

Resolution of a dispute between BT and various providers about NTS outpayments

Determination under Section 190 of the Communications Act 2003 for resolving a dispute between British Telecommunications plc (“BT”) and various providers.

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Determination under section 190 of the Communications Act 2003 for resolving a dispute between the companies listed at Annex A to this Determination (“the Providers”) and British Telecommunications plc (“BT”) about NTS outpayments for 0845, 0870 and 0820 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 have decided pursuant to section 186(2) of the Act that it is appropriate for them 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 sets out the scope of Ofcom’s powers on resolving a dispute, which may include, in accordance with section 190(2) of the Act, a direction requiring the payment of sums by way of adjustment of an underpayment or an overpayment;
- (B) on 4 July 2003 BT issued a pricing letter to the Providers, amongst others, detailing the proposed Outpayments payable by BT to the Providers for the provision of NTS services on the 0845, 0870 and 0820 number ranges from 1 June 2003;
- (C) the 4 July 2003 pricing letter was subsequently amended by a further pricing letter sent by BT to the Providers, amongst others, on 24 October 2003 that changed the effective date of the proposed Outpayments to 29 August 2003 (“the October Pricing Letter”);
- (D) both the 4 July 2003 and the October Pricing Letters related to the network charge differential (NCD) method of billing, and did not extend to the Consumer Line Identifier (CLI) method of billing;
- (E) on 23 December 2003, BT wrote to the Director General of Telecommunications (“the Director”) referring a dispute between BT and the Providers on the basis that they have either rejected or neglected to sign the October Pricing Letter. BT requested the Director to resolve the dispute by requiring the Providers to accept the terms of the October Pricing Letter;
- (F) by virtue of the Transitional Provisions the Director was able to exercise the powers under the Act for an interim period. Ofcom has now assumed those powers as of 29 December 2003;
- (G) on 28 January 2004, after considering the referral and contacting 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 Providers and BT of this decision;
- (H) in order to resolve this dispute, Ofcom has considered, among other things, the information supplied by the Providers and BT and the relevant duties set out in sections 3 and 4 of the Act;
- (I) 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;

- (J) Ofcom issued a draft of this Determination and the explanatory statement on 29 April 2004 and responses were invited by 14 May 2004.

NOW, THEREFORE, PURSUANT TO SECTION 190 OF THE ACT, OFCOM MAKES THE FOLLOWING DETERMINATION:

1. BT shall adjust the Net Retail Call Revenue for short 0845 and 0820 calls so that it is based on the following average short call durations:
 - a) 37.34 seconds for daytime calls;
 - b) 92.22 seconds for evening calls; and
 - c) 90.71 seconds for weekend calls.
2. For the avoidance of doubt this Determination shall only relate to NTS Call Origination which is subject to the NCD method of billing, being the only method of billing to which the October Pricing Letter related.
3. Subject only to BT making the adjustment as required by paragraph 1 in the Determination, the terms on which BT shall provide NTS Call Origination (including the provision of the Outpayments) for calls to 0845, 0870 and 0820 number ranges shall be those set out in the October Pricing Letter (as adjusted) with effect from 29 August 2003.
4. For the purposes of giving effect to paragraph 2 of this Determination:
 - a) where amounts have been paid by BT to the Providers which are greater than the amount due under the October Pricing Letter (as adjusted) the Providers shall pay to BT such sums, as appropriate, by way of adjustment of any overpayment; and
 - b) where amounts have been or should have been paid by BT to the Providers which are lower than the amount due under the October Pricing Letter (as adjusted) BT shall pay to the Providers such sums, as appropriate, by way of adjustment of any underpayment.
5. Words or expressions used in this Determination shall have the same meaning as Schedule 1 to the Notification (as defined below) or, if it has no meaning there, in the Act, except as otherwise stated in this Determination and as follows:
 - (a) "Condition AA11" means the condition numbered AA11 set out in Part 2 of Schedule 1 to the Notification;
 - (b) "Net Retail Call Revenue" means the retail revenue for calls, excluding VAT and after any applicable discounts;
 - (c) "NTS Call Origination" means originating NTS Calls and retailing those NTS Calls to the End-User on behalf of the Third Party who has requested NTS call origination;
 - (d) "Notification" means the notification pursuant to sections 48(1) and 79 of the Act which is set out in Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets published by the Director on 28 November 2003;

(e) "Outpayment" means the Net Retail Call Revenue passed by BT to the Third Party that is purchasing NTS Call Origination, less the charges referred to in paragraph 4 of Condition AA11; and

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

6. For the purpose 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.
7. This Determination shall take effect on the day it is published.
8. This Determination is binding on BT and the Providers in accordance with section 190(8) of the Act.

