



15 August 2006

## **BT'S RESPONSE TO OFCOM'S CONSULTATION ON END TO END CONNECTIVITY, 14 JULY 2006**

BT would welcome any comments on the contents of this document which is also available electronically at <http://www.btplc.com/responses>.

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## **Executive Summary**

BT's understanding is that the introduction of this condition is designed to ensure a proper legal foundation for end to end connectivity.

Although in the past BT was only subject to guidelines, BT has never refused to provide end to end connectivity to its customers. This is in contrast to some other PECNs who have refused to open up access to particular services on particular number ranges.

In BT's view end to end connectivity is clearly an industry not an operator specific issue. To ensure end to end connectivity, Ofcom should therefore introduce measures applicable to all PECNs if it believes any such measures are necessary.

BT's view is that a condition on BT alone will not ensure end to end connectivity is provided by other PECNs to their customers. In this regard BT believes that Ofcom's focus on transit is misplaced.

If Ofcom proceeds with its proposal to impose a condition only on BT ("Option 4"), it should monitor the conduct of other PECNs and should not hesitate to introduce a general condition should operators fail to provide end to end connectivity.

BT also suggests that if Ofcom proceeds with Option 4 it should provide guidance in its Final Statement setting out how it will deal with disputes as to what constitutes a reasonable charge and we have made some suggestions on this matter in the response.

Clarification is also needed on a number of other matters to ensure greater certainty going forward. In particular, BT seeks confirmation from Ofcom in the Final Statement that the introduction of draft clause 1.3 is not intended to diminish BT's ability to act swiftly to deal with fraud or bad debt, either at the retail or the wholesale level. A requirement on BT to purchase services from other operators should not create an opportunity for profit by unscrupulous behaviour and we have provided a number of confidential examples of the problems we have faced in this regard under the current regulatory regime.

We have included a revised Condition which, as we explain in the response, addresses a number of these points.

## **Introduction**

BT welcomes the opportunity to comment on Ofcom's consultation on End to End Connectivity (**the Consultation**). As described by Ofcom, end to end connectivity is the process of enabling retail customers to make calls to other customers on the same network or another provider's network. This is an important issue that relates, as Ofcom describes it, to customers' expectations to be able to call every other retail customer irrespective of the network to which the called party is connected.

In the Consultation Ofcom proposes to withdraw the existing guidelines which are applicable to BT and Kingston and replace these with a condition on BT. This is being done not on the basis of BT's SMP in any particular market but on the basis of Ofcom's power to impose conditions on any operator to ensure end to end connectivity.

## **End to End Connectivity and the Existing Guidelines.**

In the past Oftel did not impose a formal obligation on any party in relation to end to end connectivity. In May 2003 Oftel stated the following:

*"Oftel believes that in principle a case could be made for ex ante conditions requiring BT and Kingston to seek call termination from other providers on the basis of Oftel's proposed findings of SMP in local and national calls markets and in the calls to mobiles markets. These were set out in the consultative document Review of Fixed Narrowband Retail Markets published on 17 March 2003.*

*However, Oftel does not believe it would be proportionate to propose such conditions at this time. As explained above, commercial incentives, the USO conditions and the existence of ex post regulation have to date ensured that BT and Kingston offer end to end connectivity.... If the current arrangements were found to be inadequate in the new regime Oftel may propose such ex ante conditions. Oftel would also examine the case for proposing ex ante conditions on other providers should they not provide end to end connectivity and this had a materially adverse effect on competition or materially detrimental impact on consumers."*

## **Why is an Obligation now Proportionate?**

BT understands that Ofcom now views Oftel as having chosen an inadequate legal basis for their 2003 guidelines and that the intention behind the imposition of the new condition is primarily to address the issue of a proper legal foundation for end to end connectivity. While BT believes that it is important for Ofcom to ensure that there is a proper legal foundation for its actions, BT questions Ofcom's decision that it is only proportionate to impose the condition on BT alone. BT suggests that another approach would be to adopt legally founded guidelines – or a General Condition - applicable to all PECNs.

Since 2003 BT has never refused to provide end to end connectivity to its retail customers. The same cannot be said of some other providers who have refused to open access to 118 directory enquiry numbers and 056 location independent numbers.

[Confidential Example].

BT is concerned that in some circumstances other PECNs may have commercial reasons to refuse to open up access to particular number ranges. As set out below the fact that BT or any other third party is a transit provider does not address the problem of a provider refusing to open access. PECNs in this situation may simply refuse to let their customers access the number ranges of a particular operator or to access particular services that are hosted on particular networks. Transit does not therefore ensure end to end connectivity and BT believes Ofcom should consider a general end to end connectivity obligation on all PECNs.

