Commission for
Communications Regulation

Response to Consultation and Final Decision

Response to Consultation Document No. 10/70 and 11/32.

A final decision further specifying the price control obligation in the market for wholesale terminating segment of leased lines.

Submissions to Consultation No. 11/32

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Content

Section

1 Eircom

eircom Ltd.

Response to ComReg Doc. 11/32:

Further Response to Consultation Doc. No. 10/70 and a Further Consultation and Draft Decision on the Price Control Obligation in the Market for Wholesale Terminating Segments of Leased Lines

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TABLE OF CONTENTS

OVERVIEW

- The market analysis justifying the imposition of an obligation on eircom to provide Wholesale Leased Lines (WLLs) and price controls on eircom in relation to Partial Private Circuits (PPCs) and WLLs is now over three years old. Since then, there have been very significant market developments, such that the market definition used for distinguishing between trunk and terminating segments, eircom's market power and the remedies to address it, urgently need to be reviewed. Failing this, the current level of regulation will only serve to distort competition. Market developments that need to be reviewed include the increased availability of access infrastructure, the impact of data hosting centres on the provision of new leased line tails, and the effect on end-to-end pricing of over-capacity in the highly competitive trunk segment market.
- eircom believes that the price control proposed by ComReg in Doc. 11/32, in particular the margin squeeze set out in section 7, cannot be justified in the context of the market analysis underlying ComReg Decision D06/08. In particular, eircom believes that the obligation to provide WLLs cannot be understood in the manner suggested by ComReg and, in particular, it does not imply that eircom uses WLLs for its own supply. In addition, the objective pursued by this test - to set an appropriate margin between PPCs and WLLs - does not relate to the competition problems identified by ComReg in its market analysis. As such this test is unjustifiable and unlawful.
- In addition, even if it were possible for ComReg to lawfully impose such a test on eircom, the margin squeeze test is inadequate and singularly fails to account for the realities of the current market. As such, the proposed price control, in particular the margin squeeze test set out in section 7, will cause significant damage to eircom's retail and wholesale data network businesses, since it would effectively prevent eircom from competing for leased lines and related managed services. This is because the test proposed by ComReg in the Draft Decision would set price floors for eircom's self supply at a level that is above the maximum costs faced by a competitor.
- Markets for high bandwidth wholesale and retail leased lines are extremely competitive (especially around the urban portions of markets) and eircom's current obligations already work to prevent eircom from effectively competing within these markets. Any further tightening of the regulatory constraints on eircom, such as would be represented by the current Draft Decision, would be likely to effectively remove eircom as a player in these markets. ✂
- eircom has taken the opportunity afforded in this Consultation to propose practicable amendments to the margin test to reflect market realities and to allow the test to achieve the stated regulatory objectives.
- ComReg should undertake a new market analysis with an updated price control (if such a control is found to be necessary), based on the current competitive conditions in the market.
- Section 8 of 11/32 sets out ComReg's view in relation to a margin squeeze test on the retail market under the competition rules. eircom notes ComReg's position. eircom however does not agree with the approach proposed by ComReg and notes that enforcement under the competition rules will need to reflect competitive conditions on the retail market, defined on an ex post basis. eircom does not believe that ComReg pre-determines that the assessment will necessarily be conducted on a product-by-product basis. eircom, in this regard, reserves all of its rights in relation to any such action.

RESPONSE TO CONSULTATION QUESTIONS

Q. 1. Do you agree with ComReg's proposed approach to determining PPC fibre access prices? Please provide reasons for your response.

eircom agrees with ComReg's proposed approach to determining PPC fibre access prices, as outlined in Draft Decision 11/32. The proposals in Draft Decision 11/32 reflect the reasonable level of agreement reached between eircom and ComReg and ComReg's consultants TERA following extensive engagement over recent months in relation to the methodology, and the development of appropriate costing models, to support PPC local access rental charges. eircom notes that the approach followed to determine cost-oriented levels is consistent with other recent pricing and cost modelling work for related services, including in particular the following:

- Copper network cost modelling for LLU price setting: eircom used the outputs in cost per line per month from the LLU model to calculate the average cost per annum for a copper loop used to deliver a leased line.
- Fibre access cost modelling for NG Wholesale Ethernet Access pricing.
- SDH cost modelling in the context of the legacy core model built to inform PPC and leased line prices: eircom modelled the costs for SDH equipments used in the delivery of STM1 and 34/45 Mbps PPC EUL services using cost inputs and treatments from recent modelling of the eircom legacy core network for leased line pricing purposes.
- HDSL modem costs modelled as part of the same exercise.

Accordingly, eircom agrees that the approach to determining PPC fibre access prices proposed by ComReg in 11/32 is appropriate and should be used as the basis for setting the prices going forward.

Q. 2. Do you agree with ComReg's approach on the application of the pricing gradient to WSEA logical prices? Please provide reasons for your response.

eircom agrees with ComReg's approach on the application of the pricing gradient to WSEA logical prices. As stated in our response to ComReg's Consultation document No. 10/70, the use of value gradients in access pricing is a very important tool in arriving at the optimal demand, by recognising that the value of any one product may vary according to circumstances, including, for example, according to uses and users, and by guiding the allocation of joint and common costs to different products on this basis. Value gradients are one way of approaching the maximisation of consumer welfare pursued by Ramsey pricing. In a price setting context, they facilitate the derivation of *a set of different prices* from a *single set of costs*.

eircom is in no doubt that the use of value gradients is both necessary and desirable for the purpose of pricing leased lines services, including terminating segments of leased lines, and the use of gradients allows for the optimal apportionment of costs between various services so as to recover all of those costs.

eircom, in co-operation with ComReg, is best placed to understand the likely profile of demands that will inform an appropriate gradient to demonstrate cost recovery across the portfolio.

Q. 3. Do you agree with ComReg's approach and the draft maximum prices, above and as referred to in Appendix A, for WLLs, PPCs and NGN Ethernet? Please provide reasons to support your answer.

eircom worked closely with ComReg and its consultants, Tera, in developing cost models to determine maximum charges for WLLs, PPCs and NGN Ethernet", namely the legacy core model and the NGN core model. eircom agrees that the prices derived from the models are cost-oriented.

In terms of the price levels, eircom also agrees with ComReg's proposal not to mandate any further changes to the prices in the existing network price list and notes that PPC prices have reduced by about 16% over the past eighteen months. eircom agrees with setting the maximum price for WLLs at the current charges.

Q. 4. Do you agree with ComReg's approach, as set out above, for setting the minimum price floors for WLL and other equivalents? Please provide reasons for your response.

eircom does not agree with ComReg's proposal to set a price floor for WLLs. Setting price floors for WLLs is not a proportionate and adequate measure. In addition, eircom does not agree with the method proposed by ComReg and is of the view that each of the 9 steps proposed by ComReg is flawed by at least one fundamental error. Each of these flaws is expanded upon below, but, in summary they are –

I. **Regulatory objectives** - The RIA analysis shows that the test proposed is not consistent with ComReg stated objectives.

II. **OAO Investment** - the test does not recognise the two most relevant characteristics for efficient OAO investment (identified in separate bullets below).

III. **OAO Network Configuration** - the configuration proposed by ComReg ignores those cases where an OAO builds to reach the customer premises.

IV. **Input Costs for Margin Squeeze Test** - The costs of alternative access mechanisms are not included for circuits delivered into those parts of the market where such alternative mechanisms are available.

V. **OAO Network Coverage** – ComReg takes no account of the impact of large hosting centres to the test.

VI. **OAOs other Network costs** - ComReg should have used EEO rather than SEO.

VII. **Calculating the Network Cost per Mbps** - cost should not be applied to individual circuits, individual speeds, and individual contracts in the margin test.

VIII. **Use of a Price Gradient** - price gradient should only be tested against the totality of WLL services and not on a circuit-by-circuit, or on a contract-by-contract, basis.

IX. **Applying Costs Calculated to Determine the Price Floor** - The set of costs included in the test to set an eircom price floor are always greater than the set faced by an efficient OAO.

As a result, ComReg's proposals for price floors for WLLs will not foster competition and efficient investment in infrastructure, but, in fact, will result in a reduction of competition in the retail markets. eircom's position is further explained below.

1. ComReg's reasons for setting minimum price floors for WLLs

In order to devise a proportionate price control for WLLs, it is necessary to consider the competition problems which the imposition of a remedy in the form of WLLs was designed to address in the first place. There are a number of relevant considerations.

