

OFFICE OF THE TELECOMMUNICATIONS ADJUDICATOR

GUIDELINES

14 October 2004

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Introduction

1. British Telecommunications plc ("**BT**") and other providers of electronic communication networks and services ("**Operators**") have entered into a series of bilateral contracts ("**Scheme Agreements**") which provide for certain disputes between them to be resolved by way of adjudication ("**Scheme**"). A list of Operators that have entered into Scheme Agreements together with the date of those Scheme Agreements may be found at [INSERT WEBSITE ADDRESS].
2. Each Scheme Agreement provides that until withdrawal from, or termination of, the Scheme, BT and the relevant Operator ("**Parties**") will:
 - accept, adopt and abide by:
 - the Adjudicator Appointment Rules;
 - the Facilitation Rules; and
 - the Dispute Resolution Rules (collectively "**Rules**"); and
 - that the Rules shall displace any contractual provisions in any Access Network Facilities Agreement between the Parties.
3. Peter Black was appointed as adjudicator ("**Adjudicator**") under the Rules with effect from 5 July 2004.

Status of Guidelines

4. The Dispute Resolution Rules in paragraphs 7.1 and 7.2 provide that:
 - "7.1 *The Adjudicator may publish from time to time [and] revise Guidance on the approach to be adopted by the Adjudicator, the required form of submission of a Dispute to the Adjudicator, what is required of Parties to a Dispute and any other appropriate matter.*
 - 7.2 *The Adjudicator may adopt such procedures as the Adjudicator considers necessary or appropriate for rapid resolution of a Dispute, including but not limited to, requiring within a short timescale from any Party to the Dispute in relation to:*
 - 7.2.1 *a formal submission of the Dispute to the Adjudicator;*
 - 7.2.2 *written arguments, written answers to questions, and verification of information;*
 - 7.2.3 *disclosure of documents or other information (subject to claim to privilege or confidence although Parties agree that they will not unreasonably withhold information);*

7.2.4 attendance to give oral submissions by appropriate executives or staff having relevant knowledge or requisite authority to make decisions binding that Party; and

7.2.5 co-operation in any other reasonably respect."

5. These guidelines constitute such Guidance. If these guidelines conflict with the Rules, then the Rules will take precedence.
6. The Scheme is a private contractual mechanism for dispute resolution agreed between the Parties. The Adjudicator is not required by the Rules to formally consult on these guidelines. However, he has informally consulted on these guidelines in draft and welcomes views and comments on an ongoing basis. He may revise these guidelines from time to time, but he does not anticipate making any major revision or changes before the first review of the Scheme in early 2005.
7. These guidelines are intended to help in understanding the Adjudicator's processes and how best to present a dispute so that the Adjudicator can deal with it in an efficient manner. These guidelines are not binding on the Adjudicator. However, where the Adjudicator departs from these guidelines he expects to give reasons for doing so.

Source of Guidelines

8. These guidelines have been developed by amending the existing "*Ofcom Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under EU directives*" ("**Ofcom Guidelines**") while taking account of the Rules. They should therefore:
 - be familiar to Parties;
 - minimise reworking of submissions by the Parties if disputes are referred by the Adjudicator to Ofcom or vice versa; and
 - facilitate fast resolution of any disputes which need to be dealt with by Ofcom.
9. These guidelines set out significantly shorter time limits than Ofcom's Guidelines. However disputes should not be referred for adjudication prior to negotiation and facilitation. Therefore the issues in a dispute will be familiar to the parties and the Adjudicator. Further, each of the Parties in their Scheme Agreement has committed to devote the resources needed for the operation of this scheme.

