



Waiver of BT's price notification requirements for certain of BT's Ethernet services

Consultation

Publication date: 17 December 2009

Closing Date for Responses: 4 January 2010

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Section 1

Summary

Ofcom proposes to give consent to waive BT's notification requirements for certain Ethernet services

- 1.1 This document sets out Ofcom's proposal to waive the price notification requirement in relation to the price reductions for some Ethernet rental services, allowing BT to introduce the price changes set out in Annex 7 immediately from the publication of the final waiver statement without requiring BT to comply with the obligation to provide 90 days' advance written notice. BT requested this in a letter to Ofcom dated 3 December 2009.
- 1.2 We invite comments from interested parties on whether it would be appropriate for Ofcom to accept BT's request and grant the proposed waiver set out in Annex 5 of this document. Stakeholders have until Monday, 4 January 2010 to provide their views.

BT is introducing reductions to its Ethernet rental services to comply with its charge control obligations as set out in the LLCC Statement

- 1.3 On 3 December 2009, BT issued an Access Charge Change Notice ("ACCN")¹ where it notified price reductions for some Ethernet connection and rental services to meet its charge control obligations imposed on it in the Leased Lines Charge Control Statement² (the "LLCC Statement") published on 2 July 2009. Following the 90 day notification period these charges will become effective on 4 March 2010.
- 1.4 On the same day, BT wrote to Ofcom requesting consent to introduce price reductions for some of its Ethernet rental charges without having to comply with the 90 days advance written notification requirement in SMP Condition HH6 imposed on it in the Business Connectivity Market Review Statement (the "BCMR Statement")³. The list of services affected by BT's request for a waiver is included in Annex 7. BT proposes to introduce the revised Ethernet rental charges on 1st January 2010 or as soon as possible if such consent for a waiver is granted.
- 1.5 This consultation deals with BT's request in a manner consistent with the procedure set out by Ofcom in a letter to industry of 11 October 2004 (the "Industry Letter") for dealing with requests for notification waivers. The letter is reproduced in Annex 6.
- 1.6 Ofcom may under SMP condition HH6 give consent in writing to affect the operation of the price notification requirements. However, before doing so, Ofcom must be satisfied that the giving of such consent would be objectively justified, non-discriminatory, proportionate and transparent, in accordance with Section 49(2) of the Communications Act 2003 (the Act). In addition, Ofcom must publish a notification

¹ Openreach ACCN:OR161 published at <http://www.openreach.co.uk/orpg/pricing/notificationDetails.do?data=IMu0XOzQTUxzWnrHGAL7th9v5aqNnsq%2FsXJq5bvuwX33FkRprdkPimbVIJEBnnx>

² <http://www.ofcom.org.uk/consult/condocs/llcc/llccstatement/>

³ See the regulatory Statement of 8 December 2008 entitled *Business Connectivity Market Review, review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*: <http://www.ofcom.org.uk/consult/condocs/bcmr08/bcmr08.pdf>

setting out its proposals to give consent and must provide an opportunity for interested parties to comment on the matter.

- 1.7 For the reasons set out in Section 2 of this document, Ofcom considers that the criteria set out in Section 49(2) of the Act are likely to be met in this instance and proposes to accept BT's request for consent, subject to any representations made to Ofcom during this consultation. In reaching this initial view, Ofcom has considered and acted in accordance with its duties under sections 3 and 4 of the Act.
- 1.8 Ofcom considers that the exceptional circumstances of BT's request mean that it is appropriate to depart from the standard one month consultation period for consents normally required by section 49 of the Act and instead to consult for 2 weeks (equivalent to 10 working days). This is longer than the 5 working days advocated in the Industry Letter to allow for the Christmas vacation period. Ofcom has the power to do so under section 49(6) of the Act and has in the aforementioned Industry Letter advised of its intention to make use of shorter consultation periods when considering requests for price notification waivers, due to the need for urgency in such cases.

Section 2

Review of waiver request and Ofcom's proposals

Introduction

- 2.1 In this Section, we discuss whether Ofcom should give consent to BT's request to waive the 90 days advance written notice it is required to give in relation to amended charges for some of its Ethernet services.
- We first consider the obligations relevant to this waiver request and imposed on BT as a result of two prior Ofcom decisions;
 - Secondly, we set out the background to this consultation, which covers the details of BT's request;
 - Thirdly, we discuss Ofcom's letter to industry of 11 October 2004 (the "Industry Letter") setting out how Ofcom would approach a request for consent to notification waivers; and
 - Finally we review how we consider that granting such waiver meets the criteria set out in Section 49(2) of the Act, before discussing the notification of Ofcom's proposal to give consent.