First, WLLs are not part of the market for terminating segments of leased lines. As explained by ComReg, "*the provision of Wholesale Leased Lines (WLLs) involves purchasing a full end-to-end leased line from the incumbent operator… The WLL product is essentially the same product that Eircom sells at the retail level, albeit currently priced using a "Retail Minus" mechanism."* ComReg expressed the view that competition would be best served by encouraging OAOs to use PPCs rather than WLLs, which may involve "*infrastructure that is used to provide other services that do not fall into the terminating segment market".* In this context, the rationale for requiring eircom to provide end-to-end leased lines to other operators at a discount was to avoid giving eircom an undue advantage in the retail market where other operators had not made sufficient investments so as to be able to rely on PPCs rather than end-to-end leased lines. ComReg also noted that "*where there is a competitive trunk market..., it is likely that an OAO would use PPCs to connect to the trunk segment".* However, because there were "*large parts of the country where there is not a competitive trunk market",* OAOs were still reliant on their ability to purchase WLLs.[1]

In other words, the obligation to provide end-to-end circuits to OAOs at a discount was imposed as a stop-gap measure, so to speak, so as to permit OAOs investing in infrastructure (in particular transmission infrastructure) to compete with eircom although they had not reached a coverage of the country sufficient for them to rely principally on PPCs (or indeed their own infrastructure). Having regard to the rationale for the imposition of WLLs, the appropriate form of price control is clearly a maximum price. Crucially, there is no concern on the part of ComReg in the market analysis in relation to WLLs that they may provide a disincentive to operators to purchase PPCs.

In the light of this, the market analysis supporting Decision D06/08 does not support the floor price control for WLLs that ComReg is proposing. In particular, ComReg is not entitled to design a price remedy which is concerned with setting the "appropriate economic space" between PPCs and WLLs. eircom understands that by "appropriate", ComReg means to ensure that the incentives of an OAO to avail of PPCs is not undermined by the availability from eircom of WLLs (in fact, the obligation of eircom is to provide WLLs upon request) at too low a price. eircom notes in this regard that the decisions of the French Regulator ARCEP, which ComReg cites in the Introduction to 11/32 in support of its approach, are in fact of no assistance to ComReg. In particular, France Telecom is not subject to an obligation to provide operators with WLLs. The principle of non-eviction, as invoked by ARCEP, is considered for the purpose of setting an appropriate price control for PPCs so as to ensure a competitive *retail* market. The French solution includes cost-oriented prices for terminating segments below 2 Mb/s and a margin squeeze test for terminating segments above 2 Mb/s, reflecting the differences in the intensity of France Telecom's market power

[1] See in particular ComReg Consultation Document 08/63.

below and above 2 Mb/s. This system bears little, if any, resemblance with the price control proposed by ComReg.

It appears to eircom that a price control in the form imposed in France would better reflect current competitive conditions in the Irish leased lines markets. In this regard, eircom also notes that the market analysis supporting D06/08 was undertaken more than three years ago. The Better Regulation Directive imposes an obligation on NRAs to conduct market analysis at least every three years and that no remedy can be in place for more than three years, save in exceptional circumstances, and with the approval of the European Commission. Having regard to the fundamental changes in competition in capacity markets in Ireland in the past three years, there could be no justification for the extension of the remedies set in D06/08, and clearly none for the imposition of a new remedy in the form of the price control proposed by ComReg. These fundamental changes include the following:

- In urban areas the demand for leased line services is now for high speed circuits to deliver connectivity to business headquarter sites and it is economic for OAOs to extend their own fibre networks to complete these connections;
- In provincial cities and towns, e-Net, whose infrastructure is funded by State monies, provides fibre access to business premises at subsidised prices below the rates that the OAO could self-supply or purchase from eircom;
- Government and enterprise customers are increasingly making use of data hosting centres, where the networks of all providers meet to deliver data services in large capacity at price levels that are clearly the most efficient for the customer, thereby challenging the notion of a “terminating segment”;
- Where there is rural demand for high speed leased lines, radio solutions such as those wholesaled by Airspeed are more economic than fixed deployments in many cases.

The Irish capacity markets are clearly no longer at the stage reflected by D06/08 where OAOs' investments were generally limited to building a core network, and they now extend into the access networks especially in high density areas. The economics of leased lines investments have also been fundamentally affected by E-net's offerings. In these circumstances, consistent with the requirements of the regulatory framework, no change in the price control for WLLs should be made without first undertaking a new market analysis and reviewing the appropriateness of a WLL remedy.

Second, it should be borne in mind that the "space" between "retail leased lines" and WLLs is, for the reasons explained above, entirely artificial. It follows that the “economic space” between PPCs and WLLs is, by definition, that between a wholesale access service and an end-to-end retail product. If ComReg is concerned that WLLs act as a disincentive to PPC investments, it would appear that the simplest solution would be to remove the obligation on eircom to offer “wholesale” leased lines. OAOs would have all the incentives to invest in PPCs and, where this is not efficient, they could avail of end-to-end circuits from eircom on the non-regulated downstream retail markets (possibly availing of volume discounts).

Instead, ComReg appears to choose to treat WLLs as an input to eircom's retail offerings and require that all end-to-end products of eircom recover at least a “floor” price for WLLs, regardless of whether the product concerned was offered to an operator as WLLs or in a “retail” form. Such an approach does not address the issue of the economic space between WLLs and PPCs. Rather it works to impose a price floor on eircom in relation to end-to-end circuits, in circumstances where eircom’s market power in terminating segments has already been addressed by the obligation of cost-orientation of PPCs and Ethernet access products, and the obligation of non-discrimination. eircom does not believe that ComReg’s

proposal for a price floor, and the manner in which it proposes to apply it, are appropriate in these circumstances.

Finally, eircom notes that, as pointed out before, D06/08 cannot be construed to require eircom to provide wholesale Ethernet end-to-end leased lines at a discount. Any maximum or minimum wholesale price that ComReg were to impose in relation to WLLs would not apply to Ethernet end-to-end products provided to OAOs. Were eircom to accede to a request for an OAO to provide it with such a product, such a product will be provided as a retail end-to-end product which is not directly regulated by D06/08.

In the light of the above, eircom is of the view that there is no need, nor any justification, for the form of margin squeeze test proposed by ComReg. Having regard to the competition problem that WLLs are meant to address, a maximum price is entirely sufficient for WLLs. The publication of cost-oriented prices for PPCs is sufficient to ensure that ComReg is in the position to monitor prices in downstream markets. In addition, in any event, no change in the price control can lawfully be imposed without reviewing market conditions and accounting for the significant changes in competitive conditions.

2. The Test as Specified by ComReg is Inadequate and Flawed

Even if the test proposed by ComReg was justified (which it is not), the approach taken by ComReg in relation to each of the steps it identifies to arrive at a price floor for WLLs is such that it will not allow the test to deliver the objectives that ComReg has said were being pursued, including ensuring that eircom can deliver appropriate discounts in the most competitive portions of the market and protecting OAOs' investments.

OAO Investment

If the objective of the test is to protect OAOs' investments, then regard should be had to the economic characteristics of efficient investments made by OAOs in leased line infrastructure. OAOs can build networks to provide services into a number of communications markets to business and residential customers. For all markets for fixed communications services in Ireland, OAOs can "Build or Buy", or they can resell. "Build or Buy" means, building their own network purchasing wholesale inputs from eircom, and this can be done in varying proportions. In general, wholesale inputs are priced at the eircom nationally averaged cost. This is the case of eircom's Partial Private Circuits (PPCs) - the regulated access variant of a leased line. Pricing wholesale services in this way means that an efficient OAO will only build its own network where it can profitably use it to provide services at a cost below the eircom national average cost – because the alternative of buying wholesale access services priced at the eircom averaged cost is available everywhere.

The second relevant economic characteristic of any OAO investment in network build is that the investment, once made, becomes a sunk cost. Viewed from the point of an OAO making a decision on pricing leased line services that utilise this investment, each service should make a contribution to the cost of that investment. However the OAO concerned will not seek to recover the average cost of that investment from the price charged to each and every customer. To do this would have the effect of failing to sell services to the more price sensitive customers who are not prepared to purchase at the average cost; and it would fail to achieve the efficient level of return from those less price sensitive customers prepared to pay more than the average cost. Clearly, pricing both above and below average costs maximises the volume of services sold, thus reducing the unit cost per service of the investment – and so is the rational and efficient pricing policy for the investing OAO.

So the two most relevant characteristics for efficient OAO investment in leased line network build are:

- The efficient OAO will only build its own network where a lower unit cost than the eircom national average can be achieved; and
- Once OAOs have built their own network, they will compete efficiently in the leased line market by pricing both above and below the average unit cost for that investment.

Neither of these key characteristics has been recognised in the test proposed by ComReg.

