ANNEXE B

PARTIES’ STATEMENT OF FACTS

Proposed agreement between the National Farmers’ Union and the Country Land and Business Association (the Parties) regarding recommended wayleave rates relating to infrastructure for the provision of rural broadband (Recommended Reference Rate)

1. THE PARTIES

1.1. The National Farmers’ Union (NFU) has members across England and Wales. It has around 56,000 farmer and grower members, and around 40,000 countryside members with an interest in farming and the countryside. The NFU is not aware of any reliable statistics for the total number of farmers and growers in England and Wales, particularly as there is no precise definition of who constitutes a farmer/grower. The NFU believes that there are around 105,000 English claimants under the European Union’s (EU) Common Agricultural Policy (CAP) scheme but not all claimants under the CAP scheme are necessarily commercial farmers or growers. The NFU’s role is to champion British farming and it provides professional representation and services to its farmer and grower members.

1.2. The Country Land and Business Association (CLA) represents 34,100 members across England and Wales. The CLA estimates that its members own approximately half of the land mass in England and Wales. Its activities, on behalf of the membership, cover some 250 different areas, including agriculture, tourism, communication and technology, planning, renewable energy and the environment.

1.3. Farmers/growers and landowners may be members of both the NFU and the CLA although the Parties do not know what proportion of their members belong to both organisations.
2. BACKGROUND: RURAL BROADBAND

2.1 The Parties are proposing the Recommended Reference Rate for wayleave rates for the laying of broadband infrastructure\(^1\) in rural areas. The Parties expect that most (if not all) of the infrastructure providers who look to lay broadband infrastructure in rural areas will access Government funding via BDUK or the Rural Community Broadband Fund which is jointly funded by DEFRA and BDUK (please see paragraph 2.7 below). The intention is to facilitate and reduce the cost of the provision of broadband in rural areas of England and Wales, but it is important to note that the Parties will be making recommendations that will not be binding upon either their respective members, or on infrastructure providers (please see paragraphs 3.8 to 3.10 below).

2.2 By way of background to the proposed Recommended Reference Rate, this section provides an explanation on the Government’s broadband policies and the barriers (including the grant of wayleaves) to the provision of broadband in rural areas with small populations. The Parties agree with the Government that access to broadband is a crucial service, not just for the Parties’ members and their businesses, but also for the wider rural community and economy.

2.3 A more general explanation of broadband, broadband infrastructure and the relevant terminology used in the Statement of Facts is set out in Annexe 1.

2.4 For completeness, as explained in more detail in Annexe 1, while broadband can be accessed in rural areas through satellite and mobile phone networks, both means of connection have disadvantages and are not widely seen as long-term alternatives to fixed line broadband. Satellite tends to be more expensive, requires a dish to be fixed to the premises, suffers signal delay (latency) and can be adversely affected in poor weather. Mobile broadband relies on an effective and reliable mobile phone signal which may not always be available in rural areas.

\(^1\) Mostly by means of underground cables.
Rural broadband: overview of concerns and Government policies

2.5 The delivery of broadband access to rural communities is a key Government priority. The Department for Business Innovation and Skills released a report in December 2010 titled Britain’s Superfast Broadband Future\(^2\) (the Report). In the Report, the Department highlights that many rural areas are still without broadband due to ‘the challenging business case’ in remote areas.\(^3\)

2.6 The key problem is that the main infrastructure providers (such as BT and Virgin Media) have consistently said that there is a very weak commercial argument for extending broadband into rural areas. Indeed, BT’s Universal Service Obligation does not extend to the provision of broadband to rural areas. Put simply, due to the limited numbers of available potential users in rural areas, there is likely to be less take up for broadband services and, therefore, less commercial return than in urban areas.\(^4\) Indeed, the payback period in rural areas for the infrastructure alone is believed to be between 15 and 20 years due to the low level and sparsely distributed nature of available potential demand. In urban areas, the payback period is, of course, far shorter due to the high levels of concentrated potential demand.