HEATHER CLAYTON
DIRECTOR OF INVESTIGATIONS
27 May 2004

Annex A

Companies in dispute with BT

Cable & Wireless U.K.
Easynet Group PLC
EESCAPE Limited
Gamma Telecommunications Limited
GKC Communications Limited
Networks Direct plc
Norbridge Telecom Limited
NTL Group Limited
Opal Telecom Limited, previously known as Core Telecommunications Limited
Pipemedia Limited
Prodigy Internet Limited
Rateflame Limited
Skymaker Limited
Starcomm Limited
Swiftnet Limited
Tele2 UK Communications Limited
Telstra Europe Ltd formerly Telecentric Solutions Limited
Thus plc
Torch Communications Limited
Totem Communications Limited
Vodafone Limited
Zipcom Telecommunications Limited

Explanatory statement

Section 1

Summary

- 1.1 Ofcom has published a Determination under section 190 of the Communications Act 2003 (the Act) to resolve a dispute between British Telecommunications plc (BT) and the providers listed in Annex A to the Determination (the Providers).
- 1.2 This dispute relates to BT's payments to other providers which BT makes when passing NTS traffic for the 0845, 0820 and 0870 number ranges (the relevant NTS number ranges) to those providers. On 1 June 2003 BT reduced the retail prices for some 0845, 0870 and 0820 calls, and in accordance with BT's NTS Call Origination Condition AA11 imposed following the 'Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets' published on 28 November 2003¹ this led to BT proposing a reduction in the payments made to those providers in relation to the relevant NTS number ranges.
- 1.3 On 4 July 2003 BT sent a pricing letter (the 4 July Pricing Letter) to the Providers proposing to reduce the outpayments from NTS call origination with an effective date of 1 June 2003. This pricing letter was modified via a further pricing letter of 24 October 2003 (the October Pricing Letter). Both the 4 July 2003 and the October Pricing Letters related to the Network Charge Differential (NCD) method of billing and did not extend to the Consumer Line Identifier (CLI) method of billing. The effect of the October Pricing Letter was to bring the revised payments into effect from 29 August 2003. A number of providers refused to sign the October Pricing Letter. These are listed in Annex A to the determination.
- 1.4 BT referred the dispute to the Director General of Telecommunications ('the Director') on 23 December 2003. On 29 December 2003 Ofcom assumed its functions under the Act (which the Director had carried out on its behalf for an interim period).
- 1.5 On 28 January 2004, after considering the referral and contacting the Providers, Ofcom decided that it was appropriate for it to handle the dispute and informed the Providers and BT of this decision.
- 1.6 The background to the issues in dispute is set out in section 2. The history of the dispute is set out in section 3.
- 1.7 Ofcom published a draft Determination on 30 April 2004 and invited comments from the parties to the dispute and other stakeholders by 14 May 2004.

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http://www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/fixednarrowbandstatement.pdf

- 1.8 Ofcom received a numbers of comments which it has taken into account in making its final decision. These responses are discussed in section 4.
- 1.9 Ofcom's final decision and reasoning are set out in section 5.
- 1.10 Ofcom directs that BT should make an adjustment to its proposals set out in the October Pricing Letter. This proposed adjustment results from an error discovered in BT's calculations of the net retail revenue used as a starting point to calculate the outpayments to NTS providers. The Determination requires BT to modify its proposed payments for short duration 0845 and 0820 calls.
- 1.11 For the reasons detailed in the Explanatory statement Ofcom's Determination is that, as from 29 August 2003, the terms on which BT provides NTS Call Origination (including the outpayments) to NTS providers of 0845, 0820 and 0870 number ranges shall be as set out in the October Pricing Letter (as adjusted to reflect the modified short call average durations.)
- 1.12 The October Pricing Letter relates only to NTS Call Origination which is billed by the NCD method. Therefore, this Determination applies to that method of billing only.
- 1.13 Ofcom recognises that resolution of this dispute may have an impact on Electronic Communications Providers (ECPs) other than the parties to this dispute.
- 1.14 Should ECPs be required to make adjusted payments as a result of Ofcom's decision, BT has indicated to Ofcom that it is able to make the necessary re-rating of call records between long and short calls and consequent adjustments to amounts paid by providers.