BT needs to comply with Ofcom's BCMR and LLCC Statements

- 2.2 On 8 December 2008, Ofcom published a statement entitled "*Business Connectivity Market Review, review of retail leased lines, wholesale symmetric broadband origination and trunk segments*"⁴ (the "BCMR Statement"). The BCMR Statement sets out Ofcom's conclusions on the review of retail and wholesale leased lines markets in the UK.
- 2.3 In the BCMR Statement Ofcom defined, among others, a market for low bandwidth alternative interface symmetric broadband origination ("AISBO") wholesale services in the UK excluding the Hull area, for services provided at speeds up to and including 1 Gbit/s. Ofcom found that BT had Significant Market Power ("SMP") in this market and imposed a set of SMP conditions on BT. Amongst these:
- SMP Condition HH1 requires BT to provide Network Access for AISBO services on reasonable request from Third Parties and where Ofcom directs it to do so.
 - SMP Condition HH6 requires BT to publish its charges for AISBO services by sending to Ofcom and all purchasers of the services "*a written notice of any amendment to the charges, terms and conditions on which it provides Network Access ... not less than 90 days before any such amendment comes into effect for existing Network Access*".
- 2.4 The BCMR Statement also concluded that, in principle, BT should be subject to charge controls in the leased lines markets where it had SMP. On 2 July 2009, we

⁴ <http://www.ofcom.org.uk/consult/condocs/bcmr08/bcmr08.pdf>

published a further statement which set out our conclusions on the charge controls for wholesale leased lines services⁵ (the "LLCC Statement"), including the AISBO services referred to in paragraph 2.3 above. Specifically we implemented a single basket for AISBO services (the "AI basket") where:

- Services in the AI basket are subject to an overall cap of RPI-7.00% (Condition HH4.4 (a)). This means that the average price of services in this basket will need to reduce by 7% in real terms in each year of the charge control.
- Services in the sub-basket of Backhaul Extension Services ("BES") are subject to a safeguard cap of RPI+0% (Condition HH4.7). This means the average price of services in this sub-basket cannot increase in real terms in any given year of the charge control.
- Each service in the AI basket is also further subject to a safeguard cap of RPI+5% (Condition HH4.8). Therefore the price of individual services in the AI basket cannot increase by more than 5% in real terms in any given year of the charge control.

2.5 When amending the prices of AISBO services in the AI basket BT is required to comply with its SMP obligations as summarised in paragraphs 2.3 and 2.4 above.

BT requested a waiver of the 90 day notification period for price reductions to Ethernet rental charges

2.6 On 3 December 2009, BT issued an Access Charge Change Notice ("ACCN") in which it notified price reductions for some Ethernet connection and rental services to meet the charge control requirements imposed on it in the LLCC Statement (and summarised in paragraph 2.4 above)⁶.

2.7 On the same day, BT wrote to Ofcom requesting consent to introduce price reductions to some of its Ethernet rental charges without having to comply with the 90 days advance written notification requirement imposed under SMP Condition HH6 (summarised in paragraph 2.3 above). The list of services affected by BT's request for a waiver is included in Annex 7. BT's proposal is to introduce the revised Ethernet rental charges on 1st January 2010 or as soon as possible if such consent is granted.

2.8 For a detailed description of the services affected by BT's price notifications and request for waiver see the LLCC Statement, paragraphs 2.5 to 2.13.

We set out our policy for dealing with notification waiver requests in a letter to industry dated 11 October 2004 (the "Industry Letter")

2.9 We set out the general approach we proposed to take when dealing with requests for consent to waive or reduce notification periods in the Industry Letter dated 11 October 2004. This letter is reproduced in Annex 6.

2.10 We identified three main scenarios when we might be asked to consent to reduced notification periods for price changes, namely:

⁵ <http://www.ofcom.org.uk/consult/condocs/llcc/llccstatement/>

⁶ Openreach ACCN:OR161 published at <http://www.openreach.co.uk/orpg/pricing/notificationDetails.do?data=IMu0XOzQTUxzWnrHGAL7th9v5aqNnsqI%2FsXJq5bvuwX33FkRprdkPimbVIJEbnnx>

- where Ofcom had directed a provider to alter its prices forthwith;
 - where a price notification might be considered to be advantageous to consumers; and
 - where the provider had made an administrative error which requires correction.
- 2.11 In the case of directions to alter prices forthwith, we advised that we would generally consult on the implementation arrangements (including the reduced notice period) when consulting on the substance of the direction itself.
- 2.12 In the case of price reductions proposed by an SMP provider (such as BT), we recognised that there was the potential for such price reductions to cause anti-competitive effects where the full notification period was not provided. We concluded that it would be appropriate to consult with interested parties before consenting to an early implementation of such price reductions.
- 2.13 In the case of administrative errors, we advised that where an SMP provider had made a genuine error in maintaining its price list or notifying price changes, we would conduct a short consultation exercise before considering whether to consent to a reduced notification period.
- 2.14 We have implemented the above approach on three separate occasions⁷.

Statutory requirements to be met before giving a consent

- 2.15 Section 49 of the Act applies where Ofcom proposes to give consent to affect the operation of a condition made under section 45 of the Act (including SMP Conditions). In order to give such consent, Ofcom must first satisfy itself that the criteria set out in section 49(2) are satisfied, namely the giving of a consent:
- must be objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - must not discriminate unduly against particular persons or against a particular description of persons;
 - must be proportionate to what it is intended to achieve; and
 - must be, in relation to what it is intended to achieve, transparent.
- 2.16 We further discuss in paragraphs 2.21 to 2.38 below how our initial views are that granting the requested waiver to BT satisfies the above mentioned criteria.