OAO Network Configuration

ComReg has presented, in schematic diagrams, three options for the configuration of the OAO network to be used in constructing the test. For all the leased line services depicted, both customer premises are connected to the OAO network using an eircom PPC. This means that these diagrams provide only a partial view of the nature of competition in the leased line market in Ireland. Increasingly, OAOs' networks already reach many customer premises and where that is the case eircom's network is only required to deliver one end of a leased line service. The reasons for this have been explained above.

These changes are so significant that they require that a new market analysis to be undertaken. In the meantime, and without prejudice to eircom's position in relation to this, at the very least, configurations should be used in any test that show a proportion of circuits at higher speeds delivered to the customer using the OAO's own – or third party – network.

By contrast, the configuration proposed by ComReg entirely ignores those more and more frequent and widespread cases where an OAO builds to reach the customer premises (or buys an access service from a third party provider) at lower cost than the equivalent eircom PPC. In those cases, it is clear that the obligation to provide end-to-end circuits to OAOs is of little relevance. But if the margin test proposed by ComReg is to apply to eircom's self-supply (which it cannot and should not), it will entirely exclude eircom from competing, to the detriment of the customers concerned.

The clear implication for the use of the configuration proposed is that, where an OAO builds network to reach the customer premises – or buys an access service from a third party provider – that serves the customer at a cost lower than the eircom regulated access price, the margin test proposed is explicitly designed to ***exclude eircom from competing*** to sell leased line services to that customer. A very current example as to how the test proposed for high capacity leased lines is at odds with the reality of the market is the HSE National Wide Area Network (WAN). This primary contract was recently awarded to Complete Telecom and the HSE is currently seeking tenders for diverse access to the same sites through a public tender. As part of that tender, they have described in detail the site locations and the local access connectivity at each site, in the tender documentation. This information is in the public domain and is attached as the spreadsheet "***110603_LL Response_11_32_HSE WAN Access Connectivity.pdf***".

This WAN connects 36 national HSE sites (including 6 with diverse access) in cities and provincial towns at speeds of 10 Mbps and above. Even though eircom Wholesale Ethernet Access services are available at all these sites, priced at eircom averaged cost, Complete Telecom did not use a single eircom access service. The Complete Telecom solution used 27 eNet services, 7 Airspeed radio services, 4 cases of own-build fibre, and 4 cases where the HSE was already present in a data centre where Complete Telecom has access.

Input Costs for Margin Squeeze Test

ComReg lists ten categories of costs for inclusion in the margin squeeze test. eircom has four main issues with the list:

1. A number of costs are to be recovered twice: this is highly inefficient in circumstances where provision of a WLL does not, in general, require the cost to be incurred twice.
2. The costs of the OAO's own network are incomplete because they do not include any share of the costs of the OAO access network built to serve retail customers directly.
3. The costs of alternative access mechanisms (LLU, eNet, Airspeed, etc.) are not included for circuits delivered into those parts of the market where such alternative mechanisms are available.
4. The costs of eircom's PPC End User Links (EUL) have been included at a nationally average circuit length. This has the effect of raising the price floor in urban areas where the EULs used by the OAOs are shorter than the average. Again, if the price control is to be used in relation to eircom's self-supply, this places eircom at a significant competitive disadvantage in geographic areas marked with significant alternative infrastructure.

OAO Network Coverage

The coverage proposed by ComReg for the OAO network appears to be broadly in line with the networks built out by LLU access seekers. ComReg's proposal in terms of the OAO "core" network coverage appears reasonable as an input into the margin test with two key exceptions:

1. The coverage modelled makes no allowance for the increasing market requirement for all OAOs to build out their core network to the large hosting centres where customers and suppliers interconnect for the diverse delivery of high capacity business services.
2. A core network built in urban areas will inevitably pass the premises for many customers of leased line services. All network operators use this synergy to deliver access services at low incremental cost. Any treatment of network coverage that reflects the current market reality must recognise the implication this has for reducing the required length of the EUL.

OAOs Other Network Costs

eircom does not agree that the test should include OAO operating and leased line platform costs as a mark-up on the costs of their transmission network. There is no reason not to use as the benchmark the most efficient core network, and doing otherwise will distort investment incentives and encourage inefficient investments.

Calculating the Network Cost per Mbps

In addition to disagreeing with the methodology used to calculate the national average total cost per Mbps for crossing the OAO core, eircom considers that it is not a sufficient or appropriate input into a margin squeeze test that applies on a circuit-by-circuit, a speed-by-speed, or a contract-by-contract basis.

A large proportion of the total cost that is an input into the average cost per Mbps calculation is fixed or common. These costs are not relevant for pricing decisions in the market for leased line services, as, for example, an OAO will price as low as average variable costs in the case where the contract is offered into the most competitive region of the market.

To take a simple example of the approach that an OAO must take to selling a leased line service across Dublin we should consider the OAO network in that city. Some 35 of the 70 sites connected by the OAO transmission network are located in Dublin. If the OAO uses two eircom PPCs and conveys the traffic across its own network from the A-end serving eircom exchange to the B-end serving eircom exchange they cannot hope to win business by pricing the service to recover the national average cost per Mbps of their transmission network. This is because they will be competing with providers using their own local access network for at least one end of the service and with providers prepared to accept a contribution to fixed and common costs below the national averaged level. As a result the competitive level of price will settle close to the level of local variable cost rather that national total cost.

The level of cost per Mbps modelled by ComReg is the level that the OAO must recover – on average - across all contracts, across all speeds, and across all regions to achieve his target return on the network investment. So a similar approach should be used in a margin test across the full portfolio of eircom WLL services. In other words, to apply this level of cost to individual circuits, individual speeds, and individual contracts in a margin test for all eircom's end-to-end services including self-supply would simply serve to exclude eircom from competing in the urban parts of the national market, to the detriment of end-users

Use of a Price Gradient

eircom is of the view that the use of a single national average with a gradient applied to test all circuits at a given speed is not correct as it simply does not recognise regional variation in competition.

Once again the test of the average OAO cost per Mbps multiplied by the price gradient for the circuit speed should only be tested against the totality of WLL services provided by eircom at that speed – and not be applied on a circuit-by-circuit, or an a contract-by-contract, basis.

Applying Costs Calculated to Determine the Price Floor

The fundamental issues arising with ComReg's proposed test as identified above will be magnified by the manner in which ComReg has proposed to apply the cost inputs into the test that will determine the price floor.

The fundamental disagreements that eircom has with the ComReg approach to constructing the proposed test can be summarised into two main issues:

- The set of costs included in the test to set an eircom price floor are always greater than the set faced by an efficient OAO competing in the national market for retail leased line services

- The degree of averaging applied to these costs has the effect, when applied to all contracts on a speed-by-speed basis, of excluding eircom from the high-speed urban portions of the market where competition is most intense

Eircom Recommendations for an Appropriate Margin Test

From the discussion above, it is clear that the test, as currently described in ComReg document 11/32, is entirely unacceptable as a tool to address the competition problems currently evident in Market Six. However, eircom believes that there are a number of ways that the test can be modified to make it appropriate to both protecting efficient OAO investments, and to benefitting end users of leased line services. eircom will now propose how the cost information available to ComReg should be used in appropriate tests. This recommendation is informed by the nature of the cost information now available to ComReg that has the following characteristics:

1. Up to and including 2 Mbps, leased line services are delivered almost exclusively over eircom copper loops. The exceptions are a small number of fixed radio systems that are more economic in certain geographies, and cases where a number of 2 Mbps demands are aggregated onto fibre delivery at a customer hub site.
2. Above 2 Mbps, in rural areas and in smaller provincial towns, the PPC EUL and NGN Wholesale Ethernet fibre access products are nearly always the most economic form of data connectivity. This is in sharp contrast to larger provincial towns and cities served by eNet fibre, UPC fibre rolled out to upgrade cable television services, and data centre connectivity between service providers and customers. ✂

For these reasons eircom proposes that there should be at least two quite distinct margin tests. Up to and including 2 Mbps leased line services, the inputs that ComReg has deployed are appropriate. However the treatment of these inputs and the application of the test must be adjusted to ensure that the effect is not to exclude eircom from parts of the market – and so limit the discounts available to end users. The two main changes necessary are:

A – Leased lines up to and including 2 Mbps: the test proposed generates a single national price floor based on the sum of a number of average costs – the average cost of the OAO network, the average cost of an eircom PPC EUL access circuit, and the cost of an eircom PPC Transport Link (TL) with average fill. For each of these three inputs costs there are fixed and variable elements. In summary, eircom proposes that the appropriate test for leased line services up to an including 2 Mbps should be applied in two stages.[2]

(i) At the first stage the leased line services in each customer contract should pass the test to the average variable cost (AVC) standard.

