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### ***Review of the wholesale broadband access markets 2006/2007***

Kingston Communications (Hull) Plc (Kingston) welcomes the opportunity to respond to the consultation regarding the review of the wholesale broadband access markets (WBAM) 2006/2007

As well as being the incumbent operator in the Hull area, Kingston has significant presence in the rest of the UK where we operate under the Affiniti, Eclipse and Mistral Brands supplying broadband to both residential and business customers.

We have based our comments around the questions listed in the consultation document.

Kingston supports and endorses the submission made by UKCTA. However the comments made in this submission should be regarded as having precedence over any aspects of the UKCTA response if there is any conflict apparent.

#### Executive Summary

Kingston is not convinced that there is any need for *ex ante* regulatory intervention in the "Hull area".

However there is a need for continued regulatory intervention in the rest of the UK, in all 3 Markets identified by Ofcom.

There is a strong emphasis in the EU framework on the need to minimise *ex ante* regulation and to use competition law remedies where possible. In its Recommendation on relevant markets, the European Commission concludes that *ex ante* regulation is justified where:

- there are high and persistent barriers to competition and
- there is no effective competition and the market is not tending to effective competition and

- competition law alone is not sufficient to remove the barriers to competition or restore effective competition.

The Recommendation notes that this analysis needs to be dynamic and should not concentrate purely on current market characteristics such as the number of competitors. Competition is not equal to the number of competitors active at any particular point in the value chain. Regulation can only be justified if there is a bigger problem that needs addressing.

It is Kingston's opinion that within the Hull area, imposing regulatory remedies that require continuous administration and have had little effect in encouraging more Service providers to operate in Hull is unduly burdensome and takes resources away from improving our services to our End Users within the Hull area.

However, in the rest of the UK, while it is true that the number of competing Service Providers Indeed Kingston asserts that the supply of wholesale broadband access is limited to only 2 or 3 players, and not all of these are able to offer service UK wide, as Kingston's requirements dictate. Therefore, until such time that competitive pressure alone forced BT to offer Broadband access on reasonable terms and conditions, Kingston suggests that it would be premature for Ofcom to remove regulatory remedies.

We have based the remainder of our comments around the questions listed in the consultation document.

*Question 1 Do respondents consider that the regulatory remedies put in place in the 2003/04 market review were effective in counterbalancing BT's and Kingston's SMP in the relevant markets?*

In regard to Kingston we believe that the measures put in place were not necessary.

It is true to say that Kingston enjoys a strong market position local to Hull, and if this were abused Ofcom would have a strong case for intervention. This abuse has not taken place, we suggest therefore that there has been no market failure and no justification for any further ex ante regulatory intervention.

The regulatory measures imposed on Kingston are, we suggest, damaging. In part because of Kingston's small size. Such harm could inhibit Kingston's ability to invest in the provision of new services in the "Hull area" and, in the long term, prevent Kingston continuing to act as universal service provider.

Furthermore, Kingston is obliged under current regulation to develop wholesale products on reasonable request. It is still unclear what constitute "Reasonable" in this context as, on a number of occasions, Kingston has undertaken product development only to be informed after much expense has been incurred, that the wholesale product is not actually required. This is a waste of funds that could otherwise have been spent on developing new and better products for our customers within Hull.

In regard to BT, no, not entirely. The regulatory remedies put in place by Ofcom after the last Market Review went some way to address the bottlenecks that were apparent in securing wholesale broadband access products, however without further intervention by means of the outcome of the Strategic Review of Telecoms where BT made a number of legal Undertakings and the creation of OTA, then it is highly likely that the current Market would look very different.

*Question 2: Do respondents agree with Ofcom's definition of the retail asymmetric broadband internet access market in the UK?*

Ofcom proposes to define the market as being “*asymmetric access and any backhaul as necessary to allow interconnection with other Communications Providers*”.

Firstly, Kingston would like to bring to Ofcom's attention the increasing requirement for higher bit rate upload speeds, both from business and residential consumers. At this time we believe that it is still appropriate to keep the delineation between asymmetric and symmetric broadband markets, but this may not be the case when Ofcom is next conducting market reviews.

Secondly, Kingston requests clarification on what Ofcom considers “any backhaul as necessary to allow interconnection”.

We are aware of BT wholesales proposal for a WBC product on 21CN which requires connection to 20 aggregation points in order to obtain national coverage. The downstream product (Wholesale Managed Broadband Connect, WMBC) will be available to provide access to customers not served by those aggregation points. This WMBC product would appear to fall within the ERGs definition of bitstream (rather than resale) Therefore we would be interested in Ofcom's views as to whether WMBC and WBC would have to be provided as regulated products, and under what market they would be considered.

