

0845 POLO DISPUTE – DRAFT DECISION

14 DECEMBER 2012

1. INTRODUCTION

Cable&Wireless UK welcomes this opportunity to respond to Ofcom's draft decision on our dispute with BT relating to 0845 POLOs. We accept the broad thrust of Ofcom's provisional conclusions, believing that we were correct to hold BT to account over its failure to both properly calculate 0845 POLOs in the first instance and remedy any resulting underpayment. It was clear from the protracted negotiations that took place that BT was unwilling to make a reasonable offer over many substantive issues and that referring the matter to Ofcom was our only recourse.

BT is duty bound to take its obligations under both SMP Condition AAA11 and the Standard Interconnect Agreement seriously and it should not be afforded any opportunity to disregard these obligations either in real time or retrospectively. It is our firm view that BT must not benefit in any way through non-compliance, as to do so would provide a poor incentive for the future. In the remainder of this submission we focus on specific issues arising from the draft decision.

2. NEED FOR A PRESCRIPTIVE POLO CALCULATION

The information asymmetry in the mechanism for setting 0845 POLOs is such that a terminating CP often has no option but to go along with the material presented by BT and it is therefore essential that CPs have confidence in the information presented. The negotiations which took place illustrate the difficulties that CPs have in both obtaining sufficient information to verify POLOs and gaining the necessary assurances that all has been done to ensure that rates are both fair and accurate. We have no desire to see a repetition of this dispute and would like Ofcom to be far more prescriptive in the final determination regarding the POLO calculation methodology and how BT should apply it. As it stands BT could still exercise a degree of discretion over the interpretation of the chosen methodology and make decisions which unduly favour its own business. This investigation has uncovered instances where BT has sought to double count certain cost categories, something that was not apparent during the negotiations.

While we understand the basis of the methodology is the high-level one outlined by C&W UK, the negotiation process didn't permit C&W UK to set out all the detail necessary. We would therefore welcome in the explanatory statement accompanying the final decision a more detailed stage by

stage explanation of Ofcom's methodology for calculating the POLO, with worked illustrations where possible, to ensure that BT follows this when setting the POLO.

3. PROPOSAL TO CAP 'OTHER COSTS'

The rationale behind our request for 'other' costs to be capped at a percentage of the underlying WLR price of an exchange line was prompted by our concern that BT would seek to inflate this cost category and therefore reduce the proportion of retail line rental revenue allocated to inclusive calls. For illustrative purposes we suggested a figure of 20% be used, however we believe Ofcom should set this percentage based on a view of current 'other' costs.

4. BT'S NOVEMBER 2011 PRICE CHANGE

While we understand the approach taken by Ofcom in resolving the dispute and the benefits of consistently applying this approach to the whole dispute period, we would have liked Ofcom to set out a clear opinion on BT's decision to issue a price change in the full knowledge that the rate was wrong and then attempt to subsequently alter the rate while retaining the effective date. We consider such conduct to be neither fair nor reasonable and while it would have no bearing on the outcome of this dispute given the methodology chosen by Ofcom to resolve the matter, an Ofcom opinion on this issue would be helpful in preventing a repetition of this activity, potentially deterring future disputes.

5. CALCULATING POLOS FOR EACH QUARTER

We remain of the view that in balancing the requirements of the NTS Call Origination Condition and BT's duties and powers under the Standard Interconnect Agreement we believe the appropriate points in time to re-set the POLO would be the occasions were BT sought to adjust the discount figure. However we recognise that the decision is ultimately a matter of regulatory judgement. We would endorse the decision not to net-off the any underpayments in one quarter against potential overpayment in another; as such an outcome would create very poor compliance incentives for BT in the future.

The nature of the regime gives BT all the necessary tools to both calculate and implement fair and reasonable rates at any point it wishes and an outcome that chooses to net off any potential over-payment from any underpayment would fail to take adequate account of the contractual opportunities that were available to BT in rate setting. It remains important to hold BT to account for its action and its failure to both properly calculate and implement the correct 0845 POLO at the time. If there was any doubt over how a new retail package should have been dealt with under the NTS condition then BT should have sought guidance from Ofcom at the earliest opportunity.

We believe it would be appropriate for Ofcom to confirm that the underlying calculation data used to derive the POLO for each quarter should be taken from the third and fourth month prior to the start of that quarter. This would fairly replicate what should have occurred at the time, as BT should have used data drawn from the two months prior to the OCCN being issued, with a further 56 days' notice being given after that. For example in setting the rate for 1st November 2009 – January 31st 2010 we would advocate using the data from July and August 2009 and apply the resulting POLO to the full quarter as this is consistent with the practice at the time. We would also like to clarify that it is Ofcom's intention to use one set of POLOs for each quarter and that BT, when calculating the minimum POLO, would also be required to take changes to retail call set up fees into account from the date any change took place.

6. CALCULATING POLOS FOR EACH QUARTER

We welcome Ofcom's proposal for BT to be required to provide the necessary supporting material required to verify any POLO calculations for each of the quarters recalculated. Where BT seek to invoke concerns around confidentiality we would hope these can be worked out between the parties and we may seek Ofcom's guidance should a solution not be found that enables us to view supporting material that we believe is needed to provide confidence around the numbers BT presents. We would ask that Ofcom sets a time limit for reaching an agreement following publication of the final direction. We consider 45 days would allow sufficient time for the parties to reach agreement on implementing the final decision. To achieve this we believe it would be necessary for BT to supply details of the revised minimum POLOs for each quarter 14 days after the final decision.