⁷ Ofcom has in the past given consent to BT to reduce or waive the notification period in three instances:

- a) in 2005 (WES and BES services)
<http://www.ofcom.org.uk/consult/condocs/btwesbes/>
- b) in 2006 (Partial Private Circuits and Radio Base Station Backhaul services)
http://www.ofcom.org.uk/consult/condocs/bt_waiver/
- c) in 2009 (WES, WEES and BES services)
<http://www.ofcom.org.uk/consult/condocs/btprice/statement/>

The rationale for the obligation to provide 90 days advance notice

- 2.17 In the BCMR Statement, our main reason for imposing SMP Condition HH6 was to provide a means of ensuring all customers of BT wholesale services, which include its downstream divisions and competitors, are able to make the necessary amendments to their retail contracts, terms and conditions of provision in such a way that does not unduly discriminate between end users (in this case, between BT's end users and its competitors' end users).
- 2.18 In addition, we set out at paragraph 8.286 of the BCMR Statement how we considered that in the market for low bandwidth AISBO services, the remedies imposed would also have to promote competition in this market. We concluded that imposing SMP Condition HH6 was consistent with Ofcom's duties under sections 3 and 4 of the Act in that the conditions encouraged transparency, promoted the interests of the purchasers of AISBO services and promoted long-term competition in the AISBO market⁸.
- 2.19 The 90 days notification requirement on BT with respect to AISBO services was first imposed in the regulatory Statement entitled *Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*⁹ published in June 2004 (the "2003/04 Review"). Paragraph 7.94 of the 2003/04 Review explained how Ofcom considered that the notification requirement was consistent with the duties set out in Section 3 and 4 of the Act by promoting the interests of purchasers of wholesale AISBO services by enabling them to adjust their downstream offerings in competition with BT, while also promoting competition by allowing BT's competitors in the provision of AISBO services to make appropriate changes to their services.
- 2.20 Finally, it is also relevant to consider the Guidelines issued by the ERG on Remedies in Electronic Communications Markets¹⁰. Section 3.2.1 discusses how transparency obligations are in effect accompanying obligations with and to other obligations to make the remedy more effective. In the case of the notification obligation, this can be considered to have a natural linkage to the non discrimination obligation, in that it allows parties to observe the factors (i.e. price and non price terms and conditions of provision) over which discrimination could take place.

Would the waiver be objectively justifiable?

- 2.21 In its letter to Ofcom dated 3 December 2009, BT requested consent to waive the 90 day notification requirement for certain Ethernet rental charge reductions, on the basis that it would like to bring the economic benefits of these reduction to its customers at the earliest possible opportunity, especially given the current difficult economic climate. In the same letter BT also noted that in recognition of the fact that its customers may need time to prepare to take full advantage of the reductions in Ethernet connection prices it did not request a waiver in relation to these.
- 2.22 In order to assess whether the waiver is objectively justifiable we have taken into account the fact that the new lower Ethernet rental prices would lead to significant

⁸ See paragraphs 8.295 to 8.308 of the *BCMR Statement*
<http://www.ofcom.org.uk/consult/condocs/bcmr08/>

⁹ <http://www.ofcom.org.uk/consult/condocs/llmr/statement/>

¹⁰ *Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework*, May 2006, http://erg.eu.int/documents/docs/index_en.htm

savings for the industry and bringing these forward would be beneficial to customers. We carried out a simple analysis of the potential savings anticipated as a result of the Ethernet rental price reductions. BT expects this first phase of Ethernet price reductions to yield savings in the region of £34m¹¹ (which equates to savings of £6m for connections and £28m for rentals). Of these around £28m¹² are due to BT's reductions in Ethernet rental prices. On this basis, introducing these one and a half months earlier (for example, by mid January 2010 instead of 3 March 2009) would represent savings in the region of £3.5M on those rental services. We see benefits in consumers enjoying these sooner rather than later. This is because, given the competitive nature of the downstream markets involved, we would expect these savings to be quickly reflected in lower retail prices passed on to end customers¹³. On this basis, our initial view is that there is an objective justification to the policy aim of consenting to these price reductions being implemented earlier. We are interested in stakeholders' views on this.

2.23 We also note that the Ethernet price reductions would have been anticipated by industry players as part of BT's compliance with its charge control obligations. More specifically:

- Services in the AI basket (including the Ethernet rental services subject of this consultation) are subject to a cap of RPI-7.00% where the average price of these services is required to reduce by 7% in each year of the control. This means that reductions in the prices of AISBO services in the AI basket, and the overall level of such reductions, were anticipated by industry.
- BT has the flexibility to introduce these price reductions anywhere between the 1st October and 30 September of a given charge control year. Furthermore, BT is required to introduce the required price changes such that the revenue change associated with these changes is as if all of the price changes were introduced on 1st October of a given charge control year (Condition HH4.2)¹⁴. This condition

¹¹ BT expects to introduce further Ethernet price reductions later on in the year to achieve the required revenue reduction for the AI basket in the first charge control year (e.g. 1st October 2009 and 30 September 2010). BT estimated the required revenue reduction for the AI basket in the first year of the charge control to be around £41m, £34m of which is achieved via the ACCN published on 3 December 2009.

¹² BT calculated this saving by taking the difference in the Current and Proposed rental charges for services in Annex 7 and multiplying these with actual volumes of AISBO services in 2008/09. We also note that out of the £28m in Ethernet rental price reductions, £19m is estimated to accrue to BT's downstream division and £9m to BT's external customers.

¹³ For example, some Ethernet services (such as Wholesale Extension Services, "WES") are used to provide connectivity to a variety of businesses, but also to schools, the Police and other public services. Public services and private companies alike are in today's economic climate under increased pressure to reduce their costs, and such price reductions would help them to meet these demands. Similarly, purchasers of BT's Ethernet backhaul services will benefit from lower prices for their broadband backhaul services, enabling them to provide a cheaper and better retail broadband service to their customers.