(ii) At the second stage the leased line services across all customer contracts at any time should pass the test to the average total cost (ATC) standard

This approach allows eircom to compete on the basis of the same structure of costs as the OAO using PPCs as an input to supplement their own core network investment in delivering end-to-end leased line services. The approach also protects the OAO investment by ensuring that the revenue available from the full portfolio is sufficient to fund an efficient investment by an operator.

[2] Calculated on the basis of EEO

B – Leased Lines above 2 Mbps: as discussed at length above the main issue that eircom has with the proposed test for this part of the market is that there is no recognition of the lower access costs available in cities and provincial towns. All key competitors to eircom are pricing their services to reflect the range of access solutions available. Therefore, ComReg's proposal to require eircom to set leased line prices for urban networks based on eircom averaged fibre costs will simply exclude eircom from any new contracts. The margin test must include the real costs faced by the OAO namely:

(i) The costs of the actual access solution used (a mix of e-Net, Airspeed, data centre charges, own fibre build, and eircom regulated access service)

(ii) A contribution to the costs of interconnection services bought from eircom (for the proportion of eircom access actually used)

(iii) The cost of the OAO transmission and leased line core network modelled on an EEO basis (i.e. using eircom costs)

Basing the price floor test on these three sets of costs adds some complexity for ComReg over and above the simplistic test proposed in this Consultation – mainly because the test proposed by ComReg is exclusively based on eircom costs and charges. The first complexity added is that the test must now be populated with third party charges (eNet fibre prices, Airspeed radio charges), OAO costs for fibre build and for data centre occupancy. The second level of complexity is that there are rural areas where there will be some demand for high capacity leased line service that have limited alternatives to eircom regulated access (Airspeed wireless can be an economic alternative if the number of radio hops is limited).

For this reason eircom proposes two tests above 2 Mbps. For purely rural networks a test identical to the two-stage national test (AVC per contract, ATC over all customers) for leased line services up to 2 Mbps is appropriate. For urban areas (to include all cities and those provincial towns where eNet offers access using government funded MANs), the input costs listed above are the only basis for a margin test that will protect efficient OAO investments and benefit customers through vigorous price competition.

Again the test should be applied in two stages:

(i) At the first stage the leased line services in each customer contract should pass the test based on the actual (mix of) cost for access mechanisms available to OAOs in urban markets, plus the variable costs of the OAO network

(ii) At the second stage the leased line services across all customer contracts at any time should pass the test based on the actual (mix of) cost for access mechanisms available to OAOs in urban markets, plus the average total costs of the OAO network

Eircom appreciates that these tests need additional information above that collected by ComReg for the test proposed in the current Consultation. However an increasing amount of the necessary information is in the public domain. This includes eNet and Airspeed charges (though OAOs may receive unpublished volume discounts), the locations of data centres, and the awards of large contracts for government and enterprise high capacity leased line networks.

In preparing tenders for high capacity leased line networks in urban areas, eircom must assess the range and likely mix of competing access services available to OAOs bidding for that network. This is necessary to ensure that any price we might offer is competitive.

Q. 5. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

This response deals exclusively with the wording of the Draft Decision instrument, and is without prejudice to eircom's substantive position as expressed in response to the other questions raised in 11/32. eircom's comments are provided below section by section of the Draft Decision.

1. Statutory and Legal Powers

eircom is of the view that Decision D06/08 cannot be used as the basis for the price control that ComReg is proposing. In particular, the margin squeeze test between PPCs and WLLs in the form set out by ComReg is not justified by the market analysis that led to D06/08. Any such remedy can only be imposed, if justified and proportionate, following a new market analysis. ComReg's proposed Decision is, accordingly, in breach of the Framework Regulations, which do not permit the imposition or amendment of an SMP obligation without first assessing competition in the relevant markets by way of a market analysis.

In this regard, eircom further notes that the market analysis for terminating segments of leased lines was undertaken more than three years ago. This means that the maximum, period for market reviews allowed under the Better Regulation Directive (which ComReg, as a State entity, is bound to comply with, even absent transposition) has been reached. It is accordingly not appropriate for ComReg to impose and/or specify a new price control on eircom.

2. Definitions

eircom does not agree that the definition of "Margin squeeze", by reference to "appropriate economic space", itself undefined, is sufficiently detailed, clear and precise.

eircom agrees with the definition of WLLs, which is consistent with the definition of WLLs set out in ComReg Doc. 08/63 and reflects the position expressed by eircom in response to Question 4. Elements of the test proposed by ComReg, in particular Step 9 at para 7.28 and its reference to "bids", presumably on the retail market, does not reconcile with this definition.

4. Price Control

Section 4.4 is not clear. There appears to be wording missing between "WLL services" and "(including but not limited to)".

Section 4.7 should clarify that for the avoidance of doubt, compliance with this Decision does not require eircom to amend prices for WLLs agreed and applied prior to the entry into force of this Decision.

Sections 4.8 and section 4.9 seem to impose contradictory obligations on eircom. This is particularly so as eircom's current prices are not to be amended

8. Effective Date

The duration of the Decision should be expressed in terms of a maximum duration rather than a finite period. That maximum duration is linked to the market review period and the Decision adopted on the basis of relevant findings, and these (rather than a subsequent Decision on their basis) may not exceed three years.

Reference to *"sections 10.2"* in section 8.3 should be to section 8.2.

Q. 6. Do you have any views on this Regulatory Impact Assessment with regard to the draft maximum charges determined for WLLs, PPCs and NGN Ethernet and also with regard to the Margin Squeeze test and are there any other factors that ComReg should consider in completing its Regulatory Impact Assessment on these points? Please explain your response and provide details of any additional factors that should be considered by ComReg.

Objectives and Policy Issues

ComReg articulates 4 objectives as:

- Avoid distortion or restriction of competition
- Encourage efficient investment
- Promote the interests of users
- Encourage access to the internet

eircom agrees that these are appropriate objectives. eircom also believes, however, that more than three years after the analysis of the relevant markets was undertaken, these objectives should be defined, and the means to achieve them defined and provided for, in the context of a new market analysis, in accordance with ComReg's obligations under the regulatory framework. Eircom nonetheless analyses below the two main Draft Decisions in ComReg 11/32 against these objectives.

Maximum Prices for PPCs, WLL, and Wholesale NG Ethernet Access

eircom agrees that LRAIC plus is the appropriate cost modelling approach for setting cost oriented access prices that send the appropriate build or buy signals to potential investors for access products including, in particular, PPCs and equivalents.

WLL services, in contrast, require no OAO investment – being simple resale of eircom end-to-end services. Current maximum prices reflect this fundamental difference. NRAs are generally of the view that network based competition is more vigorous, and more sustainable, than service based competition. However, any proposal to reduce the current maximum prices for WLL services runs the risk of discouraging OAOs from extending their networks. Such a short term reduction in one set of wholesale prices may well be against the long term interests of users by limiting competition to service-based competition where network-based competition may be more appropriate, given demand levels and potential returns available.

In their discussion of the pricing methodology, ComReg contrasts the "*national average pricing approach for the legacy WLLs and PPCs products*" with the "*geographically de-averaged pricing approach for the wholesale NGN Ethernet leased lines products and services*". This distinction is more apparent than real. All leased line pricing is de-averaged in several dimensions to recognise two factors:

1. The proportion of network costs used to deliver the leased line service at issue, and
2. The customer's willingness to pay.

With no de-averaging of leased line prices all circuits would have the same price regardless of speed, length, or nature of the network used to deliver the service.

For traditional leased line speed services, the first form of de-averaging is by circuit speed. Higher prices for higher speeds recognise that the bandwidth delivered between customer site drives network costs – and that a customer attaches more value to a 45 Mbps circuit than to a 64 Kbps circuit linking the same site.

The second form of de-averaging is by leased line length. Again this recognises that longer lines use more network resources, as well as that customers attach a greater value to a facility that transmits key data accurately and quickly over 200 km than they do to a similar facility that transmits the same data across 2 km.

In the move to NGN Ethernet, eircom's pricing has maintained the de-averaging by speed using a similar speed/price gradient applied to the average cost per Mbps as is used for TDM leased lines. The de-averaging by distance has been replaced by a regional analysis of costs that shows higher unit costs in provincial regions, where demand for all services is lower. These provincial regions are generally larger than the low cost urban areas. The result is that higher cost of crossing a provincial region generally conveys the Ethernet traffic a greater distance. So the move to "geographic de-averaging" for NG Ethernet services still reflects the use of network resources in a similar way to "nationally averaged" distance based charging.

Margin Squeeze Test

eircom does not agree that the proposed margin squeeze test is appropriate if it is applied in relation to eircom's self-supply for retail purposes. In addition, in any event, ComReg has made a number of crucial errors, and the form of margin test proposed will not, for that reason, assist ComReg in meeting the objectives it has identified.