### **BT's Role as an Originator and a Transit Provider.**

Ofcom's current view appears to be that it is not currently proportionate to impose a general condition on all operators. Ofcom suggests that because of BT's position in origination and transit this leads to commercial practices which are likely to ensure end to end connectivity.

In paragraph 3.17 Ofcom states that placing an obligation on all PECNs would not be appropriate and proportionate because of the relationship with the transit market.

*"Once a PECN has secured an agreement to send calls to BT's network, they will in any event be in a position to send calls to all other networks (thereby securing end to end connectivity for their customers). This is due to BT's position in the provision of transit whereby BT buys termination on behalf of a large part of the industry in addition to buying termination for itself.*

Ofcom goes on to say *"by virtue of BT's position as the largest provider of transit, its importance as an interconnection partner is further enhanced. Ofcom considers that this effectively means that every PECN is likely to have commercial incentives to interconnect with BT. Where BT interconnects with every PECN end to end connectivity is ensured. As a result Ofcom considers that Option 4 removes the risks that end to end connectivity may not be provided. Further it follows from Ofcom's view on Option 3 that Ofcom considers it is not necessary or proportionate for to ensure end-to end connectivity to be provided that for an obligation is to be imposed on any other PECN. It should be noted in this context, that in Ofcom's view this is true for Kingston Communications as it is for other PECNs for the following reasons."* (sic)

*"Kingston is a small network.....This means that for the largest part of its traffic, Kingston has to buy termination in order to provide a satisfactory service to its customers. On this basis, Ofcom considers it unlikely that Kingston would have an incentive to refuse to buy termination from another PECN. Furthermore BT's role as a provider of transit means that Kingston is not able to refuse interconnection (it cannot tell where calls it transits via BT are terminated)."*

BT has a number of comments on this analysis.

First, while it may be correct that currently BT is the largest provider of connections (even when fixed and mobile are taken together) mobile networks are an increasingly important source of origination. Ofcom's own statistics indicate at the end of the fourth quarter of 2005, the respective subscriber numbers for Vodafone, O2, T-Mobile and Orange (000s) in comparison with BT originations figures were as follows:

BT	Vodafone	02	T-Mobile	Orange
25,874	14,820	15,981	15,312	14,858

These subscriber figures demonstrate that taken together the mobile operators dwarf BT's origination figures and that even any two of the mobile operators together account for a larger number of subscribers (and hence origination) than does BT. This indicates how important being able to receive calls from the mobile operators' subscribers would be for the customers of any new entrant and the importance of all PECNs providing end to end connectivity.

Second, the fact that operators have an incentive to interconnect with BT does not of itself mean that end to end connectivity is assured if there is only an obligation on BT. Interconnection with BT does not mean that an operator will always allow traffic from its customers to terminate on the network of a third party.

While interconnecting with BT gives operators the opportunity to terminate calls on a third network by transiting their traffic through BT, this does not mean that they will always wish to do so. The first decision that an operator must make is whether to allow their customer to call the customers of a third party by opening up to their customers a particular number range. Once this decision is made then it becomes a choice for the operator as to whether it connects directly to that operator or whether it transits its traffic through BT or another transit provider such as Cable & Wireless.

In some if not most circumstances PECNs will have a commercial incentive to open up access to new number ranges and new operators because this allows them to offer their customers access to all other subscribers and services. However there are examples which show that in some circumstances this commercial incentive will be outweighed by other considerations which result in PECNs denying their customers access to particular number ranges. This results in a failure of end to end connectivity in this context.

While BT's preference is for legally founded guidelines which are applicable to all PECNs, BT would suggest that if Ofcom proceeds with Option Four (an obligation only on BT) then it needs to clearly monitor the actions of other PECNs. Were PECNs to deny their customers end to end connectivity then BT suggests that Ofcom should act swiftly to impose a general condition on all PECNs.

### **Proposed Condition.**

In this section BT sets out its comments on the proposed condition. If Ofcom proceeds with Option Four as set out in the Consultation there are areas in which the operation of the condition could be clarified both through amendment of the proposed condition and also through additional guidance being offered in the text of the Final Statement. Clarification of these issues at this stage would benefit all parties by reducing the likelihood of disputes being raised under the proposed condition and would also replace the guidance contained in the existing guidelines which are being withdrawn.