¹⁴ This can be illustrated with a simple example. Let us assume BT sells a single item A at £10/item. Let us further assume that the required price reduction is 10% and BT is expected to sell 10 items in the first charge control year. If no price changes were introduced BT is expected to earn a revenue of £100 (£10/item x 10). If BT introduced the price change on the 1st of October it is expected to earn a revenue of £90 (£10/item x 90% x 10 = £90). On the other hand if BT decides to introduce the price reduction six months later, then it would need to double its (delayed) price reduction so that the revenue it is expected to earn by the end of the first charge control year is still £90. BT would therefore need to decrease its price by 20% in the second half of the year, to compensate for the fact

ensures that BT's customers are not any worse off if price changes are introduced later than the first day of a given charge control year.

- 2.24 Finally, in our view it is also reasonable to assume that most stakeholders would have anticipated these price reductions to occur earlier in the charge control year (for example at the start of the charge control i.e. 1st October 2009, around 90 days after the publication of the LLCC Statement on 2 July 2009). In the absence of granting this waiver, the new lower Ethernet rental prices would become effective on 4 March 2010, which would be 5 months into the charge control year (1st October 2009 to 30 September 2010). On the other hand, granting the waiver means that these reductions will come into effect earlier and therefore be more likely aligned with most stakeholders' anticipation.
- 2.25 Therefore, following from the above, it is our initial view that it is objectively justifiable in this case to allow BT to introduce the new prices set out in Annex 7 without having to comply with a 90 days advanced notice obligation.

Question 1: *Do stakeholders agree with Ofcom that in this case it would be objectively justifiable to give consent to BT's request for a waiver? In addition, do stakeholders agree that introducing the wholesale Ethernet rental price reductions earlier will be quickly reflected in lower retail prices?*

Would the waiver be unduly discriminatory?

- 2.26 We consider that it would not be unduly discriminatory to allow BT to introduce the Ethernet rental price reductions set out in Annex 7 early as these would benefit all purchasers of such services. We consider that these price reductions would treat similar stakeholders in a similar manner. In any event, we consider that there is an objective justification for giving this consent because we consider that introducing price reductions early would benefit all purchasers of these services, as discussed above in paragraphs 2.21 to 2.25. With regards to the potential competition effects of granting this waiver, we discuss these in paragraphs 2.28 to 2.37 below.
- 2.27 Ofcom also considers that the proposed waiver is unlikely to have an adverse effect on any diversity groups. This is because, if such a waiver is granted and price reductions are implemented earlier, then all end customers in the relevant downstream markets are going to benefit.

Would the waiver be proportionate?

- 2.28 Section 49(2) of the Act requires that the proposed measure must be proportionate to what it is intended to achieve.
- 2.29 In general, notification obligations are imposed to assist a non discrimination obligation in preventing downstream discrimination between the incumbent's downstream arms and its downstream competitors.
- 2.30 In some cases, the promotion of upstream competition in the relevant wholesale market is also relevant. In such cases, a proportionate measure would need to balance the short term benefits of reduced prices with the long term benefits of

that its price was unchanged at £10/item in the first half of the year ($£10/\text{item} \times 10 \times 6/12 + £10/\text{item} \times 80\% \times 10 \times 6/12 = £90$). In both of these examples the revenue reduction as a result of introducing the price decrease is £10 (e.g. £100 (before price reductions) less £90 (after price reductions)).

competition. One such case would be, for example, when a waiver request from the SMP operator affects 'horizontal' competitors that rely on the SMP operator for upstream SMP services.

- 2.31 In the case reviewed in this document, the policy goals we set out to achieve by requiring BT to provide 90 days' advance written notice of price changes were:
- to provide protection to the rest of the industry by enabling other CPs to monitor BT's prices for possible anti-competitive effects and give them sufficient time to adjust their downstream prices to enable competition with BT's own retail leased lines services; and
 - to promote competition between BT and other providers of wholesale AISBO services.
- 2.32 We discussed above the main benefits we foresee coming from an early implementation of these price reductions, whereby these price reductions would be enjoyed by the downstream markets earlier rather than later. Our conservative estimate of such savings puts them at around £3.5M for one and a half months (paragraph 2.22). We have not been able to identify an alternative mechanism which could achieve this objective with less intrusive means.
- 2.33 In proposing to grant this waiver we have also taken into account two further considerations:
- whether the benefits of having the price reductions introduced earlier outweigh any potential costs of doing so; and
 - whether the benefits of having the price reductions introduced earlier outweigh any potential cost associated with the risk of exit of BT's competitors as a result of them having to react to price changes from BT without having had adequate time to prepare.
- 2.34 We discuss below the potential costs associated with waiving the notification period:
- Purchasers of Ethernet services are likely to incur some costs to amend their contracts, terms and conditions of provisions for their retail customers. It can however be argued that such costs would in any case be incurred even if BT had to comply with the 90 days notification period. The absence of an advanced notice requires a speedier implementation of such changes, which might require extra resources, but it is reasonable to assume that such additional costs would be of a much smaller magnitude than the perceived benefits of having lower charges, which would in any case immediately benefit BT's wholesale customers.
 - The second potential cost of waiving the notification period relates to the second objective of the notification obligation, namely promoting competition to BT in this market. We discuss this further below.
- 2.35 The notification obligation imposed on BT as a result of the BCMR Statement is intended to promote competition by giving BT's competitors advance notice of changes to allow them to prepare their competitive response. Without adequate notice, given BT's SMP in this market derived from its economies of scope, scale and vertical integration, there would be a risk that end users would switch away from BT's competitors before they could provide their competitive response and offer new contractual conditions to their customers to match, or improve on, those offered by