*Question 3: Do respondents agree with Ofcom's definition of the wholesale broadband access product market?*

As this market Review is concerned solely with the supply of WHOLESALE broadband access service, therefore in order to apply the most appropriate remedies it would seem reasonable to consider all the wholesale broadband access products available.

Ofcom has identified that in a number of BT exchanges there are 4 or more LLU operators, not including BT that offer broadband access services within the exchanges local coverage. However not all of these LLU Operators offer wholesale services. Indeed in many cases the only service available in exchanges occupied by LLU providers is their retail products – available to End-Users but not other Service Providers. In these cases, the only wholesale provider within that exchange area is BT.

Therefore Kingston cautions Ofcom against using their proposed list of Markets and instead, for the purposes of reviewing the Wholesale broadband access market using a definition that includes the availability of fit-for-purpose wholesale broadband services,

rather than relying on an arbitrary figure that has no direct relation with the availability of such services.

*Question 4: Do respondents agree that the Hull area should be defined as a separate geographic market on the basis of the presence of common pricing constraints?*

Kingston accepts that, under the EU regulatory framework, the “Hull area” is a distinct geographic market for some services. There is therefore a need for Ofcom to review separately the degree of competition in the products and service markets of the “Hull area” which are susceptible to ex ante regulation. In undertaking this review and in deciding on what obligations to impose Kingston asks Ofcom to recognise the significantly different circumstances and factors that affect Kingston. In particular it is important to take account of the fact that:

- Kingston is many times smaller than BT. This small scale means that it is much more difficult for Kingston than BT to exert market power. So the obligations placed on Kingston should be proportionately less
- Kingston delivers generally superior service to BT in terms of price and quality and it is this which helps preserve Kingston’s substantial market share in the retail fixed markets of the “Hull area”. In our view it would be wrong to impose obligations through the market review process simply to reduce Kingston’s market share. This could harm Kingston’s ability to continue its investment programme without leading to improvements in the price and quality of service enjoyed by end users in the “Hull area”.
- Kingston is already very constrained by the threat of competitive entry by other much more powerful players into the “Hull area” markets. Providing the contestability of the “Hull area” markets is preserved by ensuring satisfactory access to relevant wholesale services such as WBAM and unbundled local loops, there is little need for additional regulation on Kingston.
- in markets where Kingston’s status as an SMP operator is debatable it is important, when deciding on proportionate obligations, to keep in mind that:
  - lack of ex ante regulation is less important to the development of competition in the “Hull area” than in the rest of the UK
  - Kingston’s small size means it is harmed more by regulatory intervention than BT. Such harm could damage Kingston’s ability to invest in the provision of new services in the “Hull area” and, in the long term, to act as its universal service provider.

In addition it is important that Ofcom gives Kingston the right incentives for investment in new and innovative services in the “Hull area”. This is particularly relevant to the markets

examined in this review, where Kingston has made significant investment and should be allowed to continue to provide retail and wholesale services on a commercial basis with few, if any, ex ante regulatory constraints.

*Question 5: Do respondents agree with Ofcom's methodology for assessing geographic variations in the competitive conditions in the wholesale broadband access product market?*

Kingston is concerned that Ofcom's methodology for assessing geographic variations is not sufficiently technologically neutral to take into account the different technologies that may be used to provide wholesale broadband services.

The use of BT's local exchanges as a geographic unit seems to rely on a supposition that LLU is the only driver in the changing conditions in the wholesale broadband access market. While Kingston agrees that it LLU has made inroads into increasing competition within the wholesale broadband access market, care should be taken not to overstate its ongoing importance and not to foreclose the use of alternative technology within the same geographic locale.

Moreover, focussing on BTs local exchanges as the natural geographic unit with which to examine competition within the UK, only goes to demonstrate the ongoing dominance of BT throughout the whole of the UK. BT already vary their prices of IPStream and DataStream based on LLU competition in the area. It would seem that Ofcom are encouraging BT to "game" the regulatory structure by using BT's Network architecture as the market boundaries.

Kingston disagrees entirely with Ofcom's assertion that the imposition of remedies to address a finding of SMP is inevitably going to be based on network architecture: What facts are Ofcom basing this assertion on? It seems to Kingston that Ofcom has decided to use the easy, short term option rather than using a sustainable geographic unit that will take into account the use of alternative technologies such as radio based solutions.

Furthermore, using LLU as an example, a wide-scale rollout of LLU takes much money and considerable planning. What would happen if a two tier regulatory approach is implemented and different regulation were imposed on a companies future planned exchange occupation, changing the metrics that made occupation of that exchange economical for that particular LLU operator? The effect would be that in that particular exchange, further competition would have in fact been inhibited.