Section 2

Background

Number Translation Services (NTS)

- 2.1 The term number translation services (NTS) describes a range of specially tariffed services that are used for the provision of a variety of value-added services, for example the provision of information services and Internet access. NTS refers to calls to the following numbers:
- Special Service numbers (including freephone (0800), special local rate (0845) and special national rate (0870)) which lie in the 08 number range; and
 - Premium Rate Services (PRS) (services currently provided under 090 and 091 number ranges).

Within these ranges, calls to 0844 04 numbers for Surftime Internet access services and calls to 0808 99 for Flat Rate Internet Access Call Origination have different wholesale charging arrangements and are not classed as NTS calls.

- 2.2 This dispute is about the amounts passed by BT to NTS providers of services on 0845, 0820 and 0870 numbers using the method of NCD billing.

NTS regulation

- 2.3 On 25 July 2003 a new regulatory regime for electronic communications networks and services came into force which, *inter alia*, required the abolition of licences for telecommunications operators. The new regime also required that National Regulatory Authorities (NRAs) undertake reviews of communications markets to establish whether Significant Market Power (SMP) exists in any market and, where it does, what regulatory obligations are considered necessary. Pending the outcome of those reviews certain licence conditions and directions made under the Telecommunications (Interconnection) Regulations 1997 ("the 1997 Regulations") were continued under Continuation Notices issued under the Act, so that they would continue to apply to relevant operators including BT.
- 2.4 Following the 'Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets' published on 28 November 2003² (the relevant market review), BT was found to have SMP in the markets identified in that review, and certain SMP conditions were imposed on BT including Condition AA11.
- 2.5 As from 28 November 2003, BT's NTS Call Origination Condition implements the arrangements that were previously captured by various determinations made under the 1997 Regulations. These determinations are listed in Annex 1 to this Explanatory Statement.

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http://www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/fixednarrowbandstatement.pdf

BT's NTS Call Origination Condition

2.6 BT's Condition AA11 'Requirement to provide NTS call origination' published within the relevant market review on 28 November 2003 imposes an obligation to provide NTS Call Origination on fair and reasonable terms, and on such terms, conditions and charges as Ofcom may, from time to time, direct. Condition AA11 specifies that the only charges that may be made for providing NTS call origination services are:

- a charge for the Call Origination Service used to originate the NTS Call;
- a charge for the NTS Retail Uplift; and
- a charge for bad debt relating to the retailing by BT of Premium Rate Services calls.

2.7 BT's SMP Condition AA11 requires BT to pass the Net Retail Call Revenue (Net Retail Call Revenue means the retail revenue for calls, excluding VAT and after any applicable discounts) less the charges referred to above to the third party purchasing the NTS Call Origination. In this document the payments passed on in accordance with Condition AA11 are referred to as Outpayments.

Links to other Ofcom workstreams

Ofcom has a number of workstreams related to NTS. Relevant documents and projects are listed below.

- NTS framework re-examination project;
- Review of retail price and numbering arrangements for calls to 0845 and 0870 numbers, published 29 April 2004³;
- Consultation on options for NTS interconnection charging (consultation closed on 23 January 2004)^{4,5};
- Retail uplift review (charge setting consultation planned for May 2004)⁶;
- A dispute between BT and various providers over the level of NTS discounts⁷
- Ofcom 'own initiative' investigation into suspected margin squeeze on 0845/0870 ISPs⁸.

Ofcom does not consider that there is any significant dependency between the outcome of the above workstreams and the resolution of this dispute. Where any of the workstreams lead to a change in the NTS regime, that change is likely to be forward looking and subject to both consultation and an implementation period. In the meantime, the current legal framework and existing policy as set out in the relevant market review is the relevant framework for resolution of this dispute.