BT. Under these circumstances it would be more difficult for BT's competitors to provide a competitive response, as lowering sales volumes would decrease their economies of scale and scope, which are critical for competition in wholesale leased lines markets¹⁵. This could, ultimately, lead to them exiting the market, and BT strengthening its SMP position, which could in the long term lead to reduced investments and/or increased prices to the detriment of consumers.

- 2.36 In this particular case, however, we consider there are minimal risks of exit and any detriment to competition is mitigated. Amongst the mitigating factors is the fact that the price reductions are implemented so that BT complies with its charge control obligations and therefore would have been anticipated by industry. In addition the waiver request is in relation to Ethernet rental prices (and not connections) and will therefore mainly benefit existing customers (rather than new customers). We also note that BT would have served around half of its notification period, which corresponds to the time between the publication date of the ACCN (3 December 2009) and the publication date of the waiver statement (which we would expect at the earliest to be around mid January 2010).
- 2.37 Our initial view is therefore that the benefits of granting this waiver outweigh the total potential costs, including the risk of exit of BT's upstream competitors, and we consider granting such a waiver to be proportionate.

Question 2: *Do stakeholders agree with Ofcom that the benefits of having the proposed Ethernet rental price reductions introduced without advance notification outweigh in this case any potential costs?*

Is the proposed waiver transparent?

- 2.38 Ofcom considers that the proposed consent would be transparent in that its aims and effects are clear. The text of the draft notification is being published with this consultation. Its intended operation is also aided by our arguments in this consultation. From the above, it is clear that BT is not required to comply with the 90 days price notification requirements under SMP Condition HH6 in respect of the proposed prices set out in Annex 7 of this document.

Conclusions

- 2.39 For the reasons discussed in the previous paragraphs, our initial view is that the proposed waiver would meet the criteria set out in section 49(2) of the Act.
- 2.40 We are also satisfied that issuing a consent in these circumstances would appear to be consistent with our obligations under sections 3 and 4 of the Act in that it would further the interests of consumers, as any anticipated savings from introducing the Ethernet rental price reductions would accrue to end users earlier rather than later.. Furthermore we note that BT would have served around half of its notification period as, at the very least, 6 weeks would have passed between it notifying the new prices on 3 December 2009 and us publishing the waiver statement (which we anticipate to be at the earliest mid January 2010). In our view any potential competition effects that could arise from granting this waiver (for example BT's competitors exiting the market or leakage of information between the wholesale and retail arms of BT) is greatly reduced. In addition we also note that the price reductions are introduced so

¹⁵ For a discussion of the importance of economies of scale and scope in wholesale leased lines markets, please see the SMP analysis set out in Section 7 of the BCMR Statement.

as to allow BT to comply with its charge control obligations and in that were anticipated by industry players. Given these mitigating circumstances, we also consider that giving consent would not prejudice the promotion of competition.

- 2.41 We are therefore minded to conclude that it would be appropriate to consent BT introducing the price changes set out in Annex 7 from the publication date of any statement to that effect, without it giving the required 90 days' advance written notice.
- 2.42 We are interested in obtaining the views of stakeholders, particularly as to whether the benefits of having the price changes introduced without a notification period would be outweighed by any potential costs deriving from not having a 90 days' notification of the proposed changes.

Question 3: Do stakeholders agree with Ofcom that it would be appropriate to give consent to BT to waive the 90 days notification period for the new proposed charges for the Ethernet rental services as set out in Annex 7?

Notification of Ofcom's proposal to give consent

- 2.43 Before a consent can be given under section 49 of the Act, Ofcom is required by section 49(4) to publish a notification:
- i) stating that there is a proposal to give, modify or withdraw it;
 - ii) identifying the person whose proposal it is;
 - iii) setting out the direction, approval or consent to which the proposal relates;
 - iv) setting out the effect of the direction, approval or consent or of its proposed modification or withdrawal;
 - v) giving reasons for the making of the proposal; and
 - vi) specifying the period within which representations may be made about the proposal to the person whose proposal it is.
- 2.44 Section 49(5) requires that the period for making representations must be one month after the day of the publication of the notification unless there are exceptional circumstances, in which case a shorter notification period may be used so long as it is reasonable in the circumstances. A shorter notification period can only be given where the notification is not one that is required to be sent to the European Commission ("the Commission") under section 50(4) of the Act.
- 2.45 Section 50(4) requires that Ofcom send to the Commission a copy of every notification published under section 49(4) with respect to a proposal which:
- "...
- (a) relates to the giving of a direction, approval or consent for the purposes of –
 - (i) an access-related condition falling within section 73(2) or (4), or

(ii) an SMP services condition,

or to the modification or withdrawal of such a direction, approval or consent; and

(b) is a proposal which, in Ofcom's opinion, would affect trade between Member States,"

