

**DIRECTION under Section 106(3) of  
the Communications Act 2003  
applying the electronic  
communications code in the case of  
Highlands & Islands Enterprise**

**A Notification of this proposal was published on 9 September 2004**

Whereas:

- (A) On 31 August 2004 Highlands & Islands Enterprise made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the Highlands & Islands in accordance with section 107(1) of the Act and the notification published by Ofcom under section 107(2) of the Act on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 9 September 2004 Ofcom published a notification of their proposal to give a direction applying the Code to Highlands & Islands Enterprise in accordance with section 107 of the Act;
- (C) Ofcom received one confidential representation in response to the proposed Direction and this did not object to the proposal outlined in the explanatory statement; and
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

**NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-**

1. The electronic communications code shall apply to Highlands & Islands Enterprise for the purposes of the provision by Highlands & Islands Enterprise of an electronic communications network to have effect in relation to the Highlands & Islands.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

"Act" means the Communications Act 2003; and

"Highlands & Islands" means Barra, Benbecula, Berneray, Eriskay, Harris, Lewis, North Uist, Scalpay, and South Uist.

3. Except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions cognate with those referred to in this Direction shall be construed accordingly.

4. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published.

**Philip Rutnam**

**Partner, Competition and Markets**

**A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002**

# Explanatory Statement

- 1.1 On 31 August 2004 Highlands & Islands Enterprise (the “Applicant”) applied for the electronic communications code (the “Code”) for the purposes of the provision of an electronic communications network. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the Notification published by Ofcom on 10 October 2003 under section 107(2) of the Act.
- 1.2 On 9 September 2004 Ofcom published a notification of its proposal to give a Direction applying the Code to the Applicant in accordance with section 107 of the Act. Ofcom asked for any comments on its proposal to be made by 11 October 2004. Ofcom received one confidential response. The respondent in question did not object to Ofcom’s proposal.
- 1.3 In considering the Applicant’s application, Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty in section 3(1)(a) “to further the interests of citizens in relation to communications matters” and section 3(2)(b) under which Ofcom is required to secure “the availability throughout the United Kingdom of a wide range of electronic communications services”. Ofcom has also considered the third Community requirement set out in section 4(5) “to promote the interests of all persons who are citizens of the European Union”. The proposed direction applying the Code would benefit those citizens in the Highlands & Islands who would not otherwise be able to access broadband technology should they so wish by enabling the Applicant to build out its network. In considering the Applicant’s application, Ofcom has also had regard to its duties set out in section 107(4) of the Act, as set out below.
- 1.4 As explained in paragraph 1.2, Ofcom received one confidential representation in response to its proposal to grant Code powers to the Applicant. Ofcom did, however, receive two informal comments. In general, Ofcom would not comment on informal representations. But, as both respondents made essentially the same point, Ofcom believes that it is worth commenting on them on this occasion. Essentially, both questioned the appropriateness of public funding in the case in hand.
- 1.5 First of all, in this particular case, the Applicant made it quite clear that the network in question would not compete with private sector operators.
- 1.6 Second, more generally, Ofcom will be looking at the question and the circumstances under which it may be uneconomic for the private sector to provide broadband services in the next consultation phase of its Strategic Review of Telecommunications, which is due for publication later this autumn. Anyone with a keen interest and views on these matters are welcome to provide input.

### **The benefit to the public of the electronic communications network by reference to which the Code is to be applied to the applicant**

- 1.7 The Applicant proposes to install a high performance next generation broadband network which will predominantly be wireless based. The network will provide a varying range of bandwidths to suit different applications.
- 1.8 The Applicant is an Economic Development Agency and its funding to build and operate the network has been granted by, amongst others, the Department of Trade and Industry and the Scottish Executive. The network will serve one of the most remote rural areas of Scotland and, as a consequence, the provision and rollout of broadband networks in the absence of the proposed network is likely to be slow and, in some of the most remote areas of the Western Isles, might not occur. The Applicant anticipates that the network will expand broadband penetration to approximately 97% of potential subscribers. Its network will therefore provide broadband coverage to communities which might not otherwise have access to broadband technology.
- 1.9 For these reasons, Ofcom believes that early rollout of the network will be beneficial, as the network is likely to increase broadband penetration and assist local communities, educational establishments, the public sector, and businesses.

### **The practicability of the provision of the network without the Code**

- 1.10 The Applicant aims to rollout its network by the end of 2004 and go live in spring 2005. In the absence of the Code, this timetable might not be achievable. In itself this is not necessarily a convincing reason to grant the Code. However, as many of the areas which will be covered by the network have no means of obtaining broadband access, Ofcom believes that it is desirable to assist in expediting rollout of the network. Code powers might help to achieve early rollout.
- 1.11 In this instance, one of the funding partners is Comhairle nan Eilean Siar (Western Isles Council), which is also the Roads Authority for the area. The Western Isles Council has agreed the network plan and has also agreed to make available existing conduits for the passage of fibre cable. The predominant reasoning for seeking Code powers is therefore to hasten the installation of masts and nodes on sites other than local highways.

### **The need to encourage the sharing of the use of electronic communications apparatus**

- 1.12 In its application, the Applicant explained that wherever possible it will seek to enter into mast sharing agreements. In total, it believes that its network will require at least 30 masts. However, of these, it only expects to install seven new masts. For the other sites, the Applicant has already opened negotiations with companies who already have masts in place to share those masts. The Applicant has also reached a duct sharing agreement with a communications provider running fixed services. For the new mast sites, the Applicant has confirmed that it would allow other communications providers to use these masts on suitable commercial terms.

- 1.13 In addition, the Applicant intends to introduce a Code of Good Practice which it will follow when digging up/closing streets for new conduits, installation of equipment on buildings and planned/emergency maintenance or repairs.

**Whether the Applicant will be able to meet liabilities as a consequence of:**

**(i) the application of the Code; and**

**(ii) any conduct in relation to the application of the Code**

- 1.14 The Applicant is an Economic Development Agency and is mainly financed by the Scottish Executive's Economic Development and Lifelong Learning Department. The Applicant has therefore confirmed that there will be sufficient (actual and contingent) funds to meet any liabilities.