

Dougal Scott  
6<sup>th</sup> Floor  
Office of Communications  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Head Office  
Inveralmond House  
200 Dunkeld Road  
Perth  
PH1 3AQ

Our Reference:  
Your Reference:

Telephone: 01738 456000  
Facsimile: 01738 456415  
Email:  
Date: 12 August 2005

Dear Dougal

### **Consultation on Undertakings offered by British Telecommunications plc (BT)**

I write with our response to the above consultation. In this letter, we explain our interests in the telecoms market and then set out our main comments on the proposed Undertakings. More detailed points are contained in the attached appendix.

Scottish and Southern Energy (SSE) is primarily an energy company, with subsidiary companies operating throughout the electricity supply chain in Great Britain from generation to final supply to end-customers. Three companies in the SSE Group have a direct interest in the telecoms market: SSE Telecommunications (SSET) and Neos Networks Ltd (Neos) own and operate communications infrastructure, while SSE Energy Supply Ltd (SSEESL) provides a telephony service to energy customers through CPS arrangements. SSE also has an interest in the telecoms review as a purchaser of telecoms services for its corporate needs, including those related to the support of its electricity networks.

We recognise that Ofcom has undertaken a great deal of work, along with BT, to firm up the proposals on the Access Services Division (ASD) and other related matters that were first suggested by BT in its response to phase 2 of Ofcom's strategic review of telecoms. However, as in any major proposal on structural reform, the "devil is in the detail" and we have found a number of significant areas of concern with the framework now proposed. In the time available for response, which in our view is not particularly long given the detailed nature of the Undertakings, we have restricted our comments to a number of high-level points together with some more detailed points in the attached appendix.

## Legal Basis and Review

We note that Ofcom regard the Undertakings offered by BT as being enforceable and binding. Ofcom's statement on 23 June indicated that if BT were in breach of the Undertakings, Ofcom would be able to seek enforcement in court against BT (presumably by way of a claim for specific performance).

It is unclear whether third parties affected by a breach of the Undertakings could seek damages to recover losses incurred as a result. If it is envisaged that such third parties would be required to rely on the Contracts (Rights of Third Parties) Act 1999, then this should be clearly stated in the Undertakings. Certainly, it is unlikely that third parties would be able to apply for specific performance, as that is an equitable remedy and is unlikely to be available under the 1999 Act. It would be helpful for Ofcom to clarify the position of third parties under these Undertakings.

Whilst it is helpful for Ofcom to have clarified this to a certain degree in their earlier statement, we consider that two specific issues arise in relation to the enforceability of the Undertakings. Firstly, how the route to court sits with enforcement of other conditions under which BT operates and secondly, the wording of the Undertakings themselves.

On the first point, it seems anomalous to have a part of BT's regulatory framework subject to a separate enforcement route from that of the general and other regulatory conditions under which BT operates. We would prefer to see the additional measures represented by the Undertakings having equal force in legal terms to the other regulatory conditions and being subject to the same enforcement procedures and potential penalties as these. The Undertakings could provide for this method of enforcement, which would allow Ofcom the same powers of investigation, dispute resolution and ultimately, imposition of fines as it has in relation to the other regulatory conditions. The option of court settlement of regulatory matters is not attractive, given the time-frame, costs and uncertainties associated with this.

This brings me to the second point under this heading: the wording of the Undertakings themselves. In our view, there are many places in the Undertakings where the wording is sufficiently vague as to make it problematic to establish a breach. There are also many instances where BT appears to have wide discretion over exactly what is being offered. We understand that Ofcom has negotiated these Undertakings with BT on behalf of the industry and strongly recommend that an independent legal review is carried out with the aim of tightening up the wording. We have not had time to conduct a full legal review of the text but comment on some of the major points in the attached appendix.

## Scope of the Undertakings

We are somewhat disappointed by the overall scope of the undertakings. We recognise that there are concrete commitments to make available some existing access products on an Equivalence of Inputs basis and this is welcome. Our main concerns relate to the development of new products under the existing and potentially the Next Generation Network (NGN) framework. We believe that increasingly, retail customer products will use more intelligent "higher levels" of network architecture and that technology

supporting these products will be deployed more centrally within the overall network hierarchy. There is therefore a concern that the proposed ASD only ring-fences the lowest “physical” layer of the network for control and operation by the ASD and that this control only extends to the Access and Backhaul networks.

In our view, technology developments and changes at the Core network level will drive product developments over which BT will have significant market power (SMP) by virtue of its ubiquitous network coverage through to the end-customer. It would be helpful, therefore, if the Undertakings covered the making available of such developments on a wholesale “equivalence of inputs” (EoI) basis to other operators. At minimum, we would wish to see the Core-Backhaul interconnection products made available on an EoI basis in the same way as the Undertakings appear to offer this for Backhaul-Access interconnection products, associated with the LLU EoI proposals.