- 2.46 In its letter to industry of 11 October 2004 (see Annex 6), Ofcom recognised that it may not be appropriate for it to consult for one month when considering requests for consent and that it was necessary for Ofcom to take into account its duties under sections 3 and 4 of the Act, in particular the promotion of competition. Ofcom advised that in most cases Ofcom would consult for 5 working days only, though this may vary according to the significance or complexity of the price change. Ofcom also notes that proposals to implement price changes with shorter than usual notice may be unlikely to affect trade between Member States.
- 2.47 Ofcom considers that there are exceptional circumstances justifying the use of a shorter consultation period in this case. Without a reduced consultation period, and given the time taken to prepare the consultation document and a following statement, there would be little benefit to consumers in consulting on the early introduction of price reductions as any consent would likely be published only marginally before 90 days from the time of the first notice (i.e. 3 December 2009), by which time BT could have introduced the price changes anyway. Taking this, and the festive period into account, Ofcom proposes to consult for two weeks (equivalent to 10 working days) expecting responses on 4 January 2010.
- 2.48 Ofcom does not consider that the notification is one that is required to be sent to the Commission under section 50(4) of the Act. Although it relates to the giving of a consent for the purposes of an SMP condition, Ofcom does not consider that the proposal itself would affect trade between Member States.
- 2.49 The proposed consent relates to a waiver of the requirement to provide 90 days' advance written notice of the price changes in Annex 7. Reducing the prices now, rather than at a later date, will not have an effect on trade between Member States as the price reduction would otherwise come into force at the end of the 90 days' advance notice period required by SMP Condition HH6.
- 2.50 In light of the foregoing considerations, Ofcom considers it justified and appropriate to specify the period within which representations may be made to Ofcom about its proposal to give the said consent to BT as 10 working days. In other words, representations on Ofcom's proposed consent set out in Annex 5 should be made by the deadline and in the manner specified in Annex 1 of this document. As regards the effect of the proposed consent and Ofcom's reasons for making this proposal, these are set out above.

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 4 January 2010**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/ethernet/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email lara.stoimenof@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.
- Lara Stoimenova
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7781 3333
- 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.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex X. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Lara Stoimenova on 020 7834130.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement around mid January 2010.
- 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 Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's '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.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, 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 and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- 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 where appropriate.
- 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 parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

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

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

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

DECLARATION

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

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

Name

Signed (if hard copy)

Annex 4

Consultation questions

Sub heading

Question 1: *Do stakeholders agree with Ofcom that in this case it would be objectively justifiable to give consent to BT's request for a waiver? In addition, do stakeholders agree that introducing the wholesale Ethernet rental price reductions earlier will be quickly reflected in lower retail prices?*

Question 2: *Do stakeholders agree with Ofcom that the benefits of having the proposed Ethernet rental price reductions introduced without advance notification outweigh in this case any potential costs?*

Question 3: *Do stakeholders agree with Ofcom that it would be appropriate to give consent to BT to waive the 90 days notification period for the new proposed charges for the Ethernet rental services as set out in Annex 7?*

Annex 5

Draft Notification – Proposed Consent

NOTIFICATION UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003

Proposal to give a consent to British Telecommunications plc (“BT”) under SMP services condition HH6, imposed on BT as a result of the analysis of symmetric broadband origination markets listed in the Schedule to the Proposed Consent annexed to this Notification in which BT has been found to have significant market power

1. OFCOM hereby make, in accordance with section 49 of the Act, a proposal to give a consent under SMP services condition HH6, imposed on BT as a result of the analysis of symmetric broadband origination markets listed in the Schedule to the Proposed Consent set out in the Annex to this Notification in which BT has been found to have significant market power.
2. The proposed consent is set out in the Annex to this Notification.
3. The effect of the proposed consent, and the reasons for making the proposal, are set out in Section 2 of the accompanying Explanatory Statement hereto.
4. In making the proposal set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying Explanatory Statement by 5pm on 4 January 2010.
6. In this Notification—
 - (a) “**Act**” means the Communications Act 2003;
 - (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989; and
 - (c) “**OFCOM**” means the Office of Communications.

Gareth Davies

Competition Policy Director

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

17 December 2009

Annex

[Proposed] Consent under Condition HH6 imposed on BT as a result of the analysis of symmetric broadband origination markets contained in the Business Connectivity Market Review dated 8 December 2008 and listed in the Schedule to this Consent, in which BT has been found to have significant market power

BACKGROUND

1. as a result of a market analysis carried out by OFCOM, OFCOM issued a Notification on 8 December 2008 in accordance with section 79 of the Act that BT has significant market power in the symmetric broadband origination markets listed in Part 1 of the Schedule and set certain SMP conditions on BT, such as Condition HH6.
2. This Consent concerns matters to which Condition HH6 relates.
3. for the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM is satisfied that, in accordance with Section 49(2) of the Act, this Consent is:
 - a. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b. not such as to discriminate unduly against particular persons or against a particular description of persons;
 - c. proportionate to what it is intended to achieve; and
 - d. in relation to what it is intended to achieve, transparent.
4. For the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act.
5. By virtue of section 49(9) of the Act, Ofcom may give effect, with or without modifications to a proposal with respect to which Ofcom has published a notification under section 49(4) of the Act only if:
 - a. OFCOM has considered every representation about the proposal that is made to it within the period specified by the notification; and
 - b. Ofcom has had regard to every international obligation of the United Kingdom (if any which has been notified to it for the purpose by the Secretary of State).
6. On 17 December 2009, OFCOM published a notification of the proposed Consent in accordance with section 49 of the Act.
7. OFCOM has considered every representation about the proposed Consent duly made to it.