Eircom agrees that assessment of margin squeeze is properly done on an ex post basis. However eircom finds that the OAO network costs should be only included in this test after modelling on an Equally Efficient Operator (EEO) basis as this is the only basis for efficient investment. The OAO should only invest in their own core network where they can achieve costs below the eircom average – otherwise it is more efficient to buy PPC services priced at the eircom average. On this basis, to include the OAO network costs modelled at eircom cost levels (i.e. EEO) is clearly sufficient to avoid stranding an efficient OAO investment.

However ComReg has made a number of crucial errors in selecting the form of margin test that is consistent with the first three regulatory objectives. Where these errors are present in the body of the Consultation proposing the structure of the test, they should also have been detected in the Regulatory Impact Assessment (RIA). To the extent that the RIA should test the remedy against the regulatory objectives, eircom finds that the RIA is faulty. Eircom now proposes to test the proposed test against each of the first three objectives.

Avoid Distortion or Restriction of Competition

ComReg has proposed a test (Figure 12 on page 73 of ComReg 11/32) against a single price floor at each circuit speed for all WLL services offered by eircom at that speed.

The single price floor is made up of:

(i) The charge for two PPC EULs at that circuit speed for a set averaged length

(ii) A share of the costs of two PPC TLs calculated at a single averaged fill.

(iii) A single national charge on the OAO transmission network, calculated by applying the speed/price gradient to the average modelled cost per Mbps.

The result is the price floor is a single number in € per annum that will apply individually to all WLL services at that speed whether delivered 2 kilometres across Dublin, or 200 kilometres from Kerry to Sligo.

Because this test is to be applied on a circuit-by-circuit basis, rather than on a portfolio basis, it will have the effect both of distorting competition, and of restricting competition.

The proposed test will distort competition because the WLL price floor it sets is above the level of cost faced by an OAO buying eircom PPC services to deliver a service across Dublin. This occurs because:

(i) Both PPC End User Link (EUL) tails purchased will be below the set averaged length used in the test.

(ii) The fill in the TLs used by the OAO in Dublin have a higher fill than the national average

(iii) The OAO uses less of its own network to cross Dublin than the average for all circuits that traverse its network and the OAO will reflect this into the price offered for the WLL – particularly as Dublin has more intense competition for leased line services.

If the test is to apply to eircom's self-supply, then its application results in excluding eircom from competing for short urban services.

Conversely the same test applies a price floor for services offered over long distances in rural parts of Ireland that is well below the cost of the inputs needed by the OAO to provide the service. This will have the effect of excluding OAOs from tenders for provincial leased line networks (that require access inputs from eircom). So the effect of the test is to limit competition for provincial leased lines.

As well as restricting competition by excluding eircom from urban networks and OAOs (without access networks) from rural networks the test has further potential to distort competition. In urban areas OAOs generally compete at price levels well below the floor set for eircom by the proposed test. As this floor is at a single rate per speed the results of a number of competitions may indicate to the larger OAOs competing against eircom that there is a clear level below which eircom cannot bid. When this level becomes known to the market it is likely that price competition will centre on a level just below this floor. Even though there will be OAOs facing costs well below the eircom price floor it will be apparent that there are contracts to be won well above cost by bidding at a level just below the eircom price floor. The concentration of OAO bids around this level is, of course, a distortion of real competition where all operators price bids in relation to their own costs – in the absence of information around competitors pricing constraints.

Encourage Efficient Investment

The investment signals that the proposed margin test sends to the OAO considering building out a leased line network are stark and unambiguous. The application of the same price floor per circuit for eircom in urban and rural areas signals that they can face costs below the eircom floor in urban areas with a minimal network investment. The same test sends a very different message to an OAO considering a network investment outside out of urban areas. A provincial investment – no matter how extensive – is unlikely to deliver unit costs below the eircom nationally averaged rate that is the basis for the WLL price floor in rural areas. These conflicting signals seem very unlikely to encourage efficient investment.

Promote the Interests of Users

In the markets for WLLs and the downstream markets for retail data networks, the interests of end users are best protected by ensuring that there are a number of credible bidders for each contract. As explained above, the proposed test will have the effect of excluding the provider with the most extensive network from bidding competitively for urban networks. It will also have the effect of excluding OAOs that rely principally on eircom PPC inputs to extend their own network reach to bid for provincial leased lines from the market for such services. To this extent the proposed test has the capacity to damage the interests of end users of both urban and provincial data networks.

In summary, eircom finds that the RIA for the margin squeeze test presented in the Consultation document is flawed in that it does not directly examine the clear effects that can be anticipated from the implementation of that test against the stated objectives.

Changed Competitive Conditions

eircom's experience is that the competitive dynamics in this market have changed significantly since ComReg conducted its last Market Review in 2008. It is important to note that the data on which this market review is based is now over three years old and increasingly unrepresentative of current competitive conditions.

Some of the changes experienced in that time are –

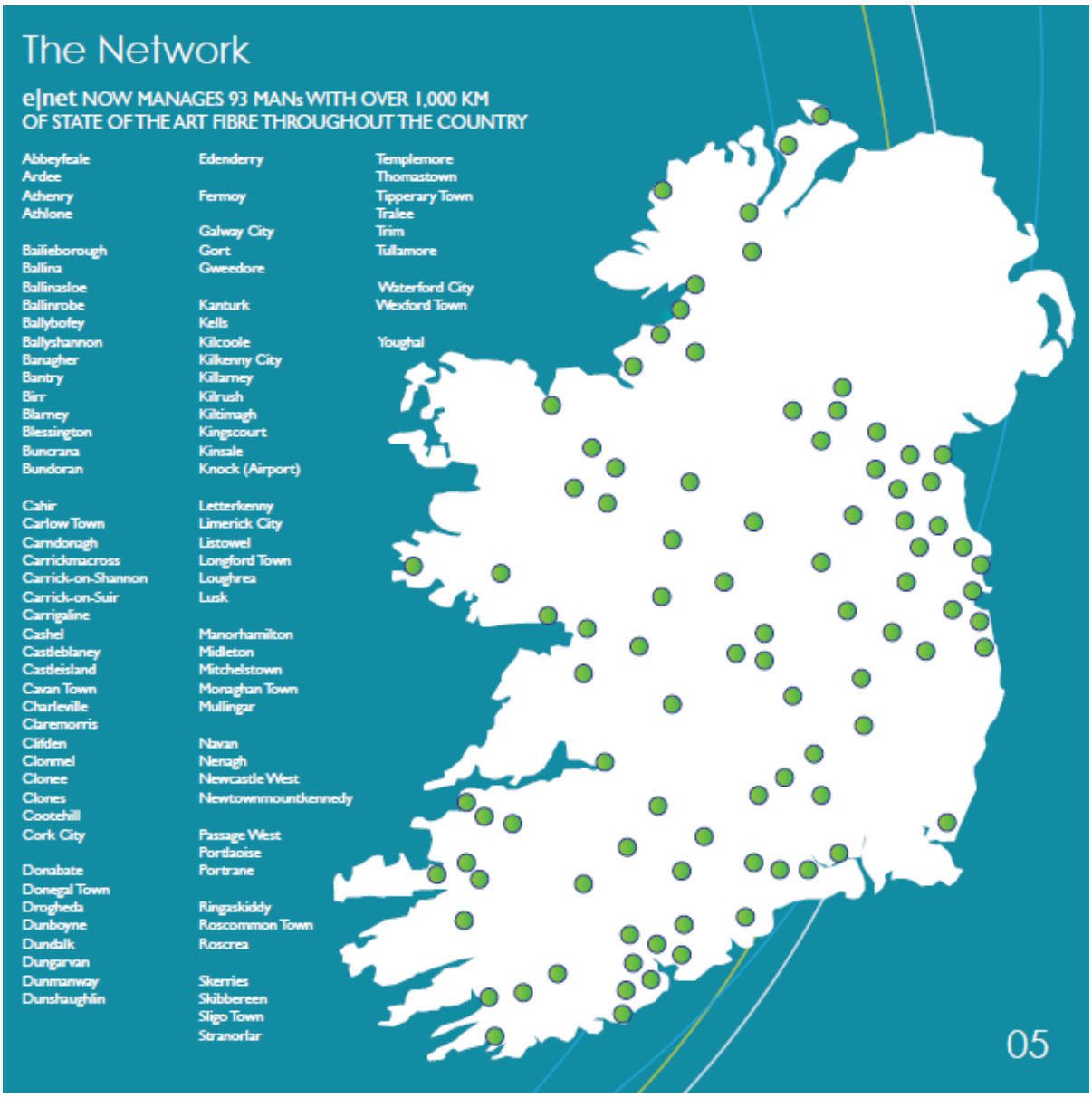
- Significant growth in competitor capability and market shares have also changed.
- Growth of ENET, selling state subsidised competitive networks in 93 cities town and villages. This fact alone should invalidate previous market analysis at the fibre level (see map and diagram below). ✂
- Entry of NTL/UPC into the business market ✂.
- AIRSPEED and other suppliers now have significant radio infrastructure ✂
- The recent acquisition by VODAFONE of INTERFUSION ✂
- The current severe domestic and international recession has caused retraction in the market, and customers are now focusing on price as a major factor in choosing network suppliers.