A specific area where this is relevant is that of partial private circuits (PPCs). BT’s competitors use these BT products to link their customers to their own core networks. BT does not need to use these products as it has end-to-end coverage to all customers and can offer volume data communications services to customer through the kilostream / megastream family of products. There have been concerns that the pricing and service level agreements that BT has been able to offer for its retail megastream products have been more advantageous than the terms on offer to competitors at wholesale level through PPCs. We note that PPCs are explicitly excluded from the EoI provisions applying to the ASD (paragraph 5.41). While recognising the physical system differences between BT’s network and that of its competitors, we suggest that a greater degree of “commercial equivalence” between the processes that BT’s competitors are obliged to follow and those followed by BT upstream and downstream of the ASD would be appropriate.

### Transparency and Governance

There are a number of areas where BT’s competitors are reliant on information and discussion with BT to progress their own product offerings. For example, the recently constituted “WES forum” meetings are useful in understanding BT Wholesale’s development plans for this family of products. However, the Undertakings are silent on any formal requirement for BT to provide or attend such a forum. In our view, the Undertakings would be strengthened if they allowed for transparency in the following areas:

- The planning and prioritisation of BT Wholesale’s investment to support new retail products;
- Access and tail circuit routing where BT circuits are used to link customers to other operator’s core networks;
- Clear advance notification of product pricing changes;
- An independent customer transfer process for mass telephony products.

In fact, it is in these areas that other market players would wish to have the ability to influence BT decisions, not just be aware of what is planned. This raises the question of

governance and input from other market players into the infrastructure plans of BT where it has SMP.

In the first case above, for new product developments at the retail level, it is nearly always the case that investments will have to be made by BT Wholesale. It is not clear from the Undertakings, how interested parties other than BT will obtain the knowledge that such wholesale developments are planned / underway and how they will be able to plan to use such developments for their own retail products. This issue extends to NGN developments where some commitment is made in the Undertakings to ensure that corresponding wholesale access is made available to other Communications Providers “sufficiently in advance of the launch” of a new BT product (paragraph 11.10). However, it is not clear how this will happen and how the continual “first mover” advantage of BT Retail in the present market framework will be eliminated. In our view, the development of governance structures that link accountability for the relevant parts of BT Wholesale’s investment with the whole of its customer base are a necessary part of the solution to this issue.

The second issue noted above is simpler, in that it relates to one-off decisions by BT Wholesale at the time that a new connection is made to the local Access / Backhaul network. Operators other than BT would expect to have the same access and influence as BT Retail in how their access circuits are routed as these decisions can have operational consequences.

### Framework for the Future

In conclusion, we recognise that BT’s Undertakings represent an improvement on the present position for the products that are specifically defined to move to an equivalence of inputs basis. We are less clear of the position for other products and for the development of new products as discussed above. We would also recommend that a thorough independent legal review is undertaken of the wording of the Undertakings themselves from the perspective of BT’s competitors.

In some ways, we would like to see the Undertakings form the starting point for an evolutionary process for developing the transparency and governance for the investment, development, pricing and introduction of new BT wholesale products for all service providers to use. We would encourage Ofcom to continue the dialogue with BT to foster such developments.

It would also be useful for Ofcom to be clear, if it decides to accept the Undertakings, on how the success or otherwise of this option would be measured. It is always possible that BT’s performance in relation to the Undertakings may be less than acceptable to other operators and service providers. Rather than risking a prolonged period of further uncertainty if this turns out to be the case, we suggest that the market would be better served if Ofcom created a clear framework around the Undertakings which detailed how they would be monitored and what remedial action might be taken in different circumstances. Ultimately, we assume that Ofcom would follow its stated intention to make a reference to the Competition Commission for an investigation into certain features of the telecoms market, if BT’s performance under the Undertakings fell short of

its expectations. To aid transparency and reduce uncertainty, it would be helpful for the market to be clear on how this event would be triggered.

I hope these comments are helpful and would welcome the opportunity to discuss them with Ofcom's team on equivalence.

Yours sincerely

Rob McDonald  
**Director of Regulation**

## **Appendix**

### **Detailed Points on BT's Proposed Undertakings**

#### Section 3

1. For how long under paragraph 3.1.1 will BT continue to apply EoI following the dates listed?
2. The compensation amounts in paragraph 3.2 do not seem particularly onerous and we note that they are time limited.
3. Under paragraph 3.8 BT have the option not to comply with Ofcom's targets if they are not 'reasonable and practicable'. It is inappropriate to give BT a discretion to choose not to comply with targets. They should be required to make representations to Ofcom if they consider the targets unreasonable.

#### Section 4

4. BT's commitments in relation to Carrier Pre-Selection (CPS) are fairly minimal. There is no commitment to equivalence of any sort for CPS and only "reasonable endeavours" to resolve any issues.

