



Draft determination to resolve a dispute between BT and various communications providers about INCA/CLI

Consultation

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Section 1

Draft Determination

[Draft] Determination under sections 188 and 190 of the Communications Act 2003 for resolving a dispute between British Telecommunications plc (“BT”) and five other communications providers (“CPs”) concerning Inter-Network Call Accounting (“INCA”) billing using Calling Line Identification (“CLI”) (referred to in this document as “INCA/CLI”) for NTS calls.

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. Section 190 of the Act sets out the scope of Ofcom’s powers for resolving a dispute which may include, in accordance with sections 190(2) of the Act, making a declaration setting out the rights and obligations of the parties to the dispute, and to give 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;
- (B) Following the review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, the Director General of Telecommunications imposed SMP Conditions AA1(a) and AA11 on BT on 28 November 2003 pursuant to which BT is required to grant Network Access and to provide NTS Call Origination on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct (“the SMP Conditions”);
- (C) On 28 October 2004, Ofcom published a direction under the SMP Conditions, pursuant to which BT is required to use INCA/CLI for the calculation of charges for NTS calls transiting its network (“the Direction”);
- (D) On 2 February 2006 BT wrote to Ofcom asking it to resolve a dispute between BT and certain CPs who had failed to sign, or who had rejected an Operator Charge Change Notice (“the OCCN”) issued by BT on 5 October 2005;
- (E) The CPs who are in dispute with BT about this matter are 1RT Group Limited, Colloquium Limited, Flextel Limited, Networks Direct plc and Skytel Limited;
- (F) On 27 February 2006 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;
- (G) In order to resolve this dispute, Ofcom considered, among other things, the information provided by the parties and its relevant duties set out in sections 3 and 4 of the Act;
- (H) Ofcom issued a draft of this Determination and explanatory statement on [] and responses were invited by 5pm on [];

- (l) An explanation of the background to the dispute and Ofcom's reasons for making this Determination are set out in the explanatory statement accompanying this Determination;

NOW, THEREFORE, PURSUANT TO SECTIONS 188 AND 190 OF THE ACT, OFCOM MAKES THE FOLLOWING DETERMINATION:

1. It is hereby declared that, should BT calculate charges for NTS calls originating on BT's network or NTS calls transiting BT's network on the terms set out in the OCCN, such provision would be regarded as being on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may direct in accordance with the SMP Conditions and the Direction.
2. 1RT Group Limited, Colloquium Limited, Flextel Limited, Networks Direct plc and Skytel Limited are directed to sign BT's OCCN of 5 October 2005 within 14 days from the date of this determination.
3. Words or expressions used in this Determination shall have the same meaning as in the Act, except as otherwise stated in this Determination.
4. For the purposes of interpreting this Determination, the following definitions shall apply:
 - a. "NTS" means Number Translation Services.
5. For the purposes of interpreting this Determination;
 - a. Headings and titles shall be disregarded; and
 - b. The Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.
6. This determination shall take effect on the day it is published.
7. This Determination is binding on BT, 1RT Group Limited, Colloquium Limited, Flextel Limited, Networks Direct plc, and Skytel Limited in accordance with section 190(8) of the Act.