#### **1. What Services are intended to be covered by the Condition?**

Currently the proposed condition covers the purchase of wholesale narrowband call termination services (fixed and mobile voice and Narrowband Data). Narrowband Data is defined as a service or connection supporting data transmission at speeds of up to 56k/bits.

The condition also provides that after purchase, the Connectivity Provider cannot unreasonably change, withdraw or restrict access to an applicable Normal Telephone Number. A Normal Telephone Number is defined in section 57 (2) of the Communications Act as one which:

- (a) has been made available, in accordance with the National Telephone Numbering Plan as a number to be used for the purpose of identifying the destination for, or the recipient of, electronic communications; and
- (b) is for the time being-
  - (i) a number adopted by a communications provider to be used for such a purpose; or
  - (ii) a number in use for such a purpose by a person other than a communications provider to whom it has been allocated in accordance with conditions under section 59.

Premium rate service numbers, personal numbers, mobile numbers, business rate services, freephone numbers, directory enquiry numbers and VOB numbers are all set out in the Plan.

BT believes that the wording in draft clause 1.3 does not extend the initial obligation that is set out in draft clause 1.1. This is made clear by the words “after purchase.” It is only once the obligation is triggered by 1.1 that the 1.3 obligation comes into play. A good example of this is services offered over broadband on 056 numbers. While 056 numbers are numbers in the numbering plan, as set out below voice services offered over broadband would not fall within the obligation set out in Condition 1.1.

In its recent consultation on VOIP services Ofcom explained that the term VOIP services included those services described in the 2004 consultation and services being provided in the UK using IP which include voice services provided over the public internet, voice over broadband (including managed and unmanaged services), voice over Unlicensed Mobile (Wireless) Access, voice over licensed wireless including 3G data services and pre (WiMax) based services.<sup>1</sup>

Ofcom's current view as expressed in the VOIP consultation is that we have probably not reached the point today where VOIP services can be considered to be in the same market as traditional fixed voice services.<sup>2</sup> In addition while theoretically VOIP could be provided over dial up internet connections, most VOIP services are provided over broadband connections. Broadband connections have previously been defined by Ofcom as connections starting at 128k/bits (although Ofcom has recently recognised that in practice most broadband connections now start at 512k/bits).<sup>3</sup> BT's view is that VOIP services offered over broadband therefore do not fall within the scope of the condition.

Additionally whilst Ofcom has not defined the words mobile voice that are used in the condition, BT would argue that mobile voice should refer to traditional voice services offered by licensed mobile operators using their 2G and 3G networks and should not extend to VOIP services offered over data services on those networks or to voice offered over unlicensed mobile services and WiMax based services or WiFi services.

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<sup>1</sup> See para 2.42 of Regulation of VOIP Services

<sup>2</sup> See para 9.4 of Regulation of VOIP Services

<sup>3</sup> See page 145 of The Communications Market 2006. 10 August 2006.

BT would suggest that if it is Ofcom's intention that the words fixed and mobile voice in the condition have a broader meaning and that all VOIP and other wireless services are to be covered then this should be made clear in both the Final Statement and the text of the condition itself.

## **2. What is a Reasonable Request?**

In the consultation document Ofcom sets out that although BT must allow its customers to call a particular operator's customers by purchasing termination, it is not necessary that BT directly interconnects with that operator and that it is open to BT to choose to transit traffic through another party to reach the operator in question. Ofcom indicates that where there was an indirect connection a request to deliver traffic directly would not in these circumstances be reasonable.

While currently BT does not transit traffic through a third party, there may be commercial circumstances where BT would wish to do so in the future. At the same time however BT would not wish to be under any obligation to purchase transit from a third party. BT's view is that the purchase of termination and transit are clearly different things and that a request to purchase termination and transit together would not be reasonable.

BT would suggest that there are also a number of other circumstances where a request to purchase termination would not be reasonable. Some of these circumstances are closely related to BT's concerns about fraud and bad debt which are addressed below.

For example BT would consider that where a company approaches BT with a request to purchase termination in circumstances where the company has extensive existing debts with other operators, or previous outstanding debts with BT, that such a request would not be reasonable in the absence of payment of the outstanding debts.

[Confidential Example].

While recognising that it is not possible for Ofcom to exhaustively list the circumstances in advance when a request will not be viewed as reasonable, BT would welcome some level of guidance by Ofcom on this issue. Additionally, in considering any disputes under this condition BT would suggest that Ofcom needs to balance the need for end to end connectivity with the need to protect both customers and operators from bad debt and fraudulent exploitation of any new end to end connectivity obligation.