Kingston is also extremely alarmed by Ofcom's apparent focus on future LLU roll-out rather than existing wholesale broadband competition in its assessment of geographic variations within the WBAM. This focus, in Kingston opinion, leads to presumptuous findings that are unable to be substantiated, and therefore Ofcom should reconsider their methodology entirely.

*Question 6: Do respondents agree with Ofcom's analytical framework for defining geographic markets in the UK (excluding the Hull area) and the conclusions reached?*

Kingston has a number of concerns regarding the approach proposed to define geographic markets in the UK.

Ofcom's proposals regarding the definition of the geographic boundary of the WBAM is, in Kingston's opinion unlikely to be practical or sustainable.

Firstly BT's exchanges serve individual premises, not necessarily geographic areas. There are likely to be many instances of the same street being served by more than one exchange. This in turn could mean that the exchanges serving that street fall under different market definitions, thus attracting different regulatory remedies and different opportunities for competition to develop.

Secondly, with the impending implementation of BT's 21CN, it is likely that BT will attempt to assimilate its local exchanges in order to reap the maximum benefit from the new technologies, thus rendering the definitions as proposed worthless.

Thirdly, while we appreciate Ofcom needs to attempt to incentivise WBAM competition in rural locales, Kingston asserts that the WBAM is not sufficiently developed nationally to warrant carving up the country.

Ofcom appears keen to maintain BT's dominant position in the UK by defining market boundaries using BT's infrastructure as a yardstick.

Whilst it is true to say that competition is developing in the WBAM, so far there are few wholesale broadband providers who, even in Market 3 as is currently defined, are offering a robust and economical wholesale product.

*Question 7: Do respondents agree that Ofcom has used relevant criteria for assessing SMP in the markets defined?*

Kingston agrees that market growth and market share, barriers to entry and expansion, economies of scale and scope and countervailing market power are valid criteria for assessing SMP in the markets defined, but not future potential market shares.

Kingston is extremely concerned of this "crystal ball" approach to the assessment of SMP as the WBAM is still immature. Therefore to base SMP findings on what Companies say they plan to do in the future is, in Kingston's opinion, extremely risky.

Business plans are constantly reviewed to meet the day-to-day changes that occur in this fast paced industry. So what was thought to be a 100% certainty one day could be a complete no go the next.

Kingston therefore urges Ofcom not to use future potential market shares as a criteria for the assessment of SMP.

*Question 8: Do respondents agree with the approach set-out by Ofcom for its market power assessment in the Hull area and its conclusion of finding Kingston to have SMP?*



Ofcom's analysis of the market rightly identifies that Kingston has a very strong market position. It would, however, be wrong to conclude that such a position is the result of anti-competitive behaviour, or that it reflects an enduringly high barrier to market entry. We have noted elsewhere in our response to other market reviews that the "Hull area" is relatively small, and that barriers to market entry are not particularly significant. We would not fundamentally quarrel with the overall analysis that we currently possess some degree of market power in broadband internet access. Where we do completely diverge from Ofcom is as to whether or not this position is likely to endure, and whether it justifies any ex ante regulatory intervention.

Ofcom's economic analysis supporting its supposition starts from the presumption that the "Hull area" is an entirely separate market with little if any connection with what happens in the rest of the UK. This is absurd: Kingston Communications has to pay due regard to what happens elsewhere in the UK just as every other operator in the market does. To do otherwise would lead to unacceptable customer dissatisfaction and would act as encouragement to short term local market entry by other operators.

In general it is less important to impose ex ante regulation in the "Hull area" than it is in the rest of the UK. Without ex ante regulation of BT, rivals will not enter the UK market. But once there, it is a simple matter for them to extend their activities to the "Hull area" if they choose to do so. If they do choose to enter the "Hull area" market and find anti-competitive barriers to entry then they can, ex post, seek remedies from the authorities. Therefore lack of ex ante regulation means that the development of competition in the "Hull area" is, at worst, delayed but not prevented. We believe it is vital that Ofcom keep these features of Kingston's position in mind when considering what obligations to impose.