These changes have impacted on the retail market as follows:

- There has been evidence of the severe competitive pressure on all bids, with multiple competitors, most using alternative access infrastructure.

✂

Map Showing Current ENET Network



ENET Customers

Location	Transmission Path - Hop 1	Access Type
Cork University Hospital	Fibre MAN to Cork Co-Lo	MAN
Aras Slainte, Cork	Fibre MAN to Cork Co-Lo	MAN
HSE North East HQ, Kells	Fibre MAN to Kells Co-Lo	MAN
Limerick Regional Hospital	Fibre MAN to Limerick Co-Lo	MAN
Sligo General Hospital	Fibre MAN to Sligo Co-Lo	MAN
Merlin Park Hospital, Galway	Fibre MAN to Galway PoP	MAN
University College Hospital, Galway	Fibre MAN to Galway PoP	MAN
Tullamore Hospital, Tullamore	Fibre MAN to Tullamore Co-Lo	MAN
Waterford Regional Hospital	Fibre MAN to Waterford Co-Lo	MAN
Dr Steevens' Hospital, Dublin	Fibre to DEG (Complete Telecom and Aurora)	Own Fibre
Kerry General Hospital Tralee to DEG (Primary)	Fibre on e|net Tralee MAN	MAN
Kerry General Hospital Tralee to CIX (Secondary)	Airspeed Radio to RTE Mast Knockmoyle	Airspeed
Portlaoise General Hospital	Fibre MAN to Portlaoise Co-Lo	MAN
Letterkenny General Hospital	Fibre MAN to Letterkenny Co-Lo	MAN
Mullingar General Hospital	Fibre MAN to Mullingar Co-Lo	MAN
HSE MW Area Offices, Limerick	Fibre MAN to Limerick Co-Lo	MAN
St Munchin's Regional Maternity Hospital, Limerick	Fibre MAN to Limerick Co-Lo	MAN
Cavan General Hospital	Fibre MAN to Cavan Co-Lo	MAN
Our Lady of Lourdes Hospital, Drogheda	Fibre MAN to Drogheda Co-Lo	MAN
Naas General Hospital	Airspeed Radio to ESB High Site in Saggart	Airspeed
HSE SE Offices, Lackan, Co. Kilkenny	Fibre MAN to Kilkenny Co-Lo	MAN
Mallow General Hospital	Airspeed Radio to Towercom Mallow	Airspeed
Bantry General Hospital (Primary)	Fibre to Bantry Co-Lo	Data Center
Bantry General Hospital (Secondary)	Fibre to Bantry Co-Lo	Data Center
Ennis General Hospital to Limerick (Primary)	Fibre/Radio	Airspeed
Ennis General Hospital to Galway (Secondary)	Airspeed Radio to RTE Maheragh	Airspeed
Nenagh General Hospital to Limerick (Primary)	Fibre to Civic Office	Data Center
Nenagh General Hospital to Galway (Secondary)	Fibre to Civic Office	Data Center
Louth County Hospital, Dundalk	Fibre MAN to Dundalk Co-Lo	MAN
Our Lady's Hospital, Navan	Fibre MAN to Navan Co-Lo	MAN
Monaghan General Hospital	Fibre MAN to Monaghan Co-Lo	MAN
Portiuncula Hospital,Ballinasloe	Fibre MAN to Ballinsloe Co-Lo	MAN
Mayo General Hospital, Castlebar via Ballina (Primary)	Airspeed Radio to Cellcom Tower Kiltimagh	Airspeed
Mayo General Hospital, Castlebar via Galway (Secondary)	Airspeed Radio to Cellcom Tower Kiltimagh	Airspeed
RDO Office, Model Farm Rd, Cork	Fibre MAN to Cork Co-Lo	MAN
Roscommon General Hospital to DEG (Primary)	Fibre MAN to Roscommon Co-Lo	MAN
Roscommon General Hospital via Galway PoP (Secondary)	Fibre MAN to Roscommon Co-Lo	MAN
HSE Offices, Manorhamilton, Co Sligo	Fibre MAN to Manorhamilton Co-Lo	MAN
Ambulance Control, Ballyshannon, Co Donegal	Fibre MAN to Ballyshannon Co-Lo	MAN
Ambulance Control Centre, Tallaght, Dublin	Fibre (Complete)	Own Fibre
Eircom Data Centre, Clonshaugh	Fibre to DEG using Complete Telecom, Aurora and Eunetworks (T50)	Own Fibre
HP Unit 23, Airways Ind Est, Santry, Dublin 9	Fibre (Complete)	Own Fibre

2 BT Communications Ireland Limited

BT Communications Ireland Ltd ("BT") response to ComReg Consultation Paper entitled:

Response to Consultation Document No. 10/70 and a further consultation and draft decision on the price control obligation in the market for wholesale terminating segments of leased lines

Issue 1 – 3rd June 2011

1.0 Introduction

We welcome ComReg's work in this sector of the communications market addressing business products and for the opportunity to further address some of the complex issues of setting the pricing control.

This is an important market for BT as we purchase PPCs and Ethernet from eircom and we are investing in our own infrastructure to provide both retail business solutions and wholesale services.

The principle of the ladder of investment is important to the regulatory regime to encourage investment however equally important is that such investments are not left stranded or undermined due to margin squeeze or poor pricing behaviour from the incumbent. We fully agree with ComReg in its work to establish workable price control mechanisms to ensure both fair and open competition and regulatory certainty.

We agree and support the positions ComReg have concluded in the response to consultation 10/70 and our focus for the remainder of this response addresses our comments to the further consultation and the new questions asked.

We have provided our detailed response later however we would specifically like to draw attention to the ComReg proposal for the price gradient and prices for Wholesale Ethernet Logical Circuits. In

the previous consultation we agreed with ComReg regarding the use of gradients however our concern surrounds the pivot for the curve as discussed in our detailed response below.

Acknowledging the complexity and newness of the subject and with a view to being constructive we consider further work is required to determine whether the gradient proposal is cost orientated and how it will be impacted by a doubling of the EF and AF traffic classes as proposed by eircom. We are also concerned key factors such as eircom bandwidth restrictions have not been built into the model and cost orientation is thus not transparent in the analysis.

2.0 Response to Detailed Questions

Question 1. Do you agree with ComReg's proposed approach to determining PPC fibre access prices? Please provide reasons for your response.

Response 1.

We agree with ComReg's approach to maintain the national approach to PPC pricing for this review as these services still have an important role to play at this time. Having the ceiling price is helpful provided it applies to all the products; equally important is that eircom notify industry in a non-discriminatory way at the same time as its own downstream wholesale solutions business and other downstream businesses of price changes. We strongly believe that the wholesale market has now being split by eircom into two parts, the first regulatory services and components traditionally sold by eircom and secondly, wholesale solutions which offer solutions that can contain a mix of regulated and non-regulated services and management/operational support facilities similar to the eircom 'White label' approach. We consider we should be notified of pricing and product changes at the same time as all of eircom's downstream businesses including eircom wholesale solutions.

Question 2. Do you agree with ComReg's approach on the application of the pricing gradient to WSEA logical prices? Please provide reasons for your response.

BT response 2.

We consider the capacity restrictions eircom have placed on their NGN to be arbitrary and commercial rather than good engineering practice. This leads us to the view that eircom are merely selling to the industry their retail products with a wholesale discount rather than providing true wholesale products that the industry require.

We consider ComReg should take into account the eircom proposal to double the capacity of Expedited and Assured traffic. The 0.45 power curve and the price inputs to it should be reviewed to reflect the existence of a 150Mb limit and the proposal to double that limit.

To support of our comment we consider a pivot of 1Gbps is being applied to form an exponential pricing gradient up to 1Gbit/s. Our concern is that the majority of the wholesale customer base is in the lower part of the gradient in the sub 300Mbit/s and in many cases sub 100Mbit/s regions where

the prices per Mbits/s are high. eircom as the largest single customer on their own network will be able to avail of more attractive prices further up the scale due to their large requirements for bandwidth, thus benefiting their downstream retail business against wholesale customers.