## **3. What are Reasonable Terms and Conditions?**

The current drafting of the condition requires BT to purchase call termination services in response to a reasonable request and on reasonable terms and conditions (including charges).

Currently those fixed PECNs which are subject to the findings of the fixed geographic call termination market review are subject to a requirement to provide network access on fair and reasonable terms, conditions and charges. This obligation was set in order to avoid excessive charges. Those mobile operators who been deemed to have SMP against them in respect of their 2G networks are also subject to a price control.

However new fixed PECNs who have entered the marketplace and who will enter the marketplace and are not listed in the Annex to the 2003 Market Review<sup>4</sup> are not subject to any requirement as respects their termination rates. Providers of non geographic call termination are also in a similar situation (as would be Wifi and VOIP operators if they were included in the scope of the condition).

BT's starting point is that there is less likely to be an issue about non price terms and conditions on the basis that where BT purchases on the terms and conditions contained in our Standard Interconnect Agreement (SIA) these have already been the subject of regulatory scrutiny and therefore it would be very difficult to argue that these terms were not reasonable.

In relation to new services which BT might wish to purchase on commercial terms however there are certain fundamental terms which would need to be included in any reasonable agreement such as terms dealing with termination of services, suspension of services, credit vetting, bad debt, fraud and artificial inflation of traffic. Where BT has freedom to negotiate a position that is different from that in the SIA, BT suggests that the issue of whether the particular term is reasonable or not needs to be judged having regard to the surrounding commercial context.

#### **4. What is a reasonable charge?**

In the case of PECNs who are deemed to have SMP it seems clear to BT that a reasonable charge must be a charge that complies with their existing SMP obligations.

BT has some concern that where the PECN is not subject to a finding of SMP the concept of what constitutes a "reasonable" charge is likely to be extremely contentious and may result in an increased number of disputes being referred to Ofcom. BT considers that the recent Telewest dispute illustrates the difficulty of parties reaching an agreement on charges within the broad rubric of a concept such as "fair and reasonable".

The only guidance that has so far been offered by Ofcom is "*Whether a particular term or condition (including charge) is reasonable will depend on the particular circumstances relating to any decision not to purchase in the context of the need to ensure end to end connectivity and may lie within a broader range of outcomes than that which might be considered in the circumstances of SMP. In particular as Ofcom has to ensure that any charges it imposes are proportionate, it is unlikely to set charges at a level set in the context of addressing a finding of SMP.*"

While recognising that the determination of what is a reasonable charge will differ on a case by case basis, BT would encourage Ofcom as part of any final statement to offer some guidance to parties on what are the factors that it will take into account when dealing with a dispute under this proposed condition. BT notes that the type of principles that it currently applies when assessing proposed prices from non SMP operators include reciprocity (what does BT charge for the same service) and benchmarking of the proposed new services and price against those of other comparable services.

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<sup>4</sup> Review of Fixed geographic call termination markets-Identification and analysis of markets, determination of market power and setting of SMP conditions. Final explanatory statement and notification. 28 November 2003.

BT believes that adoption of these types of principles is likely to lead to a “reasonable charge” and would welcome Ofcom’s guidance on whether these types of principles are likely to be taken into account in any assessment as part of dispute resolution by Ofcom. BT would also welcome clarification of what if any other additional factors Ofcom is likely to consider when assessing whether a price is reasonable in the context of the end to end connectivity obligation.

BT has made a slight suggested wording change to the proposed condition to reflect the reality that the requirement on BT to purchase on reasonable terms and conditions as soon as practicable is in reality a requirement for BT to agree reasonable terms and conditions including charges as soon as reasonably practicable. This reflects the reality that it is the PECN who is offering a price for termination to BT and that both parties must engage in a real negotiation in order to be able to agree a price.

BT also considers however that it is appropriate that the text of the Final Statement emphasises that although the obligation is on BT to agree reasonable terms and conditions BT is only able to agree a reasonable charge if the PECN negotiates in good faith. To do otherwise would be to place an unacceptable and unjustified level of regulatory risk on BT.

#### **5. As Soon As Practicable.**

Currently the proposed condition requires that the purchase of termination services occurs as soon as reasonably practicable. BT agrees with the adoption of this approach as opposed to the approach of proposing definitive timelines. It is clear that what is reasonably practicable will vary according to the complexity and nature of the request to purchase.

#### **6. Not Unreasonably change, withdraw or restrict access to an applicable Normal Telephone Number.**

BT’s key objective here is that the introduction of this clause should not hamper BT’s ability to act in a reasonable commercial manner to prevent fraud or bad debt both at the retail level and more importantly the wholesale level.

For example at the retail level BT uses outgoing call barring in order to manage debt. Similarly in respect of payphones at the retail level, particular number ranges may be barred from phones in order to prevent fraud. BT would argue that these and other actions that it currently takes under its retail contracts are clearly reasonable within the scope of draft clause 1.3 (1.2 in BT’s revised version of the clause).

At the wholesale level, it is a commercial reality that not all operators are conducting bona fide commercial operations. Because of these unscrupulous operators (and of genuine business failures), BT occasionally needs to act quickly when it has a reasonable suspicion that fraud or artificial inflation of traffic is occurring or that a company is likely to go into a situation of bad debt. In relation to fraudulent activity, BT is often alerted to the likelihood of fraud or artificial inflation of traffic through suspicious traffic patterns or companies being linked through named Directors or other officers to companies that have previously been involved in fraudulent activities. It is these commercial connections which BT is required to act upon to prevent it - and its transit customers - from suffering large losses. Currently 75% of Artificial Inflation of Traffic or fraudulent transactions take place on transit traffic.

In order to allow Ofcom to understand the magnitude of the problems of bad debt and fraud that BT faces we set out below some recent confidential examples. In both instances the companies in question indicated that complaints would be made to OFCOM, and the Courts if BT took action to restrict service.

[Confidential example]

BT believes that its current commercial practices and the exercise of its contractual rights are likely to constitute reasonable actions in circumstances of fraud and bad debt. The practice of for example call gapping is used by BT both in cases of network management and also in cases where BT suspects fraud. While theoretically call gapping could be seen as restricting access to particular numbers, in both cases BT would see call gapping as a reasonable activity. Similarly in circumstances where BT suspects fraud on particular charge bands it may delay or refuse to open access to those charge bands. Again BT would see this as a reasonable commercial response to fraud.

BT would not wish to see the introduction of this new clause being seen by PECNs as throwing any doubt on BT's current practices or being used by these PECNS to act as a barrier to BT acting quickly to prevent bad debt and or fraud. Ofcom needs to appreciate the practical reality that unscrupulous operators are only too willing to defraud both consumers and operators and that considerable harm to consumers may be caused directly and indirectly through such activities.

BT has therefore suggested amendments to the condition which would confirm that actions which BT is entitled to take under the SIA are reasonable. BT would also welcome Ofcom's recognition and confirmation in the Final Statement that the introduction of this clause is in no way intended to impinge on BT's current ability to deal with issues of fraud and bad debt at both the retail and the wholesale level.

#### **Revised Condition.**

BT has attached as an Annex its proposal for a revised condition which would address some of these issues

## **Annex**

### Part 1. Application, definitions and interpretation relating to the Conditions in this Schedule

1. In this Schedule, except in so far as the context otherwise requires:

“**Act**” means the Communications Act 2003

“**Connectivity Provider**” means British Telecommunications plc whose registered company number is 1800000 and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

“**Narrowband Data**” means a service or connection supporting data transmission at speeds of up to 56k/bits;

“**Normal Telephone Number**” means as defined by s57 (2) of the Act.

2. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them above, otherwise any word or expression shall have the same meaning as it has in the Act.
3. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.
4. For the purpose of interpreting the conditions set out in Part 2, the headings and titles shall be disregarded.

### Part 2: The Conditions.

#### **Condition 1- Requirement to secure end to end connectivity.**

- 1.1. Where a provider of a Public Electronic Communications Network reasonably requests in writing the Connectivity Provider to purchase wholesale narrowband call termination services (fixed and mobile voice and Narrowband Data) provided by it, the Connectivity Provider shall purchase such services by agreeing reasonable terms and conditions (including charges) with the PECN as soon as reasonably practicable.
- 1.2. In purchasing such services, the Connectivity Provider cannot after such purchase unreasonably change, withdraw or restrict access to an applicable Normal Telephone Number. For the avoidance of doubt changes, withdrawals or restriction of access to Normal Telephone Numbers in accordance with the provisions of the Connectivity Providers’ Standard Interconnect Agreement are not unreasonable.

- 1.3 The Connectivity Provider shall comply with any direction Ofcom may make from time to time under this condition including as to the terms and conditions (including charges) on which the Connectivity Provider should agree.