Adjudication Principles

10. The Adjudicator will take account of the principles set out in paragraphs 4.3 - 4.5 of the Terms of Reference:

- "4.3 *The objective for the Adjudicator is to help ensure the rapid delivery of products and processes which:*
- 4.3.1 *are, and remain, equivalent in terms of outcome to that which BT delivers to itself, so that the products and processes allow LLUOs to compete on a level playing field with BT in downstream markets based on LLU products;*
 - 4.3.2 *are, and remain, fit for purpose and appropriately industrialised; and*
 - 4.3.3 *support broad take-up of LLU (including shared and fully unbundled loops).*
- 4.4 *In relation to paragraph 4.3.1, equivalence in terms of outcome may be achieved by having other Operators use the same or similar types of products, systems and processes as are used by BT, or such other types of products, systems and processes as are appropriate to satisfy the objective.*
- 4.5 *The Adjudicator, whether acting as a facilitator or acting as an independent expert in making a Ruling or Adjudication shall where relevant take account of, inter alia:*
- 4.5.1 *reasonable resource constraints (including training requirements) of Operators and BT and the ability of Operators and BT to increase resources, although the Adjudicator is able to recommend (in facilitation) or require (in Rulings and Adjudications) reasonable increases in resources;*
 - 4.5.2 *efficiently incurred and reasonable costs, and the need to avoid wasteful expenditure by Operators and BT;*
 - 4.5.3 *likely future demand levels and forecasts;*
 - 4.5.4 *reasonable cost recovery and reasonable profit;*
 - 4.5.5 *the policy context as set by Ofcom/Oftel and regulatory rules (including any relevant Ofcom/Oftel guidelines) in relation to LLU and other relevant products and such policy / regulatory rules as are amended from time to time;*
 - 4.5.6 *existing product / processes;*
 - 4.5.7 *existing customers;*
 - 4.5.8 *network security and network integrity;*
 - 4.5.9 *the activities and recommendations of other related groups such as the NICC and Billing Industry Forum;*
 - 4.5.10 *where relevant, Ofcom's statutory duties; and*

4.5.11 the impact of any decision on other LLUOs, Operators and BT as well as on the Parties to the Dispute."

Process and Timelines

11. An overview of the process for Rulings and Adjudications may be found in the process flow charts attached as Annex 1 to these Guidelines.
12. Submissions should be made in the format set out in Annex 2 to these Guidelines.
13. Any responses (from the other Party to a dispute), comments (from an Operator not Party to a dispute or Ofcom) or reply (to any response or comment) should follow a similar format to the format described in Annex 2. In particular responses, comments and replies are encouraged to focus on paragraph B7 of the Annex 2, explaining, against the criteria set out, why they believe their preferred outcome should be the decision of the Adjudicator.
14. The Adjudicator may at any time request further information or require the parties to attend an oral hearing if he feels that it would be appropriate to resolve any particular dispute. At such time he will give guidance as to the impact of such request or hearing on the timeline and process of that particular dispute resolution.
15. The Adjudicator will, in general, refer any dispute for facilitation (or further facilitation) if in his view this would be a faster or better means for resolving a dispute.

Adjudicable Dispute

16. The Adjudicator will only accept Adjudicable Disputes. "**Adjudicable Dispute**" means a matter that the Adjudicator may resolve as set out in paragraphs 3.2 and 3.3 of the Dispute Resolution Rules:

"3.2 The disputes to be resolved under the Scheme are those concerning LLU within Rules 3.2.1 to 3.2.7 below or a particular dispute as described in Rule 3.2.8 below:

3.2.1 Product functionality which refers to the definition, specification (including timing of availability) and functionality of LLU products, and associated facilities and activities necessary for LLU such as co-location and tie-cables. It will include inter-alia issues such as:

3.2.1.1 Scope of an unbundled loop (e.g. issues such as the product definition of shared and fully unbundled loops, interpretation of the Access Network Frequency Plan);