ComReg have mandated a cost orientation obligation on eircom however it is not clear from the ComReg commentary in clauses 6.69 to 6.74 (which imply the models do not take into account service restrictions) whether cost orientation is fully demonstrated. We therefore consider the application of the pricing gradient to WSEA logical prices requires further discussion particularly when the EF and AF traffic classes are doubled.

Question 3. Do you agree with ComReg's approach and the draft maximum prices, above and as referred to in Appendix A, for WLLs, PPCs and NGN Ethernet? Please provide reasons to support your answer.

BT response 3.

We are not in a position through lack of detailed information to verify the actual values of the ceilings and depend on the offices of ComReg as regards the values, but we do agree the principle of having a ceiling is valid to provide pricing stability to the market.

We consider the combination of AF and EF traffic would be more correctly described as "committed" rather than "real time". ComReg's forecast of a 50/50 split between demand for AF and EF has a direct and significant bearing on the cost orientation of the offer, given that there is a 22% premium charged for EF over AF. We believe this specific split should be reviewed annually, given the particular dependence of the wholesale market on the EF service class.

The Best Effort service is priced below cost in our opinion, as it is not appropriate to model the achievable contention across the network as equal to the maximum contention allowed by the network design. Best effort traffic would be more properly valued at 33% of the bandwidth cost – reflecting an achievable outcome from an efficiently loaded network (i.e. Average 3:1 contention achieved against a theoretical maximum of 5:1).

Question 4. Do you agree with ComReg's approach, as set out above, for setting the minimum price floors for WLL and other equivalents? Please provide reasons for your response.

BT response 4.

We would like to offer the following comments to question 4.

4.1 Product-by-product Margin Test

We agree with ComReg's product-by-product margin testing proposal, however we consider ComReg's suggested potential to review the testing approach on a case-by-case basis brings risk if

the test is not consulted publicly and made transparent to the industry. We are concerned that incumbent lobbying of complex product scenarios may lead to an incorrect approach.

4.2 exANTE rules with exPOST Monitoring

We note that ComReg are proposing to apply exANTE rules for the margin test for WLL and compliance by exPOST tests. This is a weaker approach to regulation as it is extremely difficult for the industry to detect or prove anti-competitive behaviour due to the complete lack of incumbent transparency (incumbent secrecy and confidential contracts), and damage will already have been done to the industry by the time an exPOST investigation is completed. To mitigate this weakness we believe comprehensive and intrusive annual monitoring will be essential and transparency of the outcome is important; i.e. if ComReg find non-compliance the industry should be made aware and have the opportunity to launch whatever action it considers necessary against the incumbent which may include the launching of Competition Law disputes. We consider the monitoring should include vigilance of any and all 'off-book' point-to-point products that we believe eircom operate in the terminating segment of leased lines market of which the industry has no general knowledge of the product details or the pricing.

It is also important that this regime does not prevent operators taking Competition Law cases against eircom.

4.3 Margin Squeeze Test – comments to figure 10

With respect to figure 10 we agree it addresses the most likely cost candidates for the test for a simple product, however as ComReg and its Consultants Oxera identified in 2008 for the retail market, the test needs to be able to address the bundled scenario, or more commonly called the wholesale solution, of regulated and non-regulated components. Our concern is that the margin test could indicate that all the regulated components in a wholesale solution 'a bundle' pass the test because negative margin is harboured in below cost non-regulated components, or other activity such as 'operational and management resource' not reported in the price. Our view therefore is ComReg should highlight in the test specifically how non-regulated or non reported activities are addressed in the bundled scenario.

We are already aware of eircom offering wholesale solutions 'bundles' containing regulated and non-regulated components (with no transparency of the pricing or terms of the regulated component). We expect this to become far more popular over time.

4.4 Cost Stack for the Margin Squeeze Test – comments to figure 13

We consider an item missing in this table is the cost of exchange or remote buildings / rental of space etc necessary to house the nodes and connecting systems (Multiplexors, DWDM kit etc) around the country.

4.5 Conclusion for question 4

In conclusion we generally agree with the approach to setting the price floors and our comments are aimed at achieving a credible and workable scheme.

Question 5. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

BT response 5.

We generally agree with the Draft Decision but would like to offer the following comments.

5.1 Given the transposition of the new regulatory regime on the 25th May 2011 or shortly after, we assume ComReg will be updating all appropriate references to the new Statutory Instruments when they are available.

5.2 The definition of Ethernet in clause 2.13 appears limited as it gives the impression that it is used for local area networks whereas today it is common in wide area networks as well. Could a more descriptive definition be found for example to add at the end of the text "and becoming increasingly deployed in wide area public networks"

5.3 Reference clause 4.8. Given the 30 days notice requirement to retail customers, the proposed notification relaxation in this clause to give no notice potentially puts downstream operators in regulatory Jeopardy and at risk of having to absorb additional costs until such a time they can correctly notify their customers.

Question 6. Do you have any views on this Regulatory Impact Assessment with regard to the draft maximum charges determined for WLLs, PPCs and NGN Ethernet and also with regard to the Margin Squeeze test and are there any other factors that ComReg should consider in completing its Regulatory Impact Assessment on these points? Please explain your response and provide details of any additional factors that should be considered by ComReg.

BT response 6.

We agree with the Regulatory Impact Assessment.

End

For enquires about this response please contact John O'Dwyer at john.odwyer@bt.com. Thank you

3 Alternative Operators in the Communications Market ("ALTO")

alto

alternative operators in the communications market

Submission to ComReg: further consultation and draft decision on the price control obligation in the market for wholesale terminating segments of leased lines. Document No.11/32

Submission By ALTO

Date: May 3rd 2011

ALTO welcomes ComReg's further consultation and draft decision on the price control obligation in the market for wholesale terminating segments of leased lines.

General observations

ComReg's work in this area is of critical importance for the communications market and for the business sector in Ireland. This work provides for the opportunity to further address some of the complex issues of setting the pricing control.

ALTO has provided our comments to the questions below, however we would specifically like to draw your attention to ComReg's proposal relating to the price gradient structure and prices for Wholesale Ethernet Logical Circuits.

In the previous consultation we agreed with ComReg regarding the use of gradients however expressed our concerns that the slope of the gradient was excessive. We continue to support this view and have provided our concerns in more detail in our detailed answers.

ALTO acknowledges the complexity and relative newness of the subject matter and with a view to being constructive we consider that further work is required to determine whether the gradient proposal is cost orientated. This is as the limited treatment of key factors such as eircom bandwidth restrictions raise questions as to the environment the model is operating.

We simply have no confidence that cost orientation has been, or will be, properly demonstrated.

Response to Consultation Questions:

Q. 1. Do you agree with ComReg's proposed approach to determining PPC fibre access prices? Please provide reasons for your response.

A. 1. ALTO agrees with ComReg's approach to maintaining the national approach to PPC pricing for this review. We remark that as these services still play a critically important role in the market at this time. We believe a ceiling price is helpful provided it applies to all products and that eircom notify industry in a non-discriminatory manner and at the same time as its own downstream wholesale solutions business and other downstream businesses of those price changes.

ALTO is aware that eircom are expecting significant price reductions commencing in July this year, but as yet we have seen no formal notification or guidance in relation to this. This is an obvious cause for concern for ALTO members (and indeed other non-ALTO members) if matters are left unregulated in the interregnum.

Q. 2. Do you agree with ComReg's approach on the application of the pricing gradient to WSEA logical prices? Please provide reasons for your response.

A. 2. ALTO considers the capacity restrictions eircom has placed on their Next Generation Network – NGN, to be arbitrary and commercially restrictive, rather than best of breed engineering practice (which we say it should be). We believe that it shows poor faith to the market that eircom failed to negotiate with, or give any say to industry as to the value of the network, particularly as the industry is eircom's largest customer. ALTO considers that ComReg cannot take into account the proposal to *"possibly"* (see clause 6.27) double the capacity until there is market certainty. We are at a loss to know when this is going to happen and if so when.

ALTO agrees with setting a long-term price controls, however where there are problems in that they cannot be left to fester just because they don't fit with the model or long-term aspirations. ALTO considers our original comments regarding the gradient and we say that

these comments remain good i.e., in that we agree with the principle but the gradient is far too excessive.

To provide support of our comments ALTO consider from the ComReg text that a pivot of 1Gbps is being applied to form an exponential pricing gradient up to 1Gbit/s. Our concern is that the majority of the national wholesale customer base is in the lower part of the gradient in the sub 300Mbit/s and in most case sub 100Mbit/s regions where the prices per Mbits/s are high. We consider this raises two issues:

1. eircom are over recovering their costs due to the skewed nature of the customer base towards the lower expensive end of the curve.
2. eircom as the largest single customer on their own network will be able to avail of more attracted prices further up the scale due to their large requirements for bandwidth, thus benefiting their downstream retail business against wholesale customers.

