UK Competitive Telecommunications Association

Response to Ofcom's consultation on its review of the wholesale broadband access markets, 2006/7

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UKCTA welcomes the opportunity to respond to this important consultation.

Individual CPs will be making their own responses; the UKCTA response is limited to a few specific issues.

A. ABSENCE OF PRICING OBLIGATIONS

Ofcom's proposals for regulatory remedies shy away from any explicit obligations regarding reasonable pricing for Markets 1 and 2. This is at odds with the finding of SMP and in contradiction with the proposals for symmetrical broadband access which have cost orientation obligations and may become subject to charge controls in the future. UKCTA is of the view that both symmetrical and asymmetrical broadband services need consistent regulatory treatment.

We are concerned that Ofcom is proposing to modify condition EA1 to exclude an obligation to provide services on fair and reasonable charges. Condition EA1.2 currently in force reads:

> **EA1.2** The provision of Network Access in accordance with Condition EA1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

Ofcom proposes to replace this by:

> **EA1.2** The provision of Network Access in accordance with Condition EA1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, and conditions (not including charges) and on such terms and conditions as Ofcom may from time to time direct.

Ofcom's logic appears to be that, since there is no basis of charges (cost orientation) condition, it would be inconsistent to impose any constraint on BT's charging. We cannot see that this would give rise to any inconsistency in practice, since cost-orientation has a more specific meaning than reasonableness, and there is no precedent (so far as we are aware) for a reasonable charges obligation being used to achieve cost-orientation 'through the back door'. We believe Ofcom's concern is unnecessary.

Furthermore, the 'reasonable charges' obligation has served a useful purpose in the past in allowing Ofcom to impose reasonable charges for ancillary services like migrations, where unreasonable charges could have caused detriment to competition or consumers. For example, Ofcom made a direction concerning ADSL Broadband Access Migration Services in August 2004 which required BT to reduce the charge per broadband migration to no more than £11. BT had previously been charging £50 per migration and £35 per IPStream regrade, which Ofcom found to be excessive/unreasonable and contrary to the interests of consumers and competition. Given BT's continuing position of SMP in Markets 1 and 2, it could continue to use migration charges as a means of restricting the growth of competition, and without this clause Ofcom's powers to prevent such unreasonable behaviour would be severely limited.

Looking to the future, we are concerned that issues may arise in the context of BT's 21CN rollout where a reasonable charges obligation could be vital to minimise the incentive for abusive behaviour on BT's part. Although BT's most recent proposals for 21CN place greater emphasis on 'voluntary migrations', it is likely that a significant proportion of customers will remain on IPStream and Datastream at the point where BT wishes to retire these platforms. It is therefore inevitable that there will be a degree of 'forced migration', and disputes may well arise over the reasonableness of the terms, conditions and charges associated with these forced migrations. Although EoI may provide some protection to external customers, it will only really constrain BT's behaviour in market segments where BT is using the same input products, in the same way, as external ISPs. Business ISPs in particular are likely to be exposed to the risk of unreasonable charges. We believe a reasonable charges obligation in EA1.2 is vital to minimise abuse incentives for SMP players and to provide a legal basis for Ofcom to determine disputes.

Transitional provisions

Ofcom proposes a notice period to enable parties to seek alternative arrangements for the supply of services that are currently offered under regulation. As currently proposed, this notice period does not provide a glide path to deregulation and is wholly inadequate.

B. BUSINESS SERVICES

Retail Market Definition

In the consultation document, Ofcom concludes that "residential and business broadband internet access services are in the same relevant economic market". Ofcom explains that there is a chain of substitution between products of a higher quality sold at higher prices and products of a lower quality sold at lower prices.

We accept that there is no clear break in the chain of substitution at the lower value offering level where, for example, non-critical business usage such as occasional home working is supported using services that are similar to those used for residential internet access. We do insist, however, that there is a clear break in the chain of substitution between residential/business internet access and provision of 'high end' business broadband services. Businesses require 'high end' asymmetric broadband connectivity for a range of data connectivity requirements (such as links between branches, suppliers and customers, and applications such as those which enable secure data access and transfer). These services have very different service characteristics when compared to the typical retail offer that provides usage limitations, high contention ratios and direct routing to Internet.

Firstly, uncontended ADSL services can offer users guaranteed bandwidth, so speed is never impacted. This enables businesses to use ADSL for applications such as voice, the quality of which could not be guaranteed on contended ADSL. The price of such a service might range from £150 to £600 per month, depending on the downstream bandwidth.