- 3.2.1.2 *Location and type of unbundling (e.g. issues such as sub-loop unbundling);*
- 3.2.1.3 *Approach to achieve unbundling (e.g. prequalification, linetesting, jumpering, product compatibility, quality management);*
- 3.2.1.4 *Associated facilities required to support unbundling and the specification of these (e.g. co-location, distant co-location, commingling and tie cables); and*
- 3.2.1.5 *Operational activities associated with in-life service management (e.g. site access requirements, testing approach and how faults are managed).*
- 3.2.2 *Process specification which refers to the specification and availability of the processes involved through the life-cycle of relevant LLU products. It will include inter-alia processes such as:*
 - 3.2.2.1 *Forecasting and demand management;*
 - 3.2.2.2 *Pre-ordering (for example, pre-qualification, line testing and address matching);*
 - 3.2.2.3 *Ordering;*
 - 3.2.2.4 *Provisioning, including but not limited to new provisions, coordinated provisioning (for example, LLU with WLR (wholesale line rental)), transfer (for example, from PSTN (Public Switched Telephone Network) to fully unbundled MPFs (Metallic Path Facilities)), number portability, change of end user customer name and broadband migrations;*
 - 3.2.2.5 *Fault reporting and repair; and*
 - 3.2.2.6 *Billing.*
- 3.2.3 *Process specification which will also include the setting of reasonable quality levels, Service Level Agreements (“SLAs”) and Service Level Guarantees (“SLGs”) (and penalties / liquidated damages in these).*
- 3.2.4 *Change management which refers to on-going modifications, enhancements and improvements of LLU products and processes as outlined in Rules 3.2.1 to 3.2.3.*
- 3.2.5 *Implementation plans which refers to the implementation of new and changed LLU products and processes (as outlined in Rules 3.2.1 to 3.2.4), including the project plans, timescales and reasonable resourcing required to delivery these products and processes.*

- 3.2.6 *Monitoring activities which refers to necessary on-going activities to monitor implementation of non binding recommendations and compliance with Rulings and Adjudications of the Adjudicator, including the use of appropriate Key Performance Indicators (“KPIs”) where relevant.*
- 3.2.7 *For the avoidance of doubt, charge setting and policy development will not be included in the Scope of the Adjudicator, but will remain matters for Ofcom.*
- 3.2.8 *A particular dispute designated in a written agreement between the Parties for resolution under the Scheme.*
- 3.3 *Notwithstanding the provisions of Rule 3.2 above, a Dispute shall cease to qualify for resolution under the Scheme if at any time the Adjudicator determines that the Dispute:*
 - 3.3.1 *is an “excluded dispute” within the meaning of section 185(7) of the Act; or*
 - 3.3.2 *is trivial (in the opinion of the Adjudicator unless all Parties to such dispute advise the Adjudicator otherwise);*
 - 3.3.3 *having been submitted by Ofcom for an Adjudication under Rule 5.1 below, it should for any other reason be referred back to Ofcom for determination by Ofcom; or*
 - 3.3.4 *is a dispute where resolution of such dispute would probably result in one or more of the following:*
 - 3.3.4.1 *conflict with existing Ofcom regulatory policy;*
 - 3.3.4.2 *establishing new regulatory policy;*
 - 3.3.4.3 *setting of LLU charges;*
 - 3.3.4.4 *excessive additional expenditure by Operators and / or BT in relation to the potential benefits;*
 - 3.3.4.5 *a significant detrimental impact on network security or network integrity; or*
 - 3.3.4.6 *a significant detrimental operational disruption, dislocation or re-engineering of operational systems or processes.”*