³ <http://www.ofcom.org.uk/consultations/current/0845/>

⁴ http://www.ofcom.org.uk/legacy_regulators/oftel/nts_ic_condoc/nts_charging.pdf

⁵ http://www.ofcom.org.uk/consultations/past/0845_0870_review_responses/

⁶ http://www.ofcom.org.uk/legacy_regulators/oftel/review_nts_retail_uplift/

⁷ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_766/

⁸ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cwq_647/

Section 3

History of the dispute

- 3.1 On 3 April 2003, BT announced changes to retail prices for geographic calls. These changes included a reduction of the local evening rate from 1.49p to 1p per minute, and a reduction in the national weekend rate from 2p to 1.5p per minute. Since BT applies its local rate tariffs to 0845 calls and 0820 evening and weekend calls, and its national rate tariffs to 0870 calls, these changes were also made to the retail prices for 0845, 0820 and 0870 calls.
- 3.2 On 31 May 2003, BT sent an e-mail informally notifying companies on the Network Charge Change Notification (NCCN) mailing list of BT Retail's retail tariff changes.
- 3.3 On 4 July 2003, BT sent a pricing letter to all relevant providers proposing to vary payments that BT makes to NTS providers requesting NTS Call Origination on the relevant NTS number ranges (Outpayments) in respect of NCD billed traffic. This pricing letter had a proposed effective date of 1 June 2003.
- 3.4 BT received a number of objections to the retrospective nature of the 4 July 2003 pricing letter. This was discussed at an industry group, the NTS Focus Group, and also bilaterally between BT and a number of providers. These discussions led to BT presenting a revised offer. This offer again proposed to vary Outpayments (in respect of NCD billed traffic), but this time with the effective date of the change being 56 days after the 4 July 2003.
- 3.5 This revised offer was formally notified via a pricing letter on 24 October 2003 (the October Pricing Letter), which presented the same proposed Outpayments, but with an effective date of 29 August 2003.
- 3.6 Subsequently some providers signed the October Pricing Letter, and others did not. BT referred the matter to the Director General of Telecommunications (the Director) on 23 December 2003, asking him to direct the Providers in dispute with BT to accept the terms of the October Pricing Letter from the effective date of 29 August 2003.
- 3.7 The Director was able to carry out the functions of Ofcom for an interim period, but as of 29 December 2003 Ofcom assumed its functions and as a result it was Ofcom which accepted the dispute on 28 January 2004. For convenience Ofcom is referred to throughout and Ofcom should be taken to mean the Director when referring to a date before 29 December 2003.
- 3.8 Since the 28 November 2003 the NTS regime is now captured in the NTS call origination condition AA11, the terminology of that condition is used in this document.
- 3.9 Ofcom published the scope of the dispute in its Competition Bulletin setting out the issues in dispute to be considered by Ofcom:
 - whether BT has acted in line with its contractual and regulatory obligations in proposing the new prices;

- whether the prices proposed are reasonable within the context of BT's regulatory obligations; and
 - the effective date of the price change.
- 3.10 Ofcom published the scope on 28 January 2004 and invited comments. No comments on the published scope were received.
- 3.11 Ofcom published a draft determination⁹ with explanatory statement on 30 April 2004 (the consultation document) and invited comments by 14 May 2004.
- 3.12 Ofcom received submissions from some of the parties to the dispute which it took into account in making its final decision. These submissions are discussed in section 4.

⁹ <http://www.ofcom.org.uk/consultations/>

Section 4

Responses to the draft Determination and Ofcom's comments

Responses received

- 4.1 Ofcom received responses from:
- BT;
 - Easynet;
 - ntl (confidential response); and
 - Thus.
- 4.2 Non confidential versions of responses have been published on Ofcom's website.¹⁰