Secondly, business ADSL services can be privately routed to connect into corporate MPLS VPNs (as distinct from IP SEC/ tunneled VPNs) offering reliability and security similar to that of a leased line network and differing from normal broadband internet connectivity in the following ways:

- **Uses:** VPNs are used not just for internet access, but for secure data sharing and other applications, such as voice, which require high-end QoS and prioritisation capability.

- **Characteristics:** data is transferred via secure connections, rather than over the internet, thus removing the need for firewalls.

- **Pricing:** VPNs are priced at a relative premium and are not marketed as an alternative to ordinary broadband internet access.

These differences in the retail market translate into substantial differences at the wholesale level. This leads to the conclusion that there are in fact two separate wholesale broadband markets: one supporting the provision of plain Internet access; and another used in the provision of business connectivity services. The two distinct wholesale markets reflect the differences between the business and residential retail product markets: <u>residential wholesale asymmetric broadband</u> which is used as a wholesale input for residential retail broadband internet services (cable is part of this wholesale market), and <u>business wholesale asymmetric broadband</u> which is used for business retail (voice, data and internet) services (cable is not part of this market). We attempt to define this further below.

The market power analysis must be performed in a distinct manner for both product markets. For the residential market, cable is a substitute and needs to be factored in. In the wholesale market cable is not a substitute and needs to be excluded. Wholesale inputs for residential and business applications are, in the main, distinct.

Whereas self-supply by LLU providers might constitute market share in the wholesale residential broadband market, it may or may not be appropriate to include LLU self-supply in the market share assessment for the wholesale business broadband market, depending on the characteristics of the "notional" wholesale product which is self-supplied, and indeed depending on the features of the retail products the self-supply is ultimately used for.

In its 2005 market review[1], OPTA, the Dutch regulator, found that providers on the retail market for "low quality" broadband access had sufficient wholesale alternatives, such as cable companies and LLU operators, and were therefore not depending on a wholesale broadband offer by KPN. KPN was therefore found not to have SMP in this market. However, KPN was found to have SMP in the wholesale market for "high quality" broadband access, largely due to the fact that only KPN offered national coverage.

Wholesale Market Definition

Whereas there are geographic variations in the provision of wholesale and retail mass market broadband access, there is a national market for the provision of high-end ADSL products.

There are a number of characteristics which differ between wholesale products suitable for business broadband and those suitable for residential broadband internet access. These characteristics vary somewhat between those offered in a "20th century" environment, and those delivered over next generation networks.

One test to determine which wholesale market a product falls in could be based on the contention ratio, with the 'high end business' market being up to and including 5:1 contention ratio and residential broadband being above 5:1 contention ratio. This is the model adopted in the Netherlands. As in the Netherlands, the SMP provider in the UK should be required to offer such a product on reasonable terms and conditions (which should include a service level agreement appropriate to a business-grade product).

Other possible definitions of high-end business broadband that might be appropriate for an NGN environment are as follows:

1) A product has one or more of the following properties:

- Guaranteed minimum upstream and downstream throughput of at least 256kbps[2]
- Guaranteed maximum latency of no more than 150 ms
- Guaranteed maximum jitter of no more than 10 ms
- Guaranteed maximum packet loss of no more than 1%[3]

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[1] OPTA decision on wholesale broadband access dated 21 December 2005 (OPTA/BO/2005/203432). It should be noted that, while the markets are not precisely the same, the Netherlands has extremely wide cable coverage – moreso than the UK - suggesting that the arguments for this kind of obligation are likely to even stronger here *a fortiori*.

[2] Business voice services require a certain amount of symmetric bandwidth. Fixed rate ADSL data throughput in the UK is set at 256 kbps upstream, so *guaranteed* throughput of 256 kbps downstream should be in the high-end business product market.

[3] For the avoidance of doubt, within this market there should be a range of products with differing QoS levels including a guaranteed zero packet loss service.

2) A product having a minimum assured rate (MAR) greater than 200 kbit/s and elevated best effort class.

Under the 2004 leased lines market review, BT is required to supply, on fair and reasonable terms, any product falling within the TISBO (traditional interface symmetric broadband origination) market. This includes services provided using SDSL technology, be they contended or uncontended. We suggest that a similar obligation could be placed on BT in relation to high-end ADSL products, irrespective of BT's current wholesale product range.

