred in providing the product).³⁷ In other words, Ofcom is likely to consider that a request, which is technically feasible, is reasonable if the SMP operator can reasonably expect to receive at least a reasonable rate of return, on any necessary investments made to supply a product at a price the requesting operator is willing to pay.

5.56 In the absence of evidence to suggest that the request was not technically feasible or would impose an undue burden on BT, Ofcom provisionally concludes that the email of 7 June 2005 represented a reasonable request for network access.

³⁶ FA1 and FA9 came into force on 16 December 2004

³⁷ Paragraph 2.22

Did BT provide the service “as soon as reasonably practicable”?

5.57 The chronology of events leading to the provision of the Stopped Line Provide service can be broken down into two periods:

5.57.1 from when the request for a new product was made on 7 June 2005 to the first market trial on 21 November 2005; and

5.57.2 from 21 November 2005 to 1 July 2006 when the product was launched.

From the request to the first market trial

5.58 Although not stated in the scope of the dispute, in assessing whether BT provided network access as soon as reasonably practicable in accordance with FA 1, Ofcom considers it appropriate to examine BT's obligations under FA 8 (requests for new Network Access). At the time of setting network access regulation in 2003, the regulated process for the management of requests was designed to accompany the obligation for BT to meet all reasonable requests for access.³⁸ FA 8 provides a benchmark against which BT's actions during the first time period (as described above) can be evaluated.

5.59 Under FA8, within 15 working days of receipt of the request for a new product from C&WA on 7 June 2005, BT was under an obligation to respond in writing to C&WA in one of the following ways by confirming:³⁹

5.59.1 that the request will be met and that the timetable for the provision of the new network access, an initial offer of terms and conditions for the provision of the new network access and the timetable for the agreement of technical issues will be prepared; or

5.59.2 that a feasibility study is reasonably required in order to determine whether the request made is reasonable and BT should have set out its objective reasons for the need for such a study; or

5.59.3 that the request is not sufficiently well formulated, detailing all of the defects in the request which has been made; or

5.59.4 that the request is refused on the basis that it is not reasonable and, where it does so, BT would have detailed its reasons for refusal.

5.60 This process is reflected in BT's New Services Manual.⁴⁰

5.61 As part of its investigation, Ofcom requested information from both BT and C&WA on how BT responded to the request.⁴¹

5.62 BT stated that as the request for the new service arose during a weekly operational conference call (which was confirmed by email the day after), BT dealt with the timetable for the provision of the new service and agreement to technical issues via the 'existing channels of communication' which we understand to mean weekly conference calls between the parties:

³⁸ Ofcom Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, second consultation published on 26 August 2006, paragraph 9.174.

³⁹ FA8.6

⁴⁰ http://www.btwholesale.com/application?origin=child_link_index.jsp&event=bea.portal.framework.internal.refresh&pageid=editorial_one_column&nodeid=navigation/node/data/Pricing_and_Contracts/Interconnect_Manuals/navNode_Interconnect_Manuals Please see section B part B2 – guidelines for requesting a new product at page 25

⁴¹ Ofcom request for information under section 191 of the Act dated 16 March 2007

“... it was during one of these weekly operational calls on 6th June 2005 that C&WA formally requested that BT investigate the development of a reactivation product”