Issues raised and Ofcom's comments

Implementation Process

- 4.3 BT, Easynet and Thus raised issues about the precise process for implementing the Determination.
- 4.4 Easynet and Thus believed that some providers were still rating 0845 evening calls using a 200 second threshold rather than 300 seconds for short duration calls, which would lead to some difficulties in calculation the revised number of short call minutes back to 29 August 2003. Easynet believed that some providers may not be able to do this.
- 4.5 Easynet was concerned that it would take some time to make the necessary changes to short call thresholds in some switch systems, and consequently proposed a schedule with various milestones which moves to billing consistent with this Determination from July 2004, with any differences in payments between the effective date and then being dealt with separately.
- 4.6 BT's concerns focused on the process for reaching agreement as to the revised outpayments, and proposed that Ofcom incorporate the process set out in a direction regarding BT's Discounts published by Oftel on 28 March 2003 (sections 5.11 to 5.18). In effect BT is recommending that for the purposes of implementing this Determination communications providers acceptance of the new outpayments would be deemed to have occurred if they did not notify BT otherwise within 14 days of the receipt of the adjusted pricing letters.

Ofcom's Comments

- 4.7 Ofcom understands concerns regarding the practicalities of re-rating calls as short or long based on a new short call duration threshold, however since BT has indicated that it is in a position to make the necessary re-rating based on its own data if necessary Ofcom believes that this issue should not create undue difficulties for the parties to resolve.

¹⁰ <http://www.ofcom.org.uk/consultations/>

- 4.8 With regard to the process of implementing the changes, Ofcom notes that in accordance with section 190(8) of the Communications Act 2003, once made this determination is binding on the parties to the dispute.

Definition of the OCCN process

- 4.9 Easynet and Thus both suggested that Ofcom should explicitly define the OCCN process as part of this dispute, or require BT to do so within a time limit.

Ofcom's Comments

- 4.10 Defining the OCCN process lies outside the scope of this dispute and in any case, Ofcom considers that such process matters are best dealt with via negotiation between industry players.

Short Duration Call Calculation

- 4.11 BT noted that there were some rounding errors in the figures that Ofcom published in Table 1 of the draft determination. These related to the difference between prices including and excluding VAT. In that table, Ofcom used 5p including VAT as the minimum call charge. BT has since informed Ofcom that, the precise figure is currently 4.935p (being 4.2p + VAT at 17.5%.) BT noted that this had an impact on both the short duration call threshold and the average short call duration for daytime 0845 calls.

Ofcom's Comments

- 4.12 Ofcom accepts this point and notes that there are similar issues relating to the daytime and evening short call thresholds and average durations, where the retail price is 0.85p + VAT, which is 0.999p. In addition, there was an error in Ofcom's calculation of daytime average short call duration which made a difference of approximately 0.5 seconds. Ofcom has taken these into account and recalculated the numbers for the final Determination. The recalculated numbers are available in Table 1 of this explanatory statement.

Level of average short call duration

- 4.13 Easynet noted that Easynet's own figures showed a shorter average duration for evening and weekend calls than the figures given in Table 1 of the draft determination, and suggested that the one week sample used to derive those averages was not sufficiently robust, preferring instead that a random sample over 3 months or longer was used, given that there were observable seasonal effects on call volumes.

Ofcom's Comments

- 4.14 Ofcom has set out its thinking on this issue in section 5.28 to 5.32 of this determination and in section 5.41 to 5.44 of the draft determination. A sample taken over a longer time period may offer some advantages but there were practical constraints in terms of data availability.
- 4.15 Given the differences between Easynet and BT's NTS traffic in terms of market share, and potential differences in traffic patterns due to customer

mix, it is not necessarily surprising that there are differences between the observed average short call durations on each network.

- 4.16 Ofcom notes Easynet's concerns that call volumes are subject to seasonal variations. However, it does not follow that the average call duration figures will be subject to the same variations. While total call numbers and total minutes on a network may vary from month to month it is likely that the average call duration figure is more stable.

Discounts and the minimum call fee

- 4.17 Easynet and Thus were concerned that Ofcom has assumed that BT's retail discount schemes apply to the minimum call charge. This means that Ofcom's calculation of the time period relevant to the minimum call charge (ie the minimum call charge divided by the retail tariff per minute) will result in an over estimation of the relevant time period.

Ofcom's Comments

- 4.18 Ofcom understands that discounts do apply equally to the per minute rates and the minimum call fee. This is true for example of Friends and Family (where the discount is on the total call cost) and the inclusive call allowance.

Average Short Call Durations pre 29 August 2003

- 4.19 Easynet states that average short call durations used prior to 29 August 2003 were miscalculated by BT.