Submission of Disputes

17. Adjudicable Disputes may be submitted to the Adjudicator:

- a. by a Party prior to the Adjudicable Dispute being referred to Ofcom pursuant to Dispute Resolution Rule 4.1, in which case the Adjudicable Dispute is referred for a Ruling; or
 - b. by Ofcom after an Adjudicable Dispute has been referred to Ofcom pursuant to Dispute Resolution Rule 5.1, in which case the Adjudicable Dispute is referred for an Adjudication.
18. The Adjudicator intends to follow a similar process whether an Adjudicable Dispute is referred for a Ruling or Adjudication. Both Rulings and Adjudication will be made in accordance with the principles set out in Dispute Resolution Rule 6 and the process set out in Dispute Resolution Rule 7 and these Guidelines.
19. If a dispute is referred to the Adjudicator by Ofcom, then the Adjudicator may accept the original dispute reference made to Ofcom by a Party as the submission for Adjudication. However, if the original submission does not meet the requirements of these guidelines, the Adjudicator may, at his discretion, require the Party who originally referred the dispute to Ofcom to resubmit the dispute to the Adjudicator in the format set out in Annex 2 before accepting the dispute for Adjudication.
20. The Adjudicator will consider all submissions he receives. However, the Adjudicator expects submissions to contain a material level of evidence before he will open an investigation. The Adjudicator will consider the circumstances surrounding each submission, but will decline to resolve a dispute in response to unsubstantiated allegations, inadequate or frivolous submissions. The requirement to provide evidence to back up an allegation will enable the Adjudicator to identify disputes that raise real concerns and to use his resources efficiently.
21. The Adjudicator will only accept a dispute where a Party submits clear information on all details of the dispute including:
- a clear statement of the scope of the dispute;
 - full details of a preferred remedy with reasons referring to each criteria (as set out in paragraph 7 of Annex 2) which must be considered by the Adjudicator in reaching his decision;
 - documentary evidence of commercial negotiations on all issues covered by the scope of the dispute including facilitation; and
 - a statement by an officer, preferably with direct profit and loss responsibility for the Party's UK LLU business, that:

- the company has used its commercially reasonable endeavours to resolve the dispute through commercial negotiation; and
 - the dispute, if unresolved, will have a material impact on the broad take-up of LLU in the UK.
22. The Adjudicator recognises that companies may refuse to enter into negotiations or introduce unreasonable delay in an attempt to stall negotiations. In such cases, the Party asking the Adjudicator to resolve a dispute should demonstrate that it has taken reasonable steps to engage the other Party in commercial negotiations. The Adjudicator will usually accept, as an alternative to documentary evidence of commercial negotiations, evidence which suggests that one Party has tactically refused to negotiate.

Confidentiality

23. Parties should keep claims of confidence to a minimum and not claim confidentiality for entire documents or classes of documents, but rather excise the minimum required to protect legitimately confidential information. The Adjudicator will respect the confidentiality of information supplied to him.

Acknowledging And Accepting Submissions

24. The Adjudicator aims to acknowledge all submissions made to him within two working days and to tell the complainant whether it intends to accept a request to resolve a dispute. The Adjudicator uses this two-day period to ensure that it fully understands the scope of the dispute, and to reach a decision about whether it is appropriate to accept a dispute for resolution. Where the Adjudicator needs more than two working days to decide whether it is appropriate to open an investigation, the Adjudicator will be prepared to explain why.
25. The Submitting Party ("**Submitting Party**") is strongly encouraged to copy a non-confidential version of their submission to the other Party at the same time as submitting it to the Adjudicator.
26. The response phase begins on the earlier of the day on which a complete submission (including a non confidential version which can be sent to the other Party) is received by the Adjudicator and the day on which a non-Submitting Party receives a non-confidential copy of the submission. The Adjudicator will generally copy non-confidential submissions to the other Party (unless they are already in receipt of the submission), other interested parties as well as publishing such submission on his website.
27. If a non confidential version of the submission is not included with the original submission (or a statement that the complaint or dispute as submitted can be

regarded as non confidential), the response stage will not begin until a non confidential version of the submission is made available.

28. If the Adjudicator finds at any time that the evidence submitted is incorrect, or based on a misunderstanding, or that it is not an Adjudicable Dispute, the Adjudicator may decide to close or reject the matter.
29. If the submission includes a request for the Adjudicator to consider issues on which commercial negotiations have not taken place, or where there has been no reasonable attempt to engage in negotiations, these issues will not be included in the statement of scope and will not be addressed by the Adjudicator.
30. The Adjudicator's investigations will be open and transparent. Unless there are specific confidentiality concerns, the Adjudicator will publish details of all investigations on his website as they are opened and closed.

Responses and Comments

31. Responses to submissions (from the other Party) and comments (from other interested parties and Ofcom) should be sent to the Adjudicator, with a non-confidential copy sent to the Submitting Party, no later than close of business (5 p.m.) on the fifth clear working day following the earlier receipt of the relevant submission by such Party or publication of the submission by the Adjudicator.
32. Any responses or comments should follow a similar format to the format described in Annex 2. In particular respondents are encouraged to focus on paragraph B7 of the format shown in Annex 2, explaining against the criteria described why they believe their preferred outcome should be the decision of the Adjudicator.