- 5.63 Under FA8 as noted above, BT is required to respond within 15 working days,.
- 5.64 On 29 June 2005 (16 working days later), BT responded to the request by indicating that a feasibility study would be needed. No reason was provided for the need for a feasibility study. BT have confirmed that they subsequently decided that a feasibility study was not required and the development of the product progressed without this intermediate stage. However BT did not supply the confirmations listed in paragraph 5.59 above.
- 5.65 If BT had done so, under FA 8 BT should have within, 35 working days of receipt of the request, responded further to C&WA in writing and (a) confirmed the timetable for the provision of the new network access; (b) provided an initial offer of terms and conditions for the provision of the new network access; and (c) confirmed the timetable for the agreement of technical issues.⁴² That 35 day period to respond ended on 26 July 2005.
- 5.66 BT submit that at the end of July 2005 C&WA requested a change in scope to the originally agreed requirements⁴³. Ofcom considers that the change requested was a new request from the original request of 7 June, and therefore the 15 working day period under FA 8.6 and the 35 working day period under FA 8.7 would have started from this date. Therefore BT should have provided the confirmations listed in paragraph 5.59 above by 16 September 2005 at the latest.⁴⁴
- 5.67 C&WA's dispute submission states that it did not proceed with the reactivate service offered by BT in 2005 because:
- “.....it did not work. Specifically, the product offered still required C&WA to go back to the customer a day or more after the point of sale and advise the customer that there was a line available to be reactivated. This process made sale activity unacceptably cumbersome -- at the point of sale C&WA was not able to confirm whether a site visit would be necessary or not. This created confusion in the mind of the customer and would clearly generate negative brand associations -- why should they trust C&WA as a supplier if they could not even indicate how they would deliver their own product?. In addition, it created an extra customer touch point and extra cost -- C&WA would need to call the customer back after establishing whether a reactivation was possible or not.”*
- 5.68 On 7 September 2005, BT advised C&WA that they hoped to be ready for testing from 21 September 2005 and that “an indicative date for the subsequent developments is the end of January 2006”.
- 5.69 At a meeting on 13 September 2005 between the parties BT gave a verbal overview of the service including costs, billing and testing timescales and this was minuted accordingly.
- 5.70 At this meeting, BT indicated that testing would occur on or before 26 September with process documentation for review to be provided to C&WA before testing. C&WA stated that:

⁴² FA 8.7

⁴³ BT's submission of 19 February 2007

⁴⁴ Taking 31st July as the date when C&WA submitted a new request for a product

“in order to launch the product they would have to make significant changes to process, web site and systems. Bulldog will not be able to confirm timescales for this until they have received process documentation. Bulldog could however test the reactivation process when BT are ready.”

- 5.71 Weekly conference calls between the parties were held during the intervening period on the development of the Stopped Line Provide service and the timetable for testing changed during the course of these calls. For example, on a call on 6 October 2005 it was confirmed by BT that testing was planned for the following week.
- 5.72 On 9 November 2005 C&WA wrote to BT advising that C&WA did not wish to progress to testing until BT provided written confirmation of the pricing of the Stopped Line Provide service however it appears that the trial commenced on 21 November 2005.
- 5.73 In considering the provision of the Stopped Line Provide service Ofcom has consulted with the OTA. Summing up the situation during the period, the OTA considered that from June to December 2005 the priority of Openreach and C&WA was on clearing a backlog of MPF orders and that everything else was secondary.⁴⁵
- 5.74 On 18 October 2005 the OTA sent an email to Openreach and C&WA⁴⁶ (the subject being “Reactivation product for new MPF”), which outlined the OTA’s understanding that the position between the parties at this time was:
- 5.74.1 a tactical solution (not made available on Openreach’s tactical order management system, eCo) was being worked on for mid-November (approx launch);
 - 5.74.2 a tactical solution (made available on eCO) was being worked on for Feb 2006 time frame (approx launch);
 - 5.74.3 the revised process could be provided either on a per operator basis or it could be changed for all operators according to what the industry want;
 - 5.74.4 if the process was to be changed for all operators, industry agreement would need to be secured;
 - 5.74.5 if the process was wanted on a per operator basis, industry support for the proposed process was desirable (but not mandatory);
 - 5.74.6 the OTA had asked Openreach to provide a summary of the proposed change by Friday 21 October 2005 in order for the OTA to seek industry feedback; and
 - 5.74.7 Progress on the mid-November date would not be held up while industry feedback was sought.
- 5.75 Ofcom considers that this email provides a useful independent assessment of the main issues in relation to the provision of the New Provide product at this point in time.

From first trial to launch of the service

⁴⁵ Email from OTA to Ofcom of 19 March 2007.

⁴⁶ Email from the OTA’s Technical Director to Openreach and C&WA of 18 October 2005

- 5.76 On the basis of the evidence submitted by the parties, it appears that the trial was stopped and started at C&WA's request during November and December 2005. On 6 December 2005 C&WA stopped the trial because the lead times for the service were too long:

"We started the trial again yesterday (5 December 2005) and so far have received 8 orders where you have identified re-activation is possible. However, the dates that have been supplied are 6 for 19 January 06; 2 for 20 January 2006. These dates are not acceptable for us to offer the customers and subsequent interrogation into eCo has shown that the appointment dates could be booked more than a month earlier. Hence, we have rejected the re-activation opportunity and re-booked the engineer's appointment for each at an earlier date. There is obviously still a problem within the date booking process of this trial which must be resolved before we continue further."

- 5.77 On 10 January 2006 C&WA requested the restart of the trial and offer that they will do '60-80 reactivation orders in the trial' to encourage BT to restart it.
- 5.78 Further the following events took place:
- 5.78.1 in February 2006 C&WA stopped the trial as no confirmation of the price of the product had been received from BT;
 - 5.78.2 further in March 2006, BT admit error or delay in not confirming price; and
 - 5.78.3 in April 2006 BT admit that the indicative price given to C&WA for the reactivate product was wrong and given without authorisation.
- 5.79 On 28 March 2006 BT issue a first draft of the 'reactivate' pilot plan for comment.
- 5.80 The trial recommenced on 5 April 2006 and ended on 9 June 2006 and frequent conference calls were held on the progress of the trial. During this period BT encouraged an increased roll out of the trial however C&WA were constrained in so doing by resource issues⁴⁷. On four separate occasions the issue of the price of the service was raised and this was notified to C&WA on 7 June 2006.⁴⁸
- 5.81 The new service was launched on 1 July 2006.

Conclusion

- 5.82 In light of BT's obligations under SMP condition FA 8 for the period from receipt of the request to the date of the first trial of the new service, it appears that BT provided an indicative timetable for the provision of new network access and for the agreement of technical issues in September 2005 in a timely manner. The price of the Stopped Line Provide service was notified verbally to C&WA by BT within this timescale however this price appears to have been given in error. There does appear to be an undue delay by BT in providing written confirmation of the price to C&WA.
- 5.83 In relation to the second period of time from the first trial to the launch of the product, in the light of the evidence above and having regard to the conduct of both parties, there does not appear to be any undue delay on the part of BT in developing the service.

⁴⁷ C&WA confirm this on a conference call on 23 June 2006

⁴⁸ On the conference calls of 18 April, 31 May, 2 June and 5 June 2005

- 5.84 In relation to either period, the availability of a similar product for WLR does not appear to have been of material relevance to the speed with which BT provided the service.
- 5.85 Therefore on balance, taking the two periods as a whole, Ofcom's provisional conclusion is that BT did not breach regulatory conditions FA1 and FA9 by not providing the Stopped Line Provide service to C&WA as soon as reasonably practicable.

Annex 1

Glossary

BT: British Telecommunications plc.

DSL (Digital Subscriber Line): a family of technologies generically referred to as DSL, or xDSL, capable of transforming ordinary local loops into high-speed digital lines, capable of supporting advanced services such as fast Internet access and video-on-demand. ADSL (Asymmetric Digital Subscriber Line), HDSL (High bit rate Digital Subscriber Line) and VDSL (Very high data rate Digital Subscriber Line) are all variants of xDSL.

Hull Area: the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc.

Local loop: the access network connection between the customer's premises and the local serving exchange, usually comprised of two copper wires twisted together.

Local loop unbundling (LLU): a process by which a dominant provider's local loops are physically disconnected from its network and connected to competing provider's networks. This enables operators other than the incumbent to use the local loop to provide services directly to customers.

Main distribution frame (MDF): the equipment where local loops terminate and cross connection to competing providers' equipment can be made by flexible jumpers.

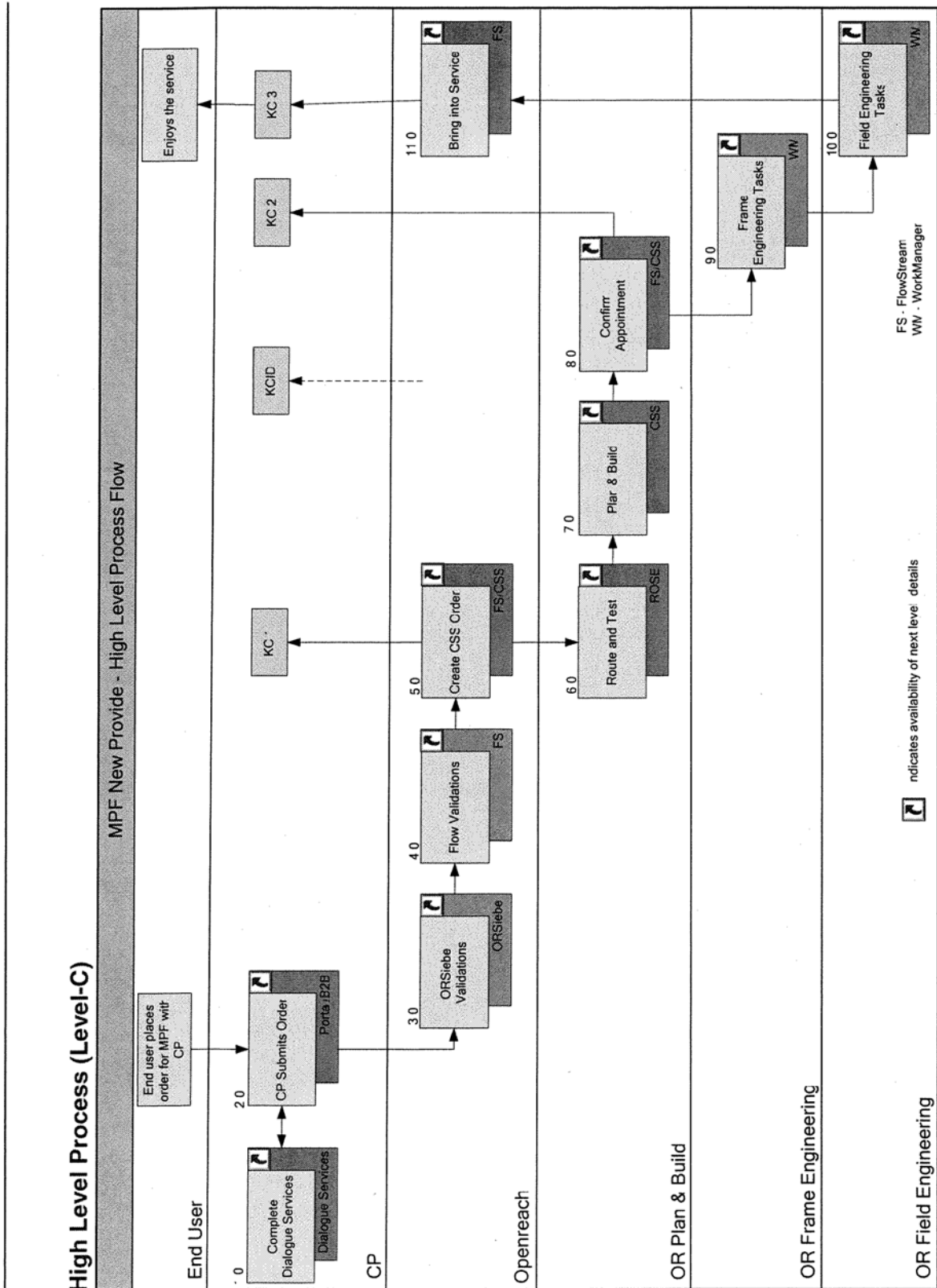
Metallic Path Facilities (MPF): the provision of access to the copper wires from the customer premises to a BT MDF that covers the full available frequency range, including both narrowband and broadband channels, allowing a competing provider to provide the customer with both voice and/or data services over such copper wires.

PSTN: Public Switched Telephone Network

Shared metallic path facility (SMPF)/shared access: the provision of access to the copper wires from the customer's premises to a BT MDF that allows a competing provider to provide the customer with broadband services, while the dominant provider continues to provide the customer with conventional narrowband communications.

SMP: The Significant Market Power test is set out in European Directives. It is used by National Regulatory Authorities (NRAs) such as Ofcom to identify those communications providers who must meet additional obligations under the relevant Directive

Annex 2 -



Annex 3

Responding to this consultation

How to respond

- A0.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 20 April 2007**.
- A0.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 6), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A0.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email **Tanya.Rofani@ofcom.org.uk** attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A0.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation:

Tanya Rofani
Floor 4
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

Further information

- A0.5 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Tanya Rofani on 020 7783 4342.

Confidentiality

- A0.6 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A0.7 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

- A0.8 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/account/disclaimer/>

Next steps

- A0.9 Following the end of the consultation period, Ofcom intends to publish a statement shortly thereafter.
- A0.10 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A0.11 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 5.
- A0.12 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A0.13 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 4

Ofcom's consultation principles

A1.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A1.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A1.3 We will be clear about who we are consulting, why, on what questions and for how long.

A1.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A1.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A1.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A1.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A1.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 5

Consultation response cover sheet

- A2.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A2.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A2.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

Whole response

Part of the response

Name/contact details/job title

Organisation

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)