Ofcom's Comments

- 4.20 This issue does not fall within the scope of the current dispute.

Short call duration change error by BT or new methodology?

- 4.21 ntl asked for clarity on whether Ofcom's proposed change in average short call duration was due to an error by BT or a new methodology from Ofcom.

Ofcom's Comments

- 4.22 Ofcom's determination does not constitute a new methodology but is a determination that the calculations should be based on more accurate data.

Clarity on scope of the dispute with respect to NCD and CLI billing

- 4.23 One respondent asked for clarity about whether the draft determination applied to Outpayments for operators using CLI billing.

Ofcom's comments

- 4.24 Both the 4 July 2003 and the October Pricing Letters related to NTS calls billed by using the NCD method. Ofcom confirms that this Determination only relates to NTS Call Origination which billed using NCD and has amended the final Determination to make this clear.

Section 5

Ofcom's decision

- 5.1 This dispute was referred to Ofcom by BT under Section 185 of the Act. In accordance with Section 186(4) of the Act, Ofcom decided that it was appropriate for it to handle this dispute and published the scope of its investigation on 28 January 2004.
- 5.2 Ofcom published a draft determination and consultation document on 30 April 2004 and invited comments by 14 May 2004.

Relevant market and the position of the parties to the dispute

- 5.3 Ofcom has determined that BT has Significant Market Power (SMP) in this market in the UK excluding the Hull area, as specified in 'Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, 28 November 2003'¹¹.
- 5.4 SMP Condition AA11 requires BT to provide NTS Call Origination on fair and reasonable terms, conditions and charges and also to pass the Net Retail Call Revenue (less various charges identified in Section 2 above) to the third party on whose behalf BT is providing the NTS Call Origination (i.e the Outpayments).
- 5.5 This SMP condition in effect continued the NTS regime as established prior to 28 November 2003.
- 5.6 The other parties to the dispute (as well as BT) supply call termination services in downstream markets. These other parties are not dominant in call origination markets in the UK excluding the Hull area.

Ofcom's decision

- 5.7 Ofcom's Determination sets out that BT should recalculate the Net Retail Call Revenue for short 0845 and 0820 calls. The calculations should be based on the following average short call durations: Daytime 37.34 seconds, Evening 92.22 seconds and Weekend 90.71 seconds.
- 5.8 Ofcom's Determination sets out that the terms on which BT shall provide NTS Call Origination (including the Outpayments) for NCD billed traffic shall be those set out in the October Pricing Letter (as adjusted) with effect from 29 August 2003.
- 5.9 Should ECPs be required to make adjusted payments as a result of Ofcom's decision, BT has indicated to Ofcom that it is able to make the necessary re-rating of call records between long and short calls, and consequent adjustments to amounts.

¹¹

http://www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/fixednarrowbandstatement.pdf

Legal and analytical framework

- 5.10 In making these proposals Ofcom has had regard to the regulatory obligations of the parties to the dispute, including BT's SMP Condition AA11 'Requirement to provide NTS call origination', and the NTS regime in place prior to 28 November 2003.
- 5.11 BT's SMP Condition AA11 requires BT to pass the Net Retail Call Revenue less the charges referred to in Condition AA11.4 to terminating providers (i.e. the Outpayments). In Ofcom's view BT was able to change the retail price for 0820, 0845 and 0870 calls for the reasons set out at paragraphs 5.19 to 5.23 below. In line with Condition AA11.3, BT was obliged to recalculate the outpayments made to the Providers. Consequently, Ofcom considers that BT has acted in line with its regulatory obligations in proposing new outpayments to the Providers.
- 5.12 It should be clarified that Ofcom considers that the Condition AA11 requirement to provide NTS Call Origination on fair and reasonable terms relates to the provision of NTS Call Origination (i.e. BT's charges for providing that service) and not the Outpayments.
- 5.13 Ofcom has considered its duties under section 3 of the Act, in particular its duties to promote competition in relevant markets. Ofcom has also considered its duties under section 4 of the Act, in particular its duty to promote competition. Ofcom considers that application of BT's SMP Condition AA11, which specifies the regulated charges that BT may charge to provide NTS call origination promotes competition by allowing different providers to compete for the provision of NTS termination services. The reasons for imposing SMP Condition AA11 are set out in 'Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, 28 November 2003'¹² in Chapter 8.