This is particularly true in this instance since a number of market entry options are already available. The use of FRA, WiMax and Wi-Fi technologies, in particular, offers new and very cost effective options for competitive internet access provision that does not rely at all on use of the Kingston network. Whilst we would accept that they are relatively new, our analysis of the costs involved in their deployment for our own use suggests that the costs to cover the Kingston area are relatively small. These costs are also commensurate with the market opportunity in broadband internet access, both in terms of the number of residential and business users and the likely levels of revenue that can be generated per user. Hence, the broadband internet access market is fully contestable on an end to end basis. Ofcom should note the recent market entry of Azzurri Communications into Hull with an FRA based service that supports this contention

The facts are that Kingston offer a range of existing wholesale DSL/ATM/IP services that allow competition at the retail ISP level for "Fast Internet access". Coupled with the low cost of deployment of the alternative radio access technologies described above, and the similarly low cost of LLU access, this suggests that the market is sufficiently contestable not to justify additional burdensome ex ante regulation. Ofcom has not undertaken sufficiently rigorous market analysis specific to the "Hull area" to suggest otherwise.

*Question 9: Do respondents agree with the approach set-out by Ofcom for its market power assessment in Market 1 and its conclusion of finding BT to have SMP?*

The finding yes, the approach excepting Kingston's earlier comments regarding our belief that using future potential market share is wrong, yes.

*Question 10: Do respondents agree with the approach set-out by Ofcom for its market power assessment in Market 2 and its conclusion of finding BT to have SMP?*

The finding yes, the approach excepting Kingston's earlier comments regarding our belief that using future potential market share is wrong, yes.

*Question 11: Do respondents agree with the approach set-out by Ofcom for its market power assessment in Market 3?*

Again, Ofcom has placed great emphasis on looking forward to what might be, rather than what the state of play is at the present. If Ofcom are reviewing the WBAM now, then they should make the analysis using present conditions, not what might happen a few months or a year down the line.

BT still have SMP in market 3 and will remain to do so until there is widespread availability of alternative wholesale products, which is clearly not currently the case.

*Question 12: Do respondents agree with Ofcom's proposed regulatory remedies on Kingston in relation to the market for wholesale broadband access in the Hull area?*

The medium term future will see substantial changes in the market conditions under which Kingston operates. In proposing ex ante regulatory remedies under the new framework, it is vital that Ofcom pay due regard to such changes. In particular, Ofcom must provide for incentives for Kingston to invest in innovative services

Kingston does not consider that the proposed remedies are necessary or appropriate. In order to avoid the imposition of the regulatory burden that the proposed remedy would represent, we would propose that a simple, alternative remedy regime would suffice:

- Kingston should be under an obligation to publish the prices its charges for WBAM both to itself and other undertakings. No advance notice of price changes would be required.
- Kingston should be obliged to supply IPLine (or equivalent services) on a non-discriminatory basis to Altnets and ISPs.

These two simple remedies would make it far easier for Ofcom and Kingston's downstream competitors to detect any anti competitive behaviour by Kingston. This would both deter such behaviour in the first place and make it easier for Ofcom to prosecute Kingston should it chose to behave in such a manner.

We also accept that there may be a justification for an obligation to supply some form of wholesale service to ISPs and their intermediaries, in order to ensure continuing



competition at the ISP level, and would be happy to discuss with Ofcom how this should be secured. This does not, however, require any additional obligations with respect to providing Network Access on reasonable terms, publication of a reference offer, or notification of variations in terms and conditions and technical information in advance.

*Question 13: Do respondents agree with Ofcom's proposed regulatory remedies on BT in relation to the market for wholesale broadband access in Market 1 and if so are there any particular implementation or compliance issues that you believe needs to be considered?*

Remedies: yes.

Implementation and compliance issues; Kingston has concerns over pricing and migration issues. These, we believe should be dealt with in an open and transparent fashion, with care taken to ensure that there is consistency in implementation across product boundaries.

*Question 14: Do respondents agree with Ofcom's proposed regulatory remedies on BT in relation to the market for wholesale broadband access in Market 2 and if so are there any particular implementation or compliance issues that you believe needs to be considered?*

Remedies: yes.

Implementation and compliance issues; Kingston has concerns over pricing and migration issues. These, we believe should be dealt with in an open and transparent fashion, with care taken to ensure that there is consistency in implementation across product boundaries.

*Question 15: Do respondents agree that the alternative broadband technologies referred to in this annex are unlikely to be sufficiently widespread or utilised within the period of this review to constrain prices in the market for wholesale broadband access services?*

Firstly, Kingston is surprised at the apparent inconsistency in Ofcom's approach – limiting appraising the use of alternative technologies within the period of the review rather than a “forward looking approach” that has been prevalent in other areas of the Review. Never-the-less, and as Kingston has cautioned against looking too far forward when reviewing this market, Kingston does agree with Ofcom that at present alternative broadband technologies will not be used to supply wholesale broadband access services. Nor are they likely to be in the near to medium future.

Should you have any questions relating to this submission, please don't hesitate to contact me.

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