David Stewart

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

[xx] June 2006

Section 2

Summary

Background

- 2.1 BT has been originating Number Translation Services (“NTS”) calls that terminate on other Communications Providers’ (“CPs”) networks for over 15 years. Terminating Communications Providers (“TCPs”) are paid for the call, less certain charges deducted by BT. These payments are calculated by taking the retail price paid by customers less BT’s regulated retention for originating these calls. BT’s retention, in turn, is based on the element based charge for call origination and conveyance across its network to the point of handover to the TCP’s network. Under this process, TCPs must invoice BT for their payments, although BT itself also carries out its own calculation in order to verify the invoices it receives.
- 2.2 In 1999, the Director General of Telecommunications (“Of tel”) issued a direction concerning BT’s NTS Conveyance pursuant to which BT was to use a manual system based on Network Charge Differential (“NCD”) methodology¹ to calculate BT’s NTS call conveyance charges to TCPs. NCD was intended to be an interim measure until BT developed an automated billing system for NTS calls. In 2000, BT introduced an automated system for the calculation of its NTS interconnection charges, using BT’s Inter-Network Call Accounting (“INCA”) billing system and Calling Line Identification (“CLI”) (referred to in this document as “INCA/CLI”). The introduction of INCA/CLI was followed in December 2001 by an Of tel direction² that BT must enable TCPs to choose whether to use the NCD methodology or INCA/CLI, in the form it existed then, to invoice BT. However, TCPs were initially unwilling to embrace INCA/CLI due to a number of concerns about its limited functionality.
- 2.3 Further to its review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets³ (“the Market Review”), Of tel imposed a requirement on BT to provide network access and NTS conveyance to other CPs on fair and reasonable terms and on such and on such terms, conditions and charges as Of tel may direct. Of com subsequently assumed the functions of Of tel and, on 28 October 2004, Of com published a direction pursuant to which INCA/CLI billing was to be used by BT for NTS calls transiting its network from 28 February 2006 (“the Direction”)⁴.

History of the dispute

- 2.4 BT issued an Operator Charge Change Notice (“the OCCN”) on 5 October 2005 proposing a change to NTS TCPs’ call termination charges as a result of the changes to the calculation of BT’s pence per minute NTS call origination charges, due to the implementation of the INCA/CLI billing system. Eighteen TCPs failed to sign, or rejected the OCCN.

¹ The name given to Of tel’s methodology which enabled BT to de-average its NTS wholesale charges following Of tel’s direction in November 1999. See:

<http://www.ofcom.org.uk/static/archive/of tel/publications/1999/consumer/nts1199.htm>

² <http://www.ofcom.org.uk/static/archive/of tel/publications/pricing/inca1201.htm>

³ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/

⁴ http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/

- 2.5 On 2 February 2006 BT requested that Ofcom resolve a dispute between BT and the eighteen CPs who had failed to sign, or who had rejected the OCCN under s185 of the Communications Act 2003 ("the Act"). BT subsequently withdrew its dispute with eleven of the CPs.
- 2.6 On 27 February 2006, Ofcom decided that it was appropriate for it to handle the dispute and published an entry in Ofcom's competition bulletin, stating that BT is in dispute with 1RT Group Limited, Colloquium Limited, Flextel Limited, Networks Direct plc, Skytel Limited ("the TCPs") and two other CPs who wished to remain anonymous. The two anonymous CPs later signed the OCCN, so were no longer in dispute with BT.

Regulatory framework and submissions by the parties

- 2.7 Following the Market Review, Ofcom determined that BT held SMP in certain of the markets for fixed wholesale narrowband access, origination, conveyance and transit.⁵ As a result, Ofcom imposed certain SMP Conditions on BT requiring it to provide reasonable network access on fair and reasonable terms and on such terms, conditions and charges as Ofcom may direct.⁶ In addition, BT is required to provide NTS call origination on fair and reasonable terms and on such terms, conditions and charges as Ofcom may direct.⁷
- 2.8 BT submits that the OCCN is fair and reasonable and that it issued the OCCN in order to meet its regulatory obligations under SMP Conditions AA1(a) and AA11 and the Direction.
- 2.9 The TCPs state that in order to implement INCA/CLI they will incur significant set-up costs, with no benefit, or in some cases an expected loss, from the adjusted payments under the new billing system. They object to the implementation of INCA/CLI being imposed on them, and they argue that Ofcom's consultation process and the industry discussions did not elicit the views of smaller NTS TCPs. Therefore it is not fair and reasonable for INCA/CLI to be implemented and NCD withdrawn.