Short average duration

- 5.14 To comply with Condition AA11, the various elements of the outpayment calculation must be calculated correctly in accordance with that condition.
- 5.15 In checking the calculation of proposed outpayments, Ofcom became aware of an error in BT's calculation of the Net Retail Call Revenue regarding the average call duration. This is explained in more detail below.
- 5.16 BT charges customers a minimum call charge (MCC), currently 4.2p plus VAT. The MCC is independent of the per minute tariff of the call. This MCC has the effect of increasing BT's retail revenue above the headline per minute rate for short calls that attract only the MCC.
- 5.17 For example (all figures exclude VAT) BT's current MCC is 4.2p. Since 1 June 2003 a daytime 0845 call has had a retail tariff of 3.36p per minute, hence all calls shorter than 75 seconds (short calls) attract the MCC. If the average length of these short calls was 37.5 seconds, then BT would be

¹²

http://www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/fixednarrowbandstatement.pdf

obtaining on average a rate of 6.72p per minute for short calls, double the headline 3.36p per minute tariff.

- 5.18 The impact of this on Net Retail Call Revenue (compared to a calculation of minutes multiplied by retail tariffs) is highest for low average call durations and low per minute tariffs. This was recognised in the NTS regime from 1997¹³ and consequently the Net Retail Call Revenue was calculated slightly differently for 0845 and 0820 calls compared to other NTS call types, including 0870, resulting in a separate 'Short termination rate' for 0845 and 0820 calls that took into account an adjustment for the MCC.
- 5.19 The key assumption required to calculate the adjustment to the Net Retail Call Revenue for Short calls is the average length of a call that attracts only the MCC at each time of day. Table 1 below shows BT's standard tariffs for 0845 calls since 1 June 2003, the MCC time threshold, the average short call duration assumed by BT in the October Pricing Letter and the average short call duration actually measured by BT Wholesale's interconnect billing system.

Table 1 – Data on Short Calls

	Daytime	Evening	Weekend
Standard retail tariff (pence per minute excl. VAT) post 1 June 2003	3.36	0.85	0.85
Threshold for MCC (secs)	75.0	296.5	296.5
Average duration of 'short calls' assumed in October pricing letter	33.0	116.6	116.6
Average duration of 'short calls' measured on the BT Wholesale interconnect billing system	37.34	92.22	90.71

- 5.20 It should be noted that Ofcom is aware that BT's Carrier Price List indicates a 300 second threshold for short calls, compared to the 296.5 second threshold in Table 1 above. The 300 seconds represents a rounding of that more accurate number.
- 5.21 The data in Table 1 above from BT Wholesale's billing system is from a sample dataset of 1 in 300 calls leaving BT's network taken between 1 March 2004 and 7 March 2004 inclusive (the March 2004 sample data). This sample was provided to Ofcom by BT in summary spreadsheet form, showing the number and total duration of calls in various duration categories.
- 5.22 The purpose of Ofcom's requirement that BT adjust for the MCC is to ensure the correct calculation of the Net Retail Call Revenue which BT's Condition AA11.3 requires is passed (less the charges referred to in Condition A11.4) to the third party that is purchasing BT's NTS call origination. Ofcom considers that measurement of the duration of NTS calls to 0845 and 0820 number ranges that leaves BT's network is an appropriate way of calculating the key input to this adjustment.
- 5.23 Typically, charges such as call origination charges, are based on recent historic data, with data coming from sources that are consistent temporally. In this case however, it is not possible to obtain call length distribution data

¹³ http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/pricing/interim.htm Annex 4 and Addendum 5

from the BT Wholesale interconnect billing system for the year 2002/3, which would be most appropriate to compare with the call origination charges. Instead, the data available is from the March 2004 sample data. Since there is no evidence to suggest that the average call durations have changed significantly over the last two years, Ofcom proposes that the March 2004 sample data from BT Wholesale's interconnect billing system should be used as the source for calculating the impact of the MCC on retail revenue that BT receives for NTS calls to the relevant number ranges on this occasion.