CONSENT

OFCOM, in accordance with section 49 of the Act and pursuant to condition HH6, hereby gives the following Consent:

1. For the purposes of complying with its obligations under SMP Condition HH6, OFCOM consents that BT shall not be obliged to give 90 days' notice in respect of the proposed price changes included in the Access Charge Change

Notice dated 3 December 2009 as listed in Part 2 of the Schedule to this Consent.

2. For the purposes of interpreting this Consent, the following definitions shall apply:
 - (a) “**Act**” means the Communications Act 2003
 - (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
 - (c) “**Notification**” means the Notification referred to in paragraph 1 of this Consent above, as published on 17 December 2009; and
 - (d) “**OFCOM**” means the Office of Communications
3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has in the Notification as appropriate.
4. For the purpose of interpreting this Consent:
 - (a) headings and titles shall be disregarded; and
 - (b) the Interpretation Act 1978 shall apply as if this Consent were an Act of Parliament.
5. This Consent shall take effect on the day it is published.

Gareth Davies

Competition Policy Director

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

XX January 2010

Schedule

Part 1

1. The market for alternative interface symmetric broadband origination services at speeds up to and including 1 Gbit/s in which British Telecommunications plc has been found to have significant market power.

Part 2

2. BT's proposed new Ethernet rental charges are shown in the table below. The Proposed Prices will become effective on the date this Notification is published.

Service		Current Price £	Proposed Price £
WES Local Access 10 managed	Rental	2,650.00	2,252.50
WES/WEES 10 (Local Reach)	Rental	2,000.00	1,700.00
WES/WEES 10 Managed	Rental	2,300.00	1,761.32
WES/WEES 10 Unmanaged	Rental	2,100.00	1,591.32
WES Local Access 100 managed	Rental	2,650.00	2,517.50
WES/WEES 100	Rental	2,300.00	2,117.42
WES/WEES 100 Opt 1	Rental	3,400.00	3,162.42
EAD Local Access 10	Rental	2,500.00	2,125.00
EAD 10	Rental	4,400.00	3,352.64
EAD Local Access 100	Rental	2,500.00	2,375.00
EAD 100	Rental	4,400.00	4,044.84
EAD 100 Resilient Option 1	Rental	6,800.00	6,324.84
EAD 100 Local Access Resilient Option 1	Rental	6,800.00	6,460.00
EAD 10 Resilient Option 1	Rental	6,800.00	5,392.64
EAD 10 Local Access Resilient Option 1	Rental	6,800.00	5,780.00
ONBS 1000 – per end	Rental	6,960.00	3,891.00
ONBS main link – 1 G	Rental	0.4	0
BES 1 G – 3 year	Rental	-	3,764.67
BES 1 G – 5 year	Rental	-	3,764.67
BES 1 G	Rental	4,137.00	3,764.67
BES 1G extended Reach – 3 year	Rental	-	5,168.89
BES 1G extended Reach – 5 year	Rental	-	5,168.89
BES 1G extended Reach	Rental	5,680.10	5,168.89
BES Daisy Chain – 3 year	Rental	-	3,663.02
BES Daisy Chain – 5 year	Rental	-	3,663.02
BES Daisy Chain	Rental	4,025.30	3,663.02

Annex 6

Ofcom's letter to industry of 11 October 2004

11 October 2004

To BT, Kingston, UKCTA, the 5 MNOs, ISPA, FCS

MICHAEL RICHARDSON

Competition and Markets

Direct line: 020 7783 4157

Direct fax:

michael.richardson@ofcom.org.uk

Consent to reduced price change notice periods

As you will know, providers with SMP are obliged to provide advance notice of changes to prices in wholesale markets, unless Ofcom consents otherwise. The notice period varies from market to market and is generally either 90 days or 28 days. (In retail markets where there is SMP, price changes have to be notified within 24 hours of the change taking effect, so the concept of advance notice does not apply.)

There have been occasions when it has been appropriate to give consent to a reduced notice period, enabling price changes to take effect more quickly than usual. Under the pre July 2003 telecoms regime, Oftel was able to consent to reduced notice periods without consulting interested parties. Under the Communications Act this is not possible, as Ofcom is required to consult for a minimum of 1 month, unless there are exceptional circumstances justifying the use of a shorter period and the proposals do not have an affect on trade between EC Member States. Ofcom is setting out in this letter how it expects to operate under the new regime.

There appear to be a limited set of scenarios when Ofcom might be asked to consent to price changes taking effect more swiftly than is normally permitted.

- Ofcom might direct a provider to alter its prices forthwith, either to offer a price specified by Ofcom or to comply with a formulation, such as a margin squeeze test, under which a range of pricing permutations would be compliant with the direction.
- A price reduction which the provider proposes to introduce at short notice might be considered advantageous to customers (it is much less likely that Ofcom would agree to consult on a price increase being introduced at short notice although, in theory, that is possible).

- The provider may have made an administrative error which needs to be corrected by altering a published price swiftly.

Price changes directed by Ofcom

In the case of price changes which follow some kind of intervention, Ofcom had generally consented (without first consulting) to revised prices being introduced without the usual notice being given. In future Ofcom will generally consult on the implementation arrangements (including a possible consent to a reduced notice period) when it consults on the substance of a direction. Consultation at an early stage should ensure that any issues are addressed and, if appropriate, notice of the price change is given.

Price reductions (and, in theory, increases) which the SMP provider wishes to implement

Ofcom recognises that price reductions are generally perceived to be advantageous to customers and, as such, that there may be an argument that price reductions should be implemented without delay imposed by regulation. However in the circumstances of a wholesale market where a vertically integrated supplier has SMP, the advantages are not so clear cut, and the reasons for imposing an obligation to give advance notice of price changes generally, which were explained in the relevant market review statements, remain valid. Ofcom does not believe SMP conditions should be modified to permit price reductions without notice. Furthermore, the damaging effects of leakage of advance information between the wholesale and retail arms of the dominant operator may be amplified where the wholesale provider is able to introduce price reductions at very short notice. The potential for anti competitive effects is perhaps even greater where the dominant wholesale supplier introduces a "special offer" with limited duration and at short notice. Ofcom will consult interested parties before consenting to early implementation of price reductions, so that their views on the specific case may be taken into account.

In the circumstances of a proposed consent to a waiver of a 28 day notice period, it would not be appropriate to consult on the proposition for 1 month, and unhelpful even in the context of a 90 day notice period. In such cases Ofcom will take into consideration its duties under Sections 3 and 4 of the Communications Act, in particular the promotion of competition, in deciding whether a case is justified. Ofcom also notes that proposals to implement a price change with shorter than usual notice may not be likely to affect trade between member states. The period for consultation may vary according to the significance or complexity of the proposed price change, but in most of these particular cases, Ofcom will consult for 5 working days only, unless there are particular reasons for allowing a longer period. Ofcom will endeavour to adopt a very concise and standardised format for such consultations, to minimise the time which it will take for interested parties to consider the proposition. Ofcom will also aim to consider responses and publish its consent, or a refusal, within a few days of the consultation period ending unless, the nature of the responses received requires more extended analysis.

In the event that Ofcom believes there may be merit in consenting to a reduced notice period applying to a price increase, it will adopt a similar approach.

Administrative errors

Where an SMP provider had made a genuine error in maintaining its price list or in notifying customers of a price change, Oftel generally gave formal consent (without first consulting) to prices being corrected without advance notice being given. Ofcom will conduct a short consultation exercise before consenting to prices being changed without the usual lengthy notice.

Next steps

Ofcom is not planning to consult formally on these new processes, and expects to adopt these from now on. However, if you have any comments on how these systems can be made fairer and more efficient, Ofcom would be interested to read these. Please do not hesitate to let me have your views.

Yours sincerely

Michael Richardson

Competition Policy Manager

Annex 7

BT's proposed Ethernet rental price reductions subject of its waiver request

A7.1 BT's proposed new Ethernet rental charges are shown in the table below.

Service		Current Price £	Proposed Price £	Absolute difference (£)	% Difference
WES Local Access 10 managed	Rental	2,650.00	2,252.50	-397.50	-15%
WES/WEES 10 (Local Reach)	Rental	2,000.00	1,700.00	-300.00	-15%
WES/WEES 10 Managed	Rental	2,300.00	1,761.32	-538.68	-23%
WES/WEES 10 Unmanaged	Rental	2,100.00	1,591.32	-508.68	-24%
WES Local Access 100 managed	Rental	2,650.00	2,517.50	-132.50	-5%
WES/WEES 100	Rental	2,300.00	2,117.42	-182.58	-8%
WES/WEES 100 Opt 1	Rental	3,400.00	3,162.42	-237.58	-7%
E AD Local Access 10	Rental	2,500.00	2,125.00	-375.00	-15%
E AD 10	Rental	4,400.00	3,352.64	-1,047.36	-24%
E AD Local Access 100	Rental	2,500.00	2,375.00	-125.00	-5%
E AD 100	Rental	4,400.00	4,044.84	-355.16	-8%
E AD 100 Resilient Option 1	Rental	6,800.00	6,324.84	-475.16	-7%
E AD 100 Local Access Resilient Option 1	Rental	6,800.00	6,460.00	-340.00	-5%
E AD 10 Resilient Option 1	Rental	6,800.00	5,392.64	-1,407.36	-21%
E AD 10 Local Access Resilient Option 1	Rental	6,800.00	5,780.00	-1,020.00	-15%
ONBS 1000 – per end	Rental	6,960.00	3,891.00	-3,069.00	-44%
ONBS main link – 1 G	Rental	0.4	0	-0.40	-100%
BES 1 G – 3 year	Rental	-	3,764.67		
BES 1 G – 5 year	Rental	-	3,764.67		
BES 1 G	Rental	4,137.00	3,764.67	-372.33	-9%
BES 1G extended Reach – 3 year	Rental	-	5,168.89		
BES 1G extended Reach – 5 year	Rental	-	5,168.89		
BES 1G extended Reach	Rental	5,680.10	5,168.89	-511.21	-9%
BES Daisy Chain – 3 year	Rental	-	3,663.02		
BES Daisy Chain – 5 year	Rental	-	3,663.02		
BES Daisy Chain	Rental	4,025.30	3,663.02	-362.28	-9%