Importance of Merchant Market

Ofcom acknowledges the absence of a competitive merchant market for wholesale broadband access currently or even prospectively. Ofcom does not believe that a merchant market is essential in order to provide a competitive retail market, since it believes that the "Principal Operators" are either already providing business services, or have the capability to enter the market without difficulty. UKCTA disagrees with Ofcom. There is limited provision of business grade services by LLU operators. Until this changes UKCTA believes that the availability of third party wholesale broadband (commercially provided or regulated) will prove a crucial tool for the protection of business users. This possibility appears to have been overlooked by Ofcom due to the exclusive focus on Internet access markets. This omission and its consequences are discussed in the following points:

- Ofcom have provided no evidence of the extent to which LLU operators are currently providing uncontended broadband and broadband private circuits to support MPLS VPNs. It is important to understand what their market share is in order to predict the impact of deregulation of Market 3. Similarly, Ofcom has made no assessment of the contribution WBA-based services make to competition in business services.

- Ofcom have provided no assessment of what would be required for a residential focussed LLU operator who does not currently have a business division to introduce new systems, processes, human resources and technical or network modifications in order to supply, maintain and service these high-end ADSL products for demanding commercial users. In order to support business applications, residential providers might need to invest to upgrade their networks; such investments (if required) would need to be justified even given the relatively low density of business customers at each MDF.

- LLU operators do not have national coverage, nor do they have blanket coverage in Market 3. A multi-site customer with a branch office within Market 3 but outside of an LLU operator's coverage area may have no choice but to use BT GS as its service provider if resellers (and LLUOs) were unable to purchase ADSL in Market 3. It is worth noting that OPTA considered the potential for market entry (new entrants in the retail market data communications services would require national coverage) a key factor in their decision making.

- The absence of third party WBA in Market 3 would prevent WBA-based providers from bidding for customers whose sites are principally in Markets 1 and 2 but some of which are in Market 3. This would strengthen BT's position in the retail market in all geographic areas.

- BT has a much higher retail share in the high end business market (likely to be similar to BT's share of retail low bandwidth leased lines which is around 70-80%4). Assuming this retail share is supported by BT wholesale products, and assuming BT Wholesale also has a significant share of the non-BT retail market, BT share of the wholesale market could easily exceed 90%. This suggests strongly that competition from LLU – whether self-supply or merchant market – is unlikely to constrain BT's behaviour in this market.

Conclusion

We do not agree with Ofcom that an unbroken chain of substitution exists between residential internet access offers and high-end business broadband offers. There is no clear evidence that future product developments will diminish the differences between the corporate and residential offers. This supports the conclusion that a distinct business market exists in the UK.

We believe Ofcom should find that there is a national market for wholesale 'high end' (uncontended or low contention) business broadband, distinct from other broadband markets, and that BT has SMP on this market, and impose appropriate remedies. This could be done either:

within the wholesale broadband market review, by defining a new national market for high end business broadband; or

within the business connectivity market review (aka leased lines market review), by including high end business broadband within the low bandwidth traditional interface terminating segment market.

In our view, the products in question may fit more logically in the BCMR, but our main concern is that they should not fall between the cracks in Ofcom's market review process. Therefore we believe it would be incorrect for Ofcom to exclude them from the WBAMR without first having made a positive decision to include them within the BCMR.

If Ofcom decides to follow the WBAMR route, we believe that the conditions imposed should be the same as those proposed for the low bandwidth traditional interface terminating segment market.

We strongly urge Ofcom to reconsider the position adopted, and adapt it to ensure that the competitive provision of business services continues in the UK market and

[4] Ofcom's BCMR says BT had 72% of retail low bandwidth alternative interface retail market in 2004 and 78% of low bandwidth traditional interface retail market in 2003

that business consumers of these services are not severely disadvantaged by lack of choice, price, service differentiation and importantly service disruption due to the regulatory framework. The competitive provision of business services has been a strong feature of the UK and provided UK business consumers with quality, innovation and choice.

C. GEOGRAPHIC MARKET ANALYSIS AND NGA BLACK HOLES

UKCTA has concerns about some aspects of geographic market definition. The Ofcom approach is quite new and untried; we would therefore urge Ofcom to proceed cautiously and keep a close eye on developments. UKCTA is particularly concerned about the prospect of BT's NGA roll-out falling into Market 3 by default. It seems to us almost certain that BT's NGA roll-out will be a monopoly – certainly this seems likely in Ebbsfleet. We also doubt whether regulation today will support competitive entry through upstream products in the wholesale local access markets within an NGA footprint.

We believe that this problem can be dealt with by using a geographic market definition which relies on the number of principal operators as the defining characteristic, and goes on (in respect of BT's existing copper network) to specify which exchanges meet the definition. NGA roll-out would simply be allocated to a geographic market as and when it is built; if, as we expect, it is a monopoly, it would automatically fall into Market 1.