We consider as mandated by ComReg, that eircom has an obligation of cost orientation and this is not disputed or challenged. However, it is not clear from the ComReg commentary in clauses 6.69 to 6.74 which state their models do not take into account important service aspects such as service restrictions that ComReg have demonstrated cost orientation. We therefore do not agree with ComReg's approach on the application of the pricing gradient to WSEA logical prices and consider further discussion is required.

Q. 3. Do you agree with ComReg's approach and the draft maximum prices, above and as referred to in Appendix A, for WLLs, PPCs and NGN Ethernet? Please provide reasons to support your answer.

A.3. As the principle behind the pricing of these services is cost orientation we expect the prices to meet the criteria and the Wholesale Leased Lines – WLL, to have the correct margin irrespective of the price ceilings. ALTO is not in a position through lack of detailed information to verify the actual values of the ceilings and depend on the offices of ComReg regarding the values, but we do generally agree with the principle of having a ceiling is valid to provide pricing stability to the market.

Q. 4. Do you agree with ComReg's approach, as set out above, for setting the minimum price floors for WLL and other equivalents? Please provide reasons for your response.

A. 4. ALTO fully agrees with ComReg's proposed product-by-product Margin Testing, however we consider ComReg's suggested potential to review the testing approach on a case-by-case basis is inherently risky, that is, if the test is not consulted on publicly and made fully transparent to the industry. We are concerned that incumbent lobbying of complex product scenarios may not lead to a correct approach to implementation.

Ex ante rules with ex post monitoring

ALTO notes that ComReg are proposing to apply *ex ante* rules for the margin test for WLL and compliance by *ex post* tests. This is a weaker approach to regulation as it is extremely difficult for industry to detect or prove anti-competitive behaviour. This is due to the complete lack of incumbent transparency (incumbent secrecy and confidential contracts), and damage will already have been done to the industry by the time an *ex post* investigation is completed.

In order to mitigate against these identified weakness ALTO believes that comprehensive and intrusive annual monitoring will be essential and transparency of the outcome; if ComReg find non-compliance the industry should have the opportunity to launch whatever action it considers necessary against the incumbent that may include the launching of Competition Law disputes. We consider the monitoring should include vigilance of off-book point-to-point very high capacity products that operate in the terminating segment of leased lines market of which the industry has no general knowledge of the product details or the pricing yet we believe exist.

It is also important that this regime does not prevent operators taking Competition Law cases against eircom.

Margin Squeeze Test (figure 10)

With respect to figure 10, ALTO agrees that it appears to address the most likely cost candidates for the test for a simple product, however as ComReg and its Consultants

Oxera identified in 2008 for the retail market, the test needs to be able to address the bundled scenario of regulated and non-regulated components. Our concern is that the Margin test could indicate that all the regulated components in a wholesale solution or 'a bundle' pass the test, as negative margin is generally harboured in below cost, non-regulated components, or non regulated activity such as 'operational and management resource' which are not reported in the price. Our view therefore is ComReg should highlight in the test specifically how non-regulated or unreported activities are addressed in the bundled scenario.

We are already aware of eircom offering wholesale solutions 'bundles' and expect this to become far more popular over time.

Cost Stack for the Margin Squeeze Test (figure 13)
We consider that there is an important item missing in this table. It is the cost of exchange or remote buildings / rental of space, etc. or the room necessary to house the node and connecting systems around the country.

In general agree with the approach to setting the price floors however we call on ComReg to consider our comments above as being important in achieving a credible, robust and workable scheme.

Q. 5. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

A.5. ALTO generally agrees with the Draft Decision but would like to offer the following comments:

5.1 Given the transposition of the new regulatory regime on the 25th May 2011 or shortly after, we assume ComReg will be updating all appropriate references to the new Statutory Instruments when they are available;

5.2 The definition of Ethernet in clause 2.13 appears limited as it gives the impression that it is used for local area networks whereas today it is common in wide area networks as well. Could a more descriptive definition be found for example to add at the end of the text *"and now largely deployed in wide area public networks"*; and

5.3 Reference clause 4.8. Given the 30 days notice requirement to retail customers. The proposed notification relaxation in this clause to give no notice at all and potentially puts downstream operators in regulatory jeopardy and at risk of having to absorb additional costs until such a time they can correctly notify their customers. We believe this is wrong.

Q. 6. Do you have any views on this Regulatory Impact Assessment with regard to the draft maximum charges determined for WLLs, PPCs and NGN Ethernet and also with regard to the Margin Squeeze test and are there any other factors that ComReg should consider in completing its Regulatory Impact Assessment on these points? Please explain your response and provide details of any additional factors that should be considered by ComReg.

A. 6. ALTO agrees with the Regulatory Impact Assessment.

Ancillary issues:

ALTO submitted a number of items to ComReg in our response to 10/70. ComReg adequately addressed the issue of quarterly billing in its Draft Decision. ALTO calls on ComReg to closely monitor progress in relation to this significant change to billing arrangements.

ALTO also mentioned the issue the procedure for ceasing/cancelling certain types of Leased Line services. ComReg replied by stating that this was a matter for industry forums. We are not satisfied that this is being addressed adequately in the context of industry discussions. We ask ComReg to consider the issues of reforms to billing periods and ceases/cancellation of Leased Lines services as a matter of priority.

ALTO

3rd June 2011

4 Magnet Networks Limited

Magnet Networks welcomes this consultation as a follow up and a further chance for industry to make inputs into the potential decision of ComReg.

Q. 1. Do you agree with ComReg's proposed approach to determining PPC fibre access prices? Please provide reasons for your response.

Overall, Magnet Networks agrees with ComReg's proposed approach for determining PPC fibre access prices. It is important to ensure transparency in the marketplace so that there is an open and level playing field. ComReg's introduction of a price ceiling is only helpful once such price ceilings are implemented across all products and are notify the operators appropriately.

Q. 2. Do you agree with ComReg's approach on the application of the pricing gradient to WSEA logical prices? Please provide reasons for your response.

Magnet Networks will reiterate its position in the previous consultation, that the concept of applying a gradient is sound however, there are potential flaws.

It must be noted that eircom impose arbitrary restrictions on capacity through their NGN network which do no take into account the needs of its largest user base. This is something that needs to be resolved to ensure that the product itself is fit for purpose.

Q. 3. Do you agree with ComReg's approach and the draft maximum prices, above and as referred to in Appendix A, for WLLs, PPCs and NGN Ethernet? Please provide reasons to support your answer.

Overall Magnet Networks agree with ComReg's approach, however, Magnet Networks requires reassurance that the relevant margin is maintained irrespective of the maximum price. In relation to the prices per se as Magnet Networks have not seen how they were calculated and what inputs were used we cannot comment further.

Q. 4. Do you agree with ComReg's approach, as set out above, for setting the minimum price floors for WLL and other equivalents? Please provide reasons for your response.

Magnet Networks overall agree, however, it must be noted that utilising a test on a case by case basis is imposing ex post ruling in an ex ante marketplace. Magnet Networks do not believe that this is the best way to monitor breaches as in ex post the damage is done before the regulator begins to regulate.

Magnet Networks believe intrusive monitoring of the incumbent is required. It may also be necessary to monitor and quantify bespoke high capacity products that operator in the terminating segment of the leased lines marketplace and which operators are ignorant of.

Q. 5. Do you believe that the draft text of the proposed decision is from a legal, technical and practical perspective, sufficiently detailed, clear and precise with regards to the specifics proposed? Please explain your response and provide details of any specific amendments you believe are required.

Magnet Networks believe that the draft decision text is compliant with all of ComReg's legislative, technical and practical obligations. The text is sufficiently clear and precise with regards to the proposals outlined.

However, Magnet Networks would like to highlight that given all operators obligation under Regulation 17 to give 30 days notice to retail customers, outlining a no notice (Clause 4.8) policy undermines operators' ability to give their customers notice. Thus, a notice period of 45 days or greater would be more acceptable.

Magnet Networks believe the definition of Ethernet as outlined at Clause 2.13 should be amended to include wide area networks where Ethernet is now commonly used.

Q. 6. Do you have any views on this Regulatory Impact Assessment with regard to the draft maximum charges determined for WLLs, PPCs and NGN Ethernet and also with regard to the Margin Squeeze test and are there any other factors that ComReg should consider in completing its Regulatory Impact Assessment on these points? Please explain your response and provide details of any additional factors that should be considered by ComReg.

Magnet Networks agree with ComReg's RIA.