Replies

33. Responses or comments should be copied to the Submitting Party. The Submitting Party may reply to issues raised in a response or comment (but not raise new issues) by way of Reply. Replies should be sent to the Adjudicator, with a non-confidential copy sent to all the other parties who have responded or commented, no later than close of business (5 p.m.) on the second clear working day following receipt of any such duly served response or comments.

Strict Time Limits

34. These time limits are intended to be strict and the Adjudicator may disregard at his discretion any response, comment or reply not meeting the time limits.

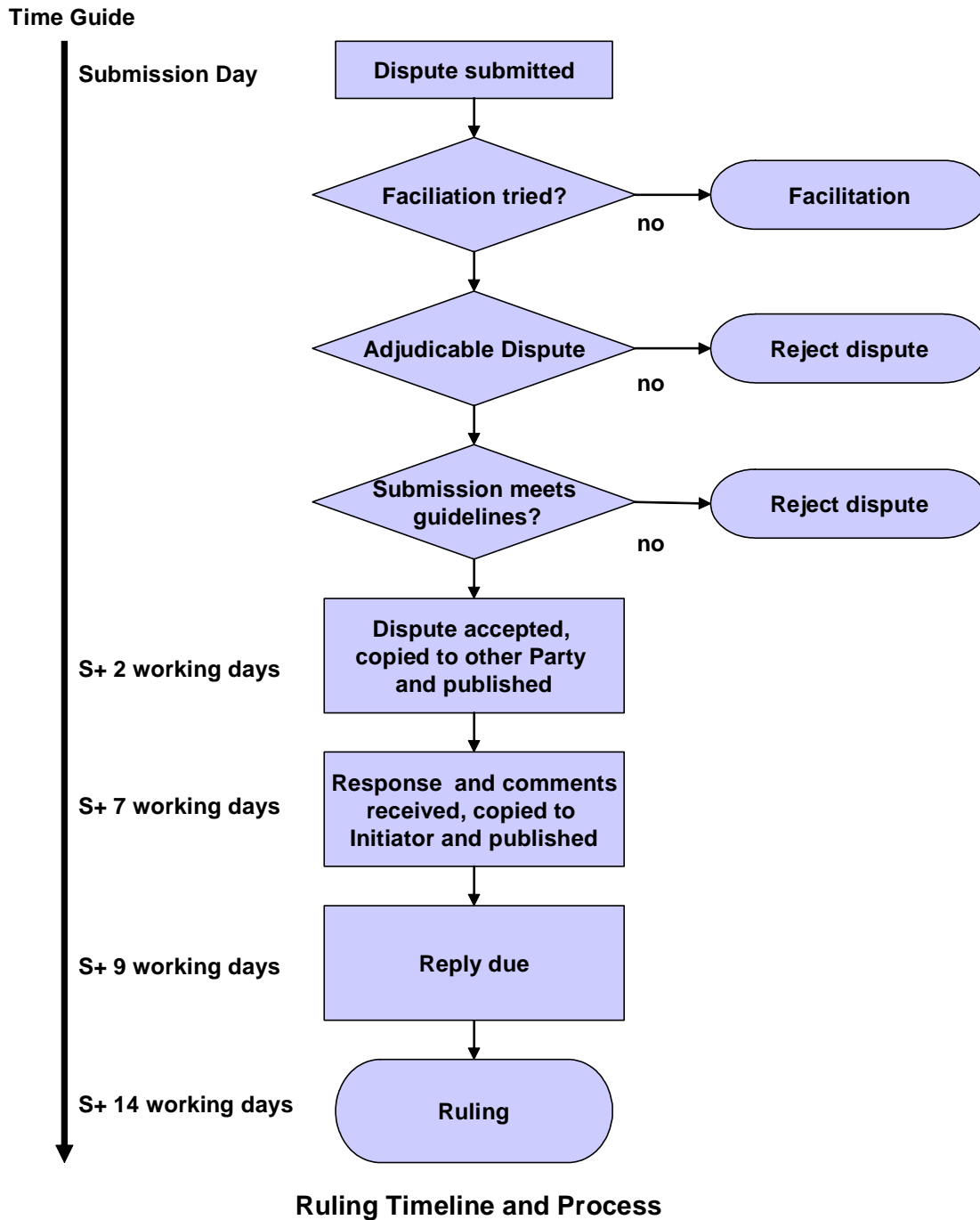
Resolution

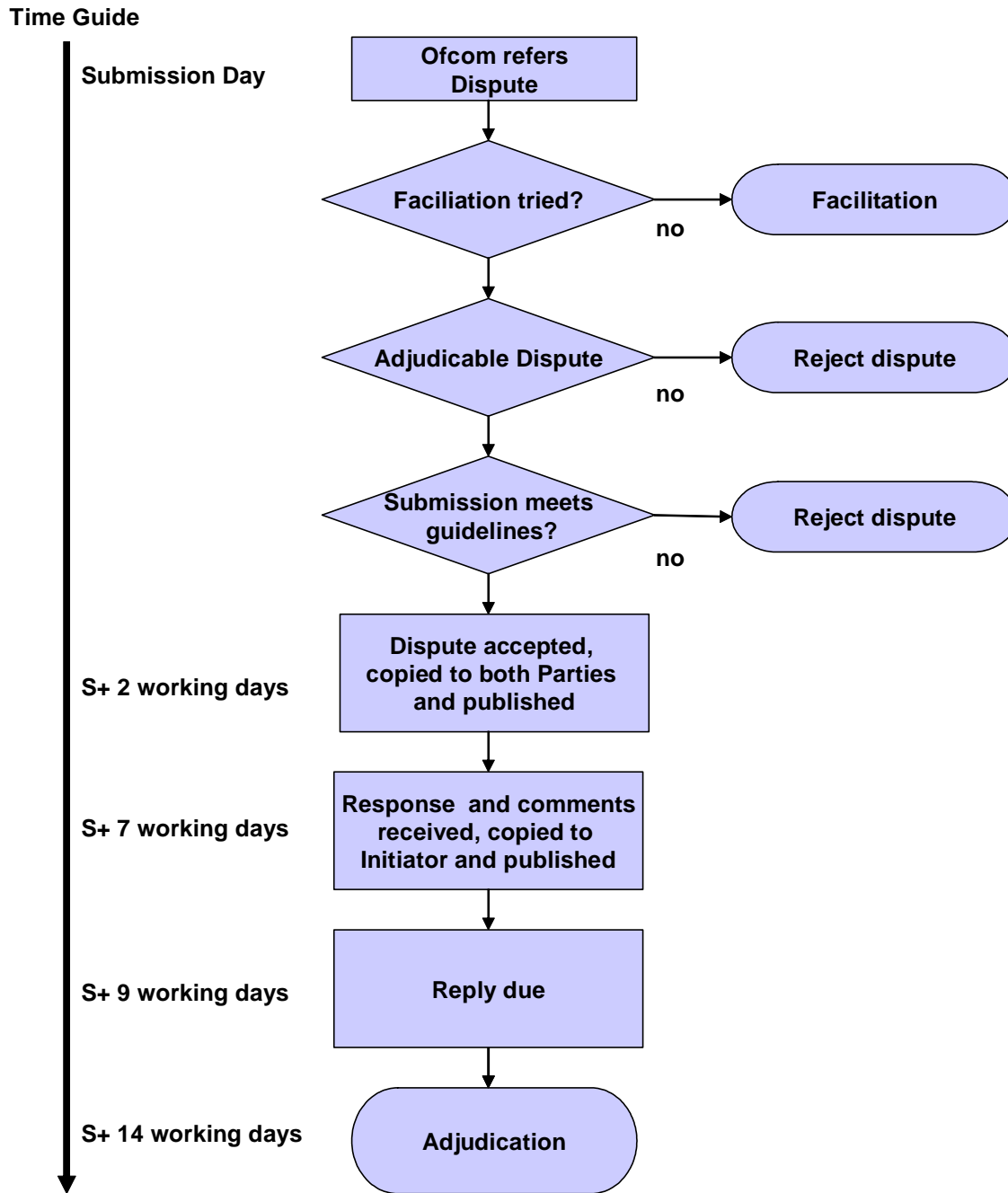
35. The Adjudicator will resolve disputes in accordance with the Rules, which provide that:

- " 6.1 *The Adjudicator shall act as expert and not as arbitrator or mediator.*
- 6.2 *The Adjudicator shall endeavour to resolve the Dispute as rapidly as is practicable.*
- 6.3 *The Adjudicator shall as a matter of general principle have regard to the need to give independent, objective and fair consideration to the submissions and evidence of each Party in accordance with the principles of natural justice.*
- 6.4 *In making any Ruling or Adjudication, the Adjudicator shall as far as is reasonably practicable have particular regard to:*
 - 6.4.1 *The objective for the Adjudicator which is to help ensure the rapid delivery of products and processes which:*
 - 6.4.1.1 *are, and remain, equivalent in terms of outcome to that which BT delivers to itself, so that the products and processes allow LLUOs to compete on a level playing field with BT in downstream markets based on LLU products;*
 - 6.4.1.2 *are and remain, fit for purpose and appropriately industrialised; and*
 - 6.4.1.3 *support broad take-up of LLU (including shared and fully unbundled loops).*
 - 6.4.2 *In relation to Rule 6.4.1.1, equivalence in terms of outcome may be achieved by having other Operators use the same or similar types of products, systems and processes as are used by BT, or such other types of products, systems and processes as are appropriate to satisfy the objective; and*
 - 6.4.3 *Where relevant take account of, inter alia:*
 - 6.4.3.1 *reasonable resource constraints (including training requirements) of Operators and BT and the ability of Operators and BT to increase resources, although the Adjudicator is able to require reasonable increases in resources;*
 - 6.4.3.2 *efficiently incurred and reasonable costs, and the need to avoid wasteful expenditure by Operators and BT;*
 - 6.4.3.3 *likely future demand levels and forecasts;*
 - 6.4.3.4 *reasonable cost recovery and reasonable profit;*

- 6.4.3.5 the policy context as set by Ofcom/Oftel and regulatory rules (including any relevant Ofcom/Oftel guidelines) in relation to LLU and other relevant products and such policy / regulatory rules as are amended from time to time;*
 - 6.4.3.6 existing product / processes;*
 - 6.4.3.7 existing customers;*
 - 6.4.3.8 network security and network integrity;*
 - 6.4.3.9 the activities and recommendations of other related groups such as the NICC and Billing Industry Forum;*
 - 6.4.3.10 where relevant, Ofcom's statutory duties; and*
 - 6.4.3.11 the impact of any decision on other LLUOs, Operators and BT as well as on the Parties to the Dispute.*
- 6.5 *The Adjudicator may also consult other LLUOs, Operators and BT as he sees fit and may as appropriate take account of their views."*
36. The Adjudicator relies on accurate information, provided in a timely manner, to carry out dispute resolution. If Parties do not comply with these guidelines or provide such other information as the Adjudicator may request the Adjudicator may resolve any dispute on the material he has before him and draw such inferences as he thinks fit.
37. The Adjudicator shall endeavour to make his decision no later than close of business (5 p.m.) on the fifth clear working day following receipt of any duly served reply.
38. Where the outcome of a dispute is of interest to a number of stakeholders, they should submit their views by way of comments.

Annex 1 - Process flowchart and timeline





Adjudication Timeline and Process

Annex 2 - Format for Referring Dispute to the Adjudicator

A request for resolution of a dispute should be submitted in four hard copies and one Microsoft Office compatible electronic version to:

FAO: The Telecommunications Adjudicator
 Riverside House
 2A Southwark Bridge Road
 London
 SE1 9HA
E-mail: Peter.Black@offta.org.uk
Tel: 020 7783 4670

On receipt, the Adjudicator will send a non confidential version of your submission to the Parties named in your dispute submission. If your submission contains confidential information, you should therefore provide a separate non confidential version which can be copied to the other Party.