- 5.24 Since the average call durations measured in the March 2004 sample are substantially different from those assumed in the October Pricing Letter, Ofcom considers that BT has incorrectly calculated the Net Retail Call Revenue in arriving at the Outpayments proposed in the October Pricing Letter. Consequently Ofcom considers that to comply with Condition AA11, BT should make an adjustment to its calculation of the Net Retail Call Revenue to take into account the March 2004 sample.
- 5.25 In reaching this conclusion, Ofcom has had regard to section 3(3) of the Act which states that regulation should be transparent, accountable and consistent. The method of deriving the adjustment to Net Retail Call Revenue due to the MCC has been set out in this document, and this is consistent both with the relevant market review and historical determinations listed in Annex 2 to this Explanatory Statement. The documentation of the proposed method also provides transparency.
- 5.26 In reaching this conclusion, Ofcom has also had regard to its duties to promote competition under sections 3 and 4 of the Act. The correct distribution of the Net Retail Call Revenue less various charges assists in the promotion of competition by ensuring appropriate cost recovery by BT, and a level playing field for access to the NTS Call Origination services by other providers.

The Effective Date

- 5.27 In notifying the Providers of the proposed changes in Outpayments, on this occasion BT followed the steps below:
- 31 May 2003 - BT wrote informally to BT's NCCN distribution list advising of the BT Retail price changes;
 - 4 July 2003 – BT sent a pricing letter to all relevant Providers using NCD billing proposing to vary Outpayments. That pricing letter had an effective date of 1 June 2003; and
 - 24 October 2003 – BT issued a second pricing letter to the industry, which proposed the same Outpayments for NCD billing as the 4 July 2003 pricing letter, but with an effective date of 29 August 2003, being 56 days after 4 July 2003 when detailed rates were first provided to the Providers.
- 5.28 The October Pricing Letter was the result of discussions between BT and other providers, both bilaterally and at the NTS Focus Group. Ofcom understands that the 56 days notice period had been common practice for OCCNs in the past.

- 5.29 The October Pricing Letter was subsequently accepted by more than half the providers to whom it was issued and these providers between them account for more than half of the 0845 traffic that leaves BT's network.
- 5.30 Whilst the process followed by BT in this case may not have been ideal, Ofcom considers that 29 August 2003 being 56 days from 4 July 2003 (and being the date set out in the October Pricing Letter) provided the Providers with sufficient notification.
- 5.31 Ofcom notes that those providers who have signed the October pricing letter have all entered the agreement with an effective date of 29 August 2003.
- 5.32 Ofcom considers that, were it to direct BT and the Providers to accept the terms of the October Pricing Letter (as adjusted) from any date other than 29 August 2003, it would reduce the incentive on other terminating providers to enter into future negotiations in good faith. It would, in fact, provide them with an incentive to delay the acceptance of new proposals. Ofcom considers that to create such an incentive would create uncertainty and would not be consistent with its duties under sections 3 and 4 of the Act to promote competition.
- 5.33 In addition, a number of arguments were raised in the draft determination and consultation document, including as to whether there was a link between BT's geographic and non-geographic tariffs and whether the proposed changes to Outpayments would make services uneconomic. No comments that countered Ofcom's original view were received during consultation. Ofcom's reasoning in the draft determination also forms part of the reasoning for this determination.
- 5.34 Ofcom therefore considers it appropriate to direct that the proposed Outpayments as set out in the October Pricing Letter (as adjusted) shall be the outpayments that BT is required to pass on when it provides NTS Call Origination to the Providers using NCD billing, with an effective date of 29 August 2003.

Annex 1

Previous relevant determinations under the 1997 Regulations

A4.1 Oftel Direction concerning BT's NTS Conveyance (November 1999)¹⁴

A4.2 Oftel's Statement on the Relationship between Interconnection Charges and Retail Prices for Number Translation Services (December 1999)¹⁵

Amended Direction on BT's Retail Uplift Charge for calls to operators Number Translation Services from 1 April 2001¹⁶

¹⁴ <http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/nts1199.htm>

¹⁵ <http://www.ofcom.org.uk/static/archive/oftel/publications/1999/consumer/nts1299.htm>

¹⁶ <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/nts0703.htm>