#### Section 5

5. Paragraph 5.4 refers only to "immediate" successor products. This would be more robust if it referred simply to successor products to avoid one or two name changes taking products out of the ASD.
6. How is "within a reasonable time of a request" to be judged in relation to paragraph 5.5?
7. Paragraph 5.6 contains conditions to be met before a potential new access product is provided by ASD. It includes the condition that "MSANs do not contain any Network layer functionality". In our view, the development of NGNs is highly likely to lead to Network layer functionality being present in MSANs. At face value, therefore, it appears that this condition of the Undertakings will act to prevent any NGN products from being provided through the ASD. Therefore a large part of the Undertakings would fall away with the development of NGNs, which seems unlikely to have been Ofcom's intention.
8. Paragraph 5.10 gives us concerns in that there is necessarily a delay between a new product being offered and Ofcom determining through a market review process that BT has SMP in relation to the market containing that new product. It provides BT with the "first mover" opportunity discussed in our cover letter. Also, the stipulation that only products using the lower levels of the network hierarchy suggests, as discussed above, that NGN products would be outwith the scope of this paragraph.

9. Paragraph 5.12 describes the “influence” that ASD will have over Transmission Layer assets. This is still rather vague and our points on transparency and governance of investment are relevant here.
10. The capital expenditure, which it is proposed that the ASD would control, at £75m per annum, seems a small amount in relation to BT’s likely overall capital expenditure on infrastructure developments.
11. It is not clear why BT’s operational support systems are excluded, in paragraph 5.40, from the planned partition of BT’s information systems.

## Section 6

12. In section 6.9, we note that people working for “BTS” are not prevented from also working for downstream (i.e. Retail) divisions of BT in the same way as people working for “BTWS” are.
13. It is not particularly comforting, in paragraph 6.11, that other communications providers are only to be protected from “material” competitive disadvantage where BTWS adds functionality or capability to products. As Ofcom has acknowledged, the cumulative effect of many instances of a low level of competitive disadvantage can be material. This area is at the heart of equivalence going forward and our comments on transparency and governance in the cover letter expand on our concerns in this area. This also applies to the prioritising of capital expenditure discussed in paragraph 6.12.
14. There should be a firm timescale for BT to establish separate systems for BTWS and BTs, rather than doing so when 'reasonably practicable'.
15. In paragraph 6.17 BT's obligations in respect of co-location seem to depend to an unreasonable extent on its knowledge of its future business plans. This could in reality be used as a barrier to the effective operation of these particular Undertakings.

## Section 7

16. This paragraph is fairly vague. We would welcome more clarity on the proposed mechanism (to deal with issues surrounding terms and conditions for SMP products) and why some types of contractual provision would not be covered.

## Section 8

17. This section deals with separation of upstream and downstream divisions of BT. The emphasis in paragraph 8.1 is on the ring-fencing of sales information and we suggest that there may be other types of information such as planning and network data that should be held confidential within upstream businesses or else be available equally to other communications providers. Similarly, the provisions of paragraph 8.5 still envisage some influence and information flowing from BT Retail to BTWS and BTS.

## Section 9

18. In paragraph 9.1 there appears to be no Ofcom involvement in the preparation or enforcement of the code of practice. This seems to be somewhat anomalous with the rest of the Undertakings.

## Section 10

19. Under paragraph 10.15 will it be an option to BT to make a positive decision not to act in respect of a complaint or a breach of the undertakings?
20. Paragraph 10.26 sets out the limits of the EAB's remit. However, presumably the EAB will have jurisdiction over breach of the Code of Practice devised under 9. The Undertakings appear silent on this point.

## Section 11

21. There are a number of places in this section where there are wide exemptions from BT's requirements to perform under the Undertakings. For example paragraph 11.9, 11.16 and 11.20.
22. Paragraph 11.3 sets a 3 month limit on negotiations for Network Access however BT should be under an obligation to negotiate in good faith and expeditiously.
23. We are surprised at paragraphs 11.16 and 11.17, as it seems that Ofcom will fetter its discretion in establishing the Operational Dispute Adjudicator by agreeing to these provisions.

## Section 12

24. Paragraph 12.1 appears to act to fetter Ofcom's discretion in setting timescales for the provision of information in a given case. Timescales should be set according to the circumstances on the particular case.

## Section 14

25. In paragraph 14.1.2 the timescale of 'at least one month' in which BT can make its representations on the alleged breach is rather uncertain. The timescale should be more in line with the 2 weeks BT has under 14.1.3.
26. What is the intended effect of 14.1.3(b)? It is not clear why BT can refuse to abide by a direction given by Ofcom. If they can do this, what is the point of having this procedure? How else will BT's obligations under these undertakings be enforced?
27. How long does BT have to comply under paragraph 14.2. It is not clear in this drafting and we believe that there should be more certainty about BT's obligations here.

## Section 18

28. Paragraph 18.1 provides for the Undertakings to terminate in the event of a reference to the Competition Commission under the Enterprise Act. Since such a reference could take a significant length of time to reach a conclusion, this leaves uncertainty over BT's behaviour in that period.

## Section 19

29. The paragraph (19.3), which allows BT not to comply with the Undertakings due to a matter "outside its reasonable control" is, in our view, too widely drafted.