Ofcom's analysis and proposed decision

- 2.10 Ofcom has considered whether the OCCN issued by BT on 5 October 2005 is fair and reasonable, and in accordance with BT's obligations under SMP Conditions AA1(a) and AA11 as described in paragraph 2.8 above.
- 2.11 Ofcom has provisionally concluded that the OCCN is in accordance with BT's SMP obligations and the terms are fair and reasonable, for the following reasons:
- 2.11.1 BT issued the OCCN introducing INCA/CLI billing for NTS calls in accordance with its obligations under the Direction. Under the Direction, BT was obliged to introduce INCA/CLI for NTS calls by 28 February 2006. The OCCN therefore provides for network access on such terms, conditions and charges as directed by Ofcom, as required by SMP Conditions AA1(a) and AA11;

⁵ Review of fixed wholesale narrowband access, origination, conveyance and transit markets, 28 November 2003: http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/

⁶ SMP Condition AA1(a)

⁷ SMP Condition AA11

- 2.11.2 Furthermore, the introduction of INCA/CLI billing is fair and reasonable as it has been agreed as a result of industry discussions over a considerable period of time; and
- 2.11.3 Ofcom has considered whether there are any new circumstances or changes in the market since the Direction which would justify reviewing that direction. The decision to extend INCA/CLI billing to NTS calls was agreed by the NTS industry and the issues surrounding the introduction of the INCA/CLI methodology were considered in detail during the industry discussions and policy consultation process, which took place over a number of years and culminated in the Direction. None of the TCPs have raised matters which were not addressed at the time of the introduction of the Direction which would justify reviewing the obligations imposed by the Direction. Ofcom notes that none of the TCPs responded to Ofcom's consultation in 2004.

Section 3

Background and history of the dispute

Background

- 3.1 NTS services are telephone services using Special Service numbers beginning 08xx and 09xx which translate and route calls to geographical numbers. Revenue sharing takes place for some NTS number ranges, where the revenue generated by the call may be split between different levels of the call chain. NTS numbers may be used to provide a national 'presence' for businesses, with the advantage that the business can choose to keep the same number if it relocates, or to provide 'value added' services, such as customer helplines. Consumers may identify 0845 and 0870 numbers as 'local' and 'national' rate calls respectively, although the link with local and national call rates no longer exists⁸.
- 3.2 BT has been originating NTS calls that terminate on other CPs' networks for over 15 years. Other CPs besides BT also offer the conveyance of NTS calls, which may terminate on either BT's network, or another TCP's network.
- 3.3 Where BT is responsible for NTS call origination and conveyance, TCPs receive an amount equal to the retail price paid by customers less BT's regulated retention costs for originating and transiting these calls. BT's retention, in turn, is based on the element based charge for call origination and transit⁹ across its network to the point of handover to the TCP's network. Under this process, TCPs must invoice BT for their payments, although BT itself also carries out its own calculation in order to verify the invoices it receives.
- 3.4 In 1999, Oftel directed BT to use a manual system based on NCD methodology to calculate BT's NTS call conveyance charges to TCPs¹⁰. The NCD methodology was introduced by Oftel as a short term expedient to allow BT to estimate its call conveyance charges for originating NTS calls. The NCD methodology was intended to allow BT to de-average its then single tandem call origination charge for all NTS calls. This was in anticipation of an automated billing system being able to calculate conveyance charges for NTS calls on a per-call basis.
- 3.5 In late 2000, BT introduced an automated billing system for the calculation of BT's NTS interconnection charges, using INCA/CLI. In December 2001, Oftel directed¹¹ BT to enable TCPs to choose whether to use the NCD methodology or INCA/CLI, in the form it existed then, to invoice BT for their terminating outpayments, otherwise known as POLOs. Oftel also required BT to keep CPs fully apprised during the development stages in order that they could carry out any parallel modifications to their own systems prior to the introduction of INCA/CLI. The Director clearly stated that an automated wholesale billing system for NTS was essential to guarantee the accuracy and consistency of BT's charges: "The continued use of NCDs must be

⁸ But see proposals in Ofcom's recent consultation document NTS: a way forward, published on 19 April 2006 to reinstate this link for 0870 numbers:

http://www.ofcom.org.uk/consult/condocs/nts_forward/statement/

⁹ Although for some NTS/PRS calls BT will submit its invoice for transit charges to the TCP after it has paid the TCP's terminating payment invoice.

¹⁰ <http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/nts1199.htm>

¹¹ <http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/inca1201.htm>

viewed as an extended expedient that should be withdrawn at the earliest opportunity.”¹²

- 3.6 In addition, the explanatory statement indicated that once the outstanding issues had been resolved by the industry, Oftel might, in the absence of commercial agreement, direct that the use of the NCD methodology should be withdrawn for calls which originate from BT's own customers.¹³
- 3.7 However, CPs identified two main issues with the use of INCA/CLI for NTS calls which made them reluctant to switch to INCA/CLI:
- 3.7.1 its inability to identify transit calls from Indirect Access ("IA")/Carrier Pre-Selection ("CPS") providers or ported numbers at the point of handover; and
- 3.7.2 calls may not always be charged according to least cost routing principles i.e. using the measurement of the shortest route between the point of origin of a call on the BT network and the point of handover to the TCP at the nominated point of connection ("POC") with the TCP's network.
- 3.8 In addition, BT had no incentive to develop INCA/CLI as BT expected to find INCA/CLI to be revenue neutral for BT (i.e. BT's revenues under INCA/CLI were expected to be broadly the same as under NCD).
- 3.9 Following Oftel's Market Review¹⁴ published on 28 November 2003, BT as a Dominant Provider in those markets now has a formal obligation (amongst other things) to provide NTS call origination on fair and reasonable terms. Certain SMP conditions were imposed on BT including Condition AA1(a) (Requirement to provide Network Access on reasonable request) and AA11 (Requirement to provide NTS Call Origination). Under Condition AA1(a).2 BT must provide Network Access as soon as reasonably practicable on fair and reasonable terms and on such terms, conditions and charges as Ofcom may from time to time direct. Under Condition AA11 BT must provide NTS Call Origination on fair and reasonable terms, and on such terms, conditions and charges as the Director may from time to time direct.
- 3.10 Both Conditions AA1(a) and AA11 contain a direction-making power for Ofcom to set terms, conditions and charges for, in this case, NTS transit (which is a form of Network Access covered by Condition AA1(a)), and NTS Call Origination.
- 3.11 On 28 October 2004 Ofcom published the Direction¹⁵ requiring BT to move to a more accurate system of calculating NTS call origination and transit network charges, using the Element Based Charging ("EBC") matrix through BT's INCA wholesale billing system using CLI, which was already in use for most other call types. Ofcom directed that INCA/CLI billing was to be used for NTS, and the manual method using NCD to be withdrawn, from 28 February 2006. It had been envisaged in Ofcom's consultation document that there would be a short period when NCD was running in parallel with INCA/CLI to enable TCPs to become familiar with the new reports and to resolve any initial problems. However, BT's response to Ofcom's consultation indicated that it would be too costly to run both billing systems in parallel. Therefore, the Direction simply directed BT to withdraw NCD, and to implement INCA/CLI by the

¹² <http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/inca1201.htm> paragraph 4.7

¹³ <http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/inca1201.htm>, paragraph 4.9

¹⁴ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/

¹⁵ http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/#content

end of February 2006 at the latest, although it was left open for BT to agree with industry to do so earlier.

- 3.12 In addition to the issues described in paragraph 3.7 above, another issue for CPs was the practice by BT of only updating the EBC matrix to take account of new POCs every three months. However, this has now been addressed following a series of workshops held by BT in 2004, from which one of the outcomes was a move to refresh the EBC matrix on a monthly basis.
- 3.13 In the absence of Ofcom's direction, BT would have had no incentive to upgrade its INCA/CLI billing system, as BT considered that its wholesale revenues received through either INCA/CLI or NCD billing would be similar. However, as BT was under a regulatory obligation to upgrade its INCA/CLI billing system, BT incurred additional costs in meeting its regulatory obligation. BT is entitled to recover its additional costs from all the beneficiaries of the change. As all the respondents to Ofcom's consultation agreed that the move from NCD to INCA/CLI would be beneficial, Ofcom considered that BT's relevant costs for enhancing INCA/CLI should be shared by all NTS CPs, including BT itself.

History of dispute

- 3.14 In order to meet its regulatory obligations arising from the Direction regarding INCA/CLI, BT was required to withdraw the NCD and implement a new payment mechanism for NTS call settlements, calculated using INCA/CLI. On 5 October 2005 BT issued the OCCN proposing a change to NTS TCPs' call termination charges as a result of the changes to the calculation of BT's pence per minute NTS call origination charges, due to the implementation of the INCA/CLI billing system.
- 3.15 Eighteen TCPs failed to sign, or rejected the OCCN.
- 3.16 On 2 February 2006 BT wrote to Ofcom requesting that Ofcom resolve a dispute between BT and the eighteen Communications Providers who had failed to sign, or who had rejected the OCCN. BT referred the dispute to Ofcom under s185(1) of the Act.
- 3.17 Ofcom contacted all parties mentioned in the referral, to confirm that they were in dispute, and to establish the scope of the dispute. Of the original eighteen TCPs who had not signed the OCCN, nine signed and returned the OCCN to BT, four operators confirmed that they were in dispute with BT, two operators confirmed that they were not in dispute over the use of INCA/CLI, and three others had not returned the OCCN to BT.
- 3.18 On 27 February 2006 Ofcom decided it was appropriate for it to handle the dispute and published an entry in Ofcom's competition bulletin¹⁶, stating that BT is in dispute with 1RT Group Limited, Colloquium Limited, Flextel Limited, Networks Direct plc, Skytel Limited and two other Communications Providers who wished to remain anonymous.
- 3.19 The scope of the dispute (as published in Ofcom's competition bulletin) is to determine:

¹⁶ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_892/

“whether it is fair and reasonable for BT to set its charges for NTS calls originated by BT or which transit BT's network using INCA/CLI.

If Ofcom determines that it is fair and reasonable for BT to set its charges for NTS calls originated by BT or which transit BT's network using INCA/CLI, Ofcom will decide what action is necessary. This may include requiring the Communications Providers that are in dispute with BT on this matter to sign BT's OCCN of 5 October 2005.”

- 3.20 Following confirmation from BT that the two communications providers who wished to remain anonymous had accepted the OCCN, Ofcom added an update note to the competition bulletin on 4 April 2006 to confirm that they were no longer in dispute and removed them from the list of parties to the dispute.
- 3.21 This consultation document sets out Ofcom's proposals to resolve the dispute.

Section 4

Regulatory framework and submissions of the parties

Regulatory framework

- 4.1 Following the Market Review published on 28 November 2003¹⁷, BT was found to have SMP in the markets identified in that review, and certain SMP conditions were imposed on BT including Condition AA1(a) (Requirement to provide Network Access on reasonable request) and AA11 (Requirement to provide NTS Call Origination).
- 4.2 Under Condition AA1(a).2 BT must provide Network Access as soon as reasonably practicable on fair and reasonable terms and on such terms, conditions and charges as Ofcom may from time to time direct. Under Condition AA11 BT must provide NTS Call Origination on fair and reasonable terms, and on such terms, conditions and charges as the Director may from time to time direct.
- 4.3 As referred to above, Conditions AA1(a) and AA11 contain a direction-making power to set terms, conditions and charges for, in this case, NTS transit (which is a form of Network Access covered by Condition AA1(a)), and NTS Call Origination. Under section 49 of the Act, directions made under an SMP condition, including under Conditions AA1(a) and AA11, must be objectively justified, non-discriminatory, proportionate and transparent. Section 49 also sets out the procedural requirements for making proposals for such directions i.e. there must be a notification setting out the proposal, its effect and the reasons for making it, etc. and there must be consultation on the proposal for at least one month.
- 4.4 The obligation to introduce the INCA/CLI billing system rests entirely with BT, which is subject to the Direction made under Conditions AA1(a) and AA11. However, in the absence of an alternative charging mechanism, non-dominant TCPs may need to configure their systems to inter-operate with INCA/CLI in order to be able to invoice BT.

Submissions of the parties

- 4.5 BT submits that the OCCN is fair and reasonable and that it issued the OCCN in order to meet its regulatory obligations under the Direction.
- 4.6 The TCPs state that in order to implement INCA/CLI they will incur significant set-up costs, with no benefit, or in some cases an expected loss, from the adjusted payments under the new billing system. They argue that the implementation of INCA/CLI is being imposed on them, and they argue that Ofcom's consultation process and the industry discussions did not elicit the views of smaller NTS TCPs, and is discriminatory to such TCPs. Therefore it is not fair and reasonable for INCA/CLI to be implemented and NCD withdrawn. Finally, the TCPs have suggested that Ofcom's ongoing work to review the NTS regime will make the use of INCA/CLI for NTS calls obsolete.

¹⁷ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/

Section 5

Ofcom's analysis and proposed decision

Ofcom's analysis

- 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. The current dispute relates to obligations imposed under SMP conditions AA1(a) and AA11 and the Direction.
- 5.2 In order to resolve this dispute, it is not necessary or appropriate for Ofcom to reconsider all the issues which were considered and debated at length during the consultation process and which were addressed in the Direction. However, Ofcom notes the following:
- 5.3 The NCD methodology was only introduced by Oftel as a short term expedient until BT could develop an automated billing system able to calculate conveyance charges for NTS calls on a per-call basis. The move to a more accurate automated billing system for NTS using INCA/CLI has been clearly signalled to the NTS industry for over five years. For example, in 2001, the Director clearly stated that an automated wholesale billing system for NTS was essential to guarantee accuracy and consistency of BT's charges: "The continued use of NCDs must be viewed as an extended expedient that should be withdrawn at the earliest opportunity."¹⁸ Ofcom therefore considers that NTS TCPs have had sufficient time to be aware of and prepare for the changes.
- 5.4 Although it is necessary for all TCPs to implement INCA/CLI billing following the Direction extending INCA/CLI billing to NTS calls, as agreed by industry, the steps taken by TCPs to implement INCA/CLI billing may vary depending on their own requirements.
- 5.5 It is not a realistic option to revert back to the previous NCD billing system for NTS calls. NCD was only devised as a short term solution. It produced inaccurate bills and encouraged inefficient networks, as there were inconsistencies within the NCD that rewarded some CPs for retaining small and/or inefficient networks whilst penalising other CPs who had optimised their interconnect to achieve single tandem charging.¹⁹ The NCD-based system was sub-optimal in two respects:
- 5.5.1 it provided an incentive to TCPs to establish more points of interconnection (POCs) with BT than is actually required for the efficient conveyance of traffic; and
- 5.5.2 it provided no incentive to TCPs to optimise the geographic locations of these POCs. The NCD relationship required a TCP to establish 69 POCs in order to benefit from single tandem call origination charges. However it was possible in principle to obtain full single tandem connectivity with between 25 and 30 POCs, assuming that the locations of those POCs were optimised.

¹⁸ <http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/inca1201.htm> para 4.7

¹⁹ See, for example, paragraphs A2.4-A2.7 of the Direction at:

http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/#content

- 5.6 Although INCA/CLI was used for other call types before being introduced for NTS calls, the billing system needed to be enhanced for NTS, due to the increased complexity of billing for NTS in regard to calls from CPS/IA providers and ported numbers. NCD was only ever intended to be a short term expedient until INCA/CLI was introduced. In the event it remained in use for over 5 years until the necessary enhancements to INCA/CLI to address the outstanding issues could be agreed and implemented. This process was undertaken with full industry co-operation and enacted via an Ofcom consultation where TCPs had the opportunity to raise issues about incurring excessive costs.
- 5.7 Following the Direction, BT and the majority of TCPs have already incurred costs implementing INCA/CLI for NTS calls.
- 5.8 The set up costs for TCPs will vary depending on the requirements of each TCP, and the features of their network. During the consultation, Ofcom did consider the issue of recovery of TCP's costs²⁰, but no details were available on the magnitude of the costs, as the requirements of each TCP will be different. It was estimated by TCPs which engaged in the consultation process that TCPs would incur costs in adjusting their billing systems to work with INCA/CLI data output of between £100k and £250k per CP²¹, although it was noted that this may differ for TCPs who contracted out their billing function and depends on the costs of switch suppliers in applying the requisite software modifications.
- 5.9 In any event, TCPs may consider other options which would not incur significant set-up costs. Although TCPs should send BT an invoice each month for terminating NTS calls originating on or transiting BT's network, BT also produces its own billing data. The TCPs which are in dispute with BT over this matter have an element of choice how they implement INCA/CLI. For example, one option may be for TCPs to trust BT to pay what BT thinks is accurate, or for a TCP to negotiate to use the data collected by BT itself. In addition, the TCP must weigh up its estimated set-up costs against the desired level of accuracy of its billing data, so it is open to TCPs to decide exactly how to strike the balance which is most appropriate to their circumstances.
- 5.10 Although it has been suggested by the TCPs that Ofcom's consultation process did not take into account the needs of the smaller TCPs, Ofcom is satisfied that it did meet the procedural requirements under section 49 of the Act and follow good practice for such public consultations. Ofcom worked closely with industry throughout the development of the proposals over a number of years, especially with the NTS focus group²², attendance of which is open to the TCPs. An example of the efforts to involve as many relevant stakeholders as possible can be found in Oftel's Direction published in December 2001 when Oftel specifically invited all interested parties to attend the meetings of the focus group to discuss the development of an accurate, automated billing mechanism for NTS: "all operators are urged to attend to express their views"²³. Furthermore, there was a two stage public consultation process, to which none of the TCPs which are party to this dispute responded. Ofcom is satisfied that the Direction is objectively justified, non-discriminatory, proportionate and

²⁰ See paragraphs 4.7-4.8, http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/#content, for example.

²¹ Paragraph A2.3, INCA/CLI for NTS Interconnection charging - Explanatory Memorandum and final Direction, http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/#content

²² The NTS Focus Group is an Ofcom sponsored industry group open to network operators who have an interconnect agreement with BT.

²³ Paragraph 4.11, <http://www.ofcom.org.uk/static/archive/oftel/publications/pricing/inca1201.htm>

transparent, as required by section 49 of the Act. Furthermore, Ofcom also had regard to its duties under section 3 and section 4 of the Act.

- 5.11 As set out above, Oftel clearly signalled to industry from the start that NCD was only ever intended to be a short term solution, and that a more accurate billing mechanism, which did not encourage inefficient networks, must be developed in the longer term. Ofcom has worked closely with industry to develop the INCA/CLI solution. Although some TCPs may have benefited from the shortcomings of the NCD system over a number of years, for the reasons outlined above, this position must not be sustained any longer.
- 5.12 Neither is it a realistic option to run the NCD billing system alongside the INCA/CLI billing process, as the two billing systems are entirely separate and therefore BT would incur two sets of costs. Furthermore, it may be considered to be discriminatory on the part of BT to have two separate billing systems for NTS calls. It may also induce other TCPs to switch back to NCD, thus encouraging inefficient networks as there are inconsistencies within the NCD that reward some CPs for retaining small and/or inefficient networks whilst penalising other CPs who have optimised their interconnect²⁴.
- 5.13 Finally, Ofcom has considered the concerns expressed by the TCPs that Ofcom's recent changes to the NTS regime will make INCA/CLI obsolete. Ofcom issued a statement on 19 April 2006 concluding the NTS Framework Re-examination and announcing its decision to remove 0870 calls from the scope of the BT NTS Call Origination Condition in January 2008 and confirming its intention to undertake a further review of the 0845 range with a view to also removing it from the scope of the BT NTS Call Origination Condition²⁵. After these changes, 0870 calls will no longer be subject to the INCA/CLI billing methodology as would 0845 calls if Ofcom adopts a similar approach for 0845 calls. The other 08 and 09 ranges will continue to be subject to the BT NTS Call Origination Condition and will therefore still require INCA/CLI billing. Also, Ofcom expects that approximately half of the 0870 traffic will migrate to other 08 or 09 numbers in order to continue to receive revenue-shares. Therefore despite the changes, INCA/CLI billing will continue to be required.

Proposed decision

- 5.14 Ofcom has provisionally concluded that the OCCN is in accordance with BT's SMP obligations and the terms are fair and reasonable, for the following reasons:
- 5.15 BT issued the OCCN introducing INCA/CLI billing for NTS calls in response to the Direction that BT must use INCA/CLI billing for NTS calls. Under the Direction, BT was obliged to introduce INCA/CLI for NTS calls by 28 February 2006. Therefore, the OCCN is on such terms, conditions and charges as directed by Ofcom;
- 5.16 Furthermore, the introduction of INCA/CLI billing appears to be fair and reasonable as it has been agreed as a result of industry discussions over a considerable period of time, and Ofcom considers that the expected set-up costs for TCPs are not excessive on the basis of the information supplied during the course of the consultation giving rise to the Direction²⁶. This view appears to be supported by the

²⁴ See paragraphs A2.4-A2.7 of the Direction at:

http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/#content

²⁵ http://www.ofcom.org.uk/consult/condocs/nts_forward/statement/#content

²⁶ see paragraph 5.7 above.

fact that the majority of TCPs (of varying sizes) have already taken steps to implement INCA/CLI.

- 5.17 Ofcom has considered whether there are any new circumstances or changes in the market since the Direction which would justify reviewing the obligation on BT to implement INCA/CLI billing and withdraw NCD. The decision to extend INCA/CLI billing to NTS calls was agreed by the NTS industry and the issues surrounding the introduction of the INCA/CLI methodology were considered in detail during the industry discussions and policy consultation process, which took place over a number of years and culminated in the Direction.
- 5.18 Ofcom sent a request for further evidence of any new developments since the adoption of the Decision to the TCPs party to this dispute by letter dated 15 March 2006. None of the TCPs party to this dispute have raised anything new which would justify reviewing the obligations imposed by the direction.
- 5.19 Therefore, Ofcom proposes to declare the terms of the OCCN to be fair and reasonable, and to direct 1RT Group Limited, Colloquium Limited, Flextel Limited, Networks Direct plc, and Skytel Limited to sign the OCCN within 14 days of the publication of the final determination of this dispute.
- 5.20 There will be a consultation on these proposals for 10 working days, and the contact details for responses are set out in Annex 1 below. Please note: the period for consultation on these proposals is 10 working days, in line with Ofcom's standard policy when handling disputes, as Ofcom has a statutory duty to resolve disputes within four months.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 9 June 2006**.
- A1.2 Ofcom strongly prefers to receive responses to this consultation via email, 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 coversheet (see Annex 3), to indicate whether or not there are confidentiality issues.
- A1.3 Please send your response to ruth.gibson@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Ruth Gibson
4th Floor, Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7783 4109

- A1.5 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

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Ruth Gibson on 020 7783 4340.

Confidentiality

- A1.7 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 (when respondents confirm on their response coversheet that this is acceptable).
- A1.8 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex so that non-confidential parts may be published along with the respondent's identity.
- A1.9 Ofcom reserves its power to disclose any information it receives where this is required to facilitate the carrying out of its statutory functions.

- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use in order to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in June 2006.
- A1.12 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

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 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.
- A1.15 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 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 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

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 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.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 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.

A2.7 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

A2.8 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 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 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 by allowing you to state very clearly what you don't want to be published. We will keep your completed coversheets confidential.
- A3.3 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.
- A3.4 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/.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. 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 coversheet 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

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. 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)