In the event that the Adjudicator accepts your submission, the Adjudicator will publish details of the dispute, including the business names of the Parties, on the Adjudicator's website.

Section A - Preliminary Information

1. A summary of your dispute, not longer than two A4 pages.
2. Business name, address, telephone/fax number, and/or e-mail address and, if relevant, the contact details of a person who can discuss the detail of the dispute.
3. A brief explanation of the nature of your business and its scale.
4. Detail of the other Party involved in the dispute and of the relationship between the Parties to the dispute.

Section B - The Issues in Dispute

5. A full statement of the scope of the dispute, including:
 - a list of all the issues which are in dispute; and
 - full details of the relevant products or services.
6. In the case of disputes involving contracts a copy of the relevant version of the contract, clearly identifying the clauses that are the subject of the dispute.

7. Details of the way in which you wish to see the dispute resolved, including an explanation as to why the Adjudicator should reach this outcome addressing each of the following considerations:

"6.4 In making any Ruling or Adjudication, the Adjudicator shall as far as is reasonably practicable have particular regard to:

6.4.1 The objective for the Adjudicator which is to help ensure the rapid delivery of products and processes which:

6.4.1.1 are, and remain, equivalent in terms of outcome to that which BT delivers to itself, so that the products and processes allow LLUOs to compete on a level playing field with BT in downstream markets based on LLU products;

6.4.1.2 are, and remain, fit for purpose and appropriately industrialised; and

6.4.1.3 support broad take-up of LLU (including shared and fully unbundled loops).

6.4.2 In relation to Rule 6.4.1.1, equivalence in terms of outcome may be achieved by having other Operators use the same or similar types of products, systems and processes as are used by BT, or such other types of products, systems and processes as are appropriate to satisfy the objective; and

6.4.3 Where relevant take account of, inter alia:

6.4.3.1 reasonable resource constraints (including training requirements) of Operators and BT and the ability of Operators and BT to increase resources, although the Adjudicator is able to require reasonable increases in resources;

6.4.3.2 efficiently incurred and reasonable costs, and the need to avoid wasteful expenditure by Operators and BT;

6.4.3.3 likely future demand levels and forecasts;

6.4.3.4 reasonable cost recovery and reasonable profit;

6.4.3.5 the policy context as set by Ofcom/Oftel and regulatory rules (including any relevant Ofcom/Oftel guidelines) in relation to LLU and other relevant products and such policy / regulatory rules as are amended from time to time;

6.4.3.6 existing product / processes;

6.4.3.7 existing customers;

6.4.3.8 network security and network integrity;

6.4.3.9 the activities and recommendations of other related groups such as the NICC and Billing Industry Forum;

6.4.3.10 where relevant, Ofcom's statutory duties; and

6.4.3.11 the impact of any decision on other LLUOs, Operators and BT as well as on the Parties to the Dispute."

Section C - History of Commercial Negotiations

8. A description of any negotiations which have taken place between the Parties; or, in the event that a Party has refused to enter into negotiations, evidence to suggest that you have taken reasonable steps to engage the Party in meaningful negotiations.
9. Details of the steps taken to resolve all of the issues which are in dispute and a review of any facilitation which has taken place.
10. An explanation of why commercial agreement could not be reached.
11. Relevant documentary evidence of commercial negotiations, covering the whole period of negotiation, including correspondence, notes of meetings and telephone calls, together with a chronological summary of the events.
12. Details of any options or proposed solutions put forward by any Party during negotiations, including what, if anything, was accepted, what was rejected and why.

Declaration By An Officer Of The Company:

13. Before making this submission to the Adjudicator, to the best of my knowledge and belief, [company name] has used its commercially reasonable endeavours to resolve this dispute through commercial negotiation and that the dispute, if unresolved, will have a material impact on the broad take-up of LLU in the UK.

Signed:

Position in the Company:

Date: