Response by Vtesse Networks to the Consultation opened on 9 October 2009 in relation to a proposed variation to and exemption from BT's Undertakings in relation to FTTP and FIRS

We would like to thank Ofcom for the opportunity to comment on these proposed changes.

Vtesse Networks is currently running FTTC trials in two areas of Cornwall and will extend these trials on a limited basis to FTTP where practical. Subject to a supportive regulatory environment, we are planning to roll out FTTC to a significant number of settlements which constitute a substantial part of the Final Third of the UK which the Digital Britain report identified as those areas where competition alone will not result in the availability of the Universal 2Mbps let alone Super-fast broadband.

The regulation of any form of Next Generation Access is important. It is already the case that BT is unable, due to limited financial resources as a result of both its pension liability and the losses suffered in its Global Services division, to address much more than half the UK in the near term. If the rest of the UK is to be addressed in a timely manner, then regulation should seek to facilitate, and not obstruct, the development of new services and business models which will attract and justify the additional investment needed. The development of a "monoculture" in which BT Openreach defines the base level of services will, we believe, restrict innovation in down-stream services and fail to attract the significant outside investment needed to meet the Digital Britain objectives.

We therefore cannot agree to the concessions sought. We enlarge on this below.

Question 1: Do you have any comments on our analysis as set out in this document, and do you agree with our provisional conclusion that we should agree to this variation as proposed in the legal text in Annex 5?

We do not agree to the concession sought and comment on this below.

Question 2: Do you have any comments on our analysis of the proposed exemption set out in this document, and do you agree with our provisional conclusion that we should agree to this exemption as proposed in the legal text in Annex 6?

We do not agree to the concession sought and comment on this below.

Passive connections have been supplied to telecommunications users since the 1850s[1]. Even after the nationalisation of telegraph and telephone companies pursuant to the Telegraph Act 1868, "Private Wires" were a part of the services offered by the predecessors of BT. EPS 8 and EPS 9 and its successor passive copper services were and are widely used by Local Authorities for DIY DSL before Local Loop Unbundling. Local Loop Unbundling in which other Communications Providers get direct access to the basic components of the BT access network has stimulated the growth in UK broadband take-up, and now involves millions of local loops on which BT has no active equipment.

It is thus remarkable that after 150 years BT claims difficulties with supporting passive connections just because the technology has changed from copper to glass.

In other markets such as Japan and Sweden[2] it has been the access to dark fibre which has stimulated the development of new services from new entrants.

Accordingly, we are disappointed that Ofcom seems to have no regard at all for developing European regulation of Next Generation Access, and has sought to grant BT rights to foreclose entry by other operators at the start of an important market. There can be no doubt that BT enjoys SMP in Ebbsfleet, and will enjoy SMP in any FTTH deployment outside the Cable TV footprint. It is regrettable that Ofcom is seeking to grant concessions to BT before the outcome of the Market 4 study.

We believe that these steps will, in the absence of the appropriate remedies, restrict competition in the longer term, and thereby limit innovation and choice.

As Ofcom knows, the European Commission published its draft guidelines (the "Commission NGA Guidelines") for the regulation of Next Generation Access on 12 June 2009 for consultation, to which we believe Ofcom contributed. As Ofcom is aware, the coming into force of these guidelines have been delayed due to issues surrounding agreement on the suspension of internet access for intellectual property breaches, which have now been resolved. The Commission NGA Guidelines are expected to come into force early in 2010 and are intended to provide ex-ante guidance to save the Commission and the NRAs excessive work after the Article 7 consultations by providing an insight into the Commission's thinking.

We fundamentally object to closed PON deployment by SMP operators. PON and its derivatives were developed at a time when optical transmitters were expensive. This is now no longer the case. PON has been shown in Japan and elsewhere to be anti-competitive because it raises the costs to new entrants, and restricts competition and choice. It is far better to mandate point to point fibre, and if any downstream operator (such as BT) wishes, it can create downstream PON based services by using its own splitters at the appropriate concentration point.
In terms of cost, pluggable optics are now down to under $100 for 2.5Gbps capable of transmission up to 10km, and take-up worldwide of FTTH and FTTC is expected to

[1] See Electric Telegraph Company –v- the Overseers of the Poor of Salford (1855) 11 Ex 181 where telegraph wires were supplied to the railway company for its exclusive use.
[2] For example B2 Bredbandsbolaget http://www.bredbandsbolaget.se/wps/portal/ started in 1998 based on access to Stockholm Municipal fibre.

reduce this further for fixed optics at 100Mbps. The original case for PON has at least been partly undermined.

Furthermore, the Commission NGA Guidelines states that:-

Obligations imposed under Article 16 of Directive 2002/21/EC are based on the nature of the problem identified, without regard to the technology or the architecture implemented by an SMP operator. Therefore the fact of whether an SMP operator deploys a point-to-multipoint or point-to-point network topology should not affect the choice of remedies.

The guiding principle should be that all BT solutions should be constructed on the basis of Equivalence of Inputs. Those inputs should be developed in the first instance and then made available to the downstream businesses of BT and other CPs, and not the other way around.

If, as is now the case with FTTC, BT Openreach constructs a downstream product which could largely be constructed from upstream regulated inputs, but as in the case of GEA FTTC does not do so, it raises the suspicion that the regulated inputs are not fit for purpose from either a cost or operational perspective, or both.

Furthermore, by putting these derived downstream products and services in BT Openreach rather than BT Wholesale, BT is purporting to present these services as "open" and "equivalent" when all that it has done is move the boundaries to encompass services the upstream components of which should otherwise have been made open to all. Whilst the exchange and the LLU copper were opened, the FTTC and FTTP services are closed.

It is regrettable that Ofcom appears to be acceding to this. The current vibrant market in broadband is largely as a result of other CPs access to al the upstream components in the local exchange and between the exchange and the end-user. BT is seeking to reduce or remove the access to the equivalent components of FTTC and FTTP by moving the service boundaries.

In relation to Ebbsfleet, we see no reason why this should not be made an open access fibre site. Are the ducts already full in Ebbsfleet? If so, why, and if not, why are they not made available to other CPs, or more fibre installed and made available? If there is no demand, it will have little or no impact on BT. If there is demand, then it demonstrates that opening access increases choice.

Again, the monopolist seeks to imply that its services operate at an elasticity of 1 to justify keeping the infrastructure closed, and thus access to other operators would reduce the size of the pie and undermine the investment case. A perfectly efficient monopolist is an oxymoron. This same argument has been used repeatedly since prior to 1984 in international, long distance and local access and has been shown to be unsustainable.

There is little justification on the basis of the cost of deploying additional infrastructure. For example, BT's blown fibre technology[3] is well capable of providing substantial densities of fibre. BT itself has standardised on installing 4 fibre bundles

[3] See http://www.emtelle.com/?id=225 for more details

to all business users of fibre, as the blown 4 fibre bundle costs very little more to install than a 2 fibre bundle.

Furthermore, we would remind Ofcom of the Commission's memorandum on NGA regulation[4], in which it states:-

Why is the deployment of multiple fibre lines important?

With Multiple fibre FTTH, an investor deploys more fibre lines than needed for its own purposes in order to sell access to the additional fibre lines to other operators. The deployment of new networks provides a unique opportunity to develop long-term sustainable infrastructure-based competition. Multiple fibre deployment costs marginally more than single fibre infrastructure and will from the outset allow for infrastructure competition and consumer choice. Multiple fibre deployments will also preclude operational difficulties of sharing one access line between several operators, as is still experienced today for copper loop unbundling (10 years after the first unbundling regulation was adopted). In contrast to single line unbundling, multiple fibre allows immediate access to the end-user (no unbundling procedure) and full independence between the operators to provide high-speed broadband offers and to compete on the retail market.

The Commission NGA Guidelines state:-

19. Where the SMP operator deploys FTTH, NRAs should, in addition to the above remedies, mandate unbundled access to the fibre loop. Such remedy should be accompanied by appropriate measures assuring co-location and backhaul. Access should be given at the most appropriate point in the network, which is normally the Metropolitan Point of Presence (MPoP).

We therefore ask that Ofcom complies with the Commission NGA Guidelines.

FIRS

In relation to FIRS we object to the principle that BT Openreach provides an end-to-end service in this way, and suggest this is passed to another division of BT that deals with end customer applications, such as BT Vision. We think it important that BT Openreach remains strictly a provider of services to downstream businesses, including other parts of BT. In particular, as we understand the description of FIRS, BT Openreach is granting to itself access to the underlying passive infrastructure for the construction of a proprietary analogue service (see para 4.5) whilst excluding other companies from access to this same passive infrastructure, in breach of the principles of competition law. This is particularly objectionable whilst BT Openreach claims, as part of its submissions seeking exemptions from the Undertakings in relation to FTTP that access to this passive infrastructure is not economically or operationally practical.

We refer to para 1.10 in which Ofcom is not seeking passive remedies, as the form of these is unclear. Furthermore in 3.30 it says:-

[4] MEMO/09/274 Date: 12/06/2009

In addition to the estimated additional costs, BT also argues that separation of responsibilities between its divisions for passive components and active electronics within BT could lead to increased risk of disruption to end-users' services, and that the resulting unsatisfactory end-user experience could reduce take-up and increase churn.

And yet in the diagram in Annex 6 there is a boundary between the optical connector, and the ownership of the end-user equipment. This has required a technical (and probably a commercial) boundary to be created. Whilst it is unclear from the diagram in Figure 1 what is the precise function of the ONT – the termination on the customer's premises – para 3.24 says:

Further, we recognise that there would be increased systems development costs associated with establishing a transactional boundary for passive components, either between different parts of BT or between BT and other Communications Providers.

But this appears to have had to have taken place for FIRS.

If BT Openreach were to wish, for example, to provide wholesale MPEG 2 or 4 Freeview streams, then these should be made available to other CPs on the same terms and conditions. We would, for example, be interested in making these available for our trials in Cornwall.

Finally, we object to the level of redaction in the consultation in relation to BT costs. Either these numbers are subject to external scrutiny, or they should not be admissible. It is one of the principles of the European framework of telecommunications regulation that there is a high degree of transparency to confirm that the decisions taken by NRA are objectively justifiable. It is in BT's gift to make these public. It is, we understand, using certain of the restrictions in relation to information granted to it in the Communications Act 2003 and its predecessor.

If BT is not willing to make this information public, it clearly raises significant issues. The products to which they relate should be cost oriented under the SMP remedies and so why are the costs which make up these components not being made public? Without the costs being published, there is no independent scrutiny of the case being made.