2.7 The Report highlights the concern that a digital divide may result from the lack of access to broadband in rural areas, as compared to urban areas. By way of context, the Parties believe that around 15 per cent to 20 per cent of rural areas have little or no access to effective broadband.\(^5\) In the light of this and the Government’s overall aim to have the ‘best superfast broadband network in Europe by 2015’, the Government has committed £530 million of funding to help stimulate investment in the provision of broadband in areas of the UK where

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\(^2\) See Annexe 2
\(^3\) Executive Summary of the Report, para 15. See also Chapter 1, para 1.10 which says ‘... the business case for broadband is weaker in rural areas and in some cases non-existent as the cost of deployment rises considerably. Work carried out by the Broadband Stakeholder Group suggests that the cost of deploying superfast broadband to the last 10% of households is up to 3 times higher than the first two-thirds of the population.’ The BSG’s report referred to in this statement is available at: www.broadbanduk.org/index.php?option=com_content&task=view&id=303&Itemid=7
\(^4\) See also the explanation of demand aggregation in Annexe 1.
\(^5\) This view is supported by the digital mapping exercise by OFCOM (see http://maps.ofcom.org.uk/broadband). The parties consider effective broadband to be at least 2Mb/ps.
the commercial investment case is weak or non-existent. The Government’s funding is allocated by an agency of the Department for Culture, Media and Sport (DCMS), Broadband Delivery UK (BDUK). In basic terms, funding is allocated by BDUK to local authorities (principally County Councils). These funds are then matched by local authorities or private investment. Funding is also available through the Rural Community Broadband Fund which provides grants to local communities in hard to reach areas identified in the Local Authority’s Local Broadband Plan and is delivered as part of the Rural Development Plan for England. However, funding is only available in respect of up to 50 per cent of so-called total ‘eligible’ costs. These costs include capital infrastructure establishment costs and other associated costs (excluding ongoing maintenance costs).

2.8 In principle, there are no limitations to the ways in which broadband infrastructure could be provided in circumstances where it is commercially unviable and BDUK or other funding is available. The Government is leaving it to communities to find the best means of achieving broadband connection. However, the Parties anticipate the Recommended Reference Rates will be of use in the following two typical situations:

2.8.1 Where a Community Interest Company (CIC) is created to build and own a micro network that supplies a community. CICs are ‘not-for-profit’ companies with primarily social objectives. Their surpluses are reinvested in the community. In most cases, it is anticipated that BDUK or other funding will be available to the CIC and that they will create their own plans for the laying of infrastructure and subsequent provision of the broadband services.

2.8.2 Where a local body engages with a private sector supplier. These bodies will run mini-tenders to select a supplier with call-off contracts typically lasting for seven years.

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6 Current indicative funding by BDUK can be found at the following link: [www.culture.gov.uk/images/publications/BDUK-Funding-Allocation-16-08-11.pdf](http://www.culture.gov.uk/images/publications/BDUK-Funding-Allocation-16-08-11.pdf)

7 Further detail on CICs is contained in Annexe 3.

8 A micro-network is one in which services are shared by a small number of people and, therefore, where connections are limited.

Provision of broadband to rural and remote areas: the wayleave issue

2.9 The Report considers how investment in broadband infrastructure in rural areas might be facilitated, despite the ‘challenging business case’. One of the factors that the Report considers creates difficulties for investment decisions at present is the negotiation of wayleaves with property owners and landowners.10

2.10 By way of explanation, the report notes that telecoms networks often travel across private land, and that access to that land has to be negotiated between the infrastructure provider and the landowner. The resulting agreement is called a wayleave. Most wayleaves are negotiated commercially but increasingly this is not possible because the infrastructure provider and the landowner are unable to agree the level of payment. The report explains that while there is a statutory framework11 for negotiating such access, the court process is time consuming and agreeing the appropriate level of payment is difficult because packages vary wildly.12 Further detail on wayleaves and wayleave agreements are contained in Annexe 4.

2.11 The report notes that the Government will consider a number of ways to address this issue. In particular, it says:

‘We will be looking to actively engage with property and landowners, through organisations such as the National Farmers Union and the Country Land and Business Association, which has named broadband rollout as one of its priorities,13 in order to try and address some of the issues faced by communications providers, and whether standardised terms and conditions may be appropriate in some cases.’14

2.12 It is as a result of this engagement with the Government and with its support that the Parties have addressed the issue of providing recommended reference rates for wayleaves. Furthermore, the

10 Chapter 5, para 5.11 et seq. of the Report.
12 Chapter 5, paras 5.11 – 5.13 of the Report.
13 See for example the CLA’s ‘Can’t Get Online Week’ which ran from 30 October to 6 November 2011.
14 Chapter 5, para 5.16 of the Report.
Parties should make clear that they support the Government’s broadband policies in respect of rural areas and recognise that uncertainty regarding the agreement of wayleaves and associated payments, between landowners and communications providers, is one of the factors holding up or preventing the deployment of infrastructure for the provision of rural broadband. Indeed, it is clear that a marginal project which is likely to depend on public subsidy is easily derailed by prospective grantors of wayleaves demanding unrealistically high rates.

2.13 The Parties also recognise that one of the key problems is that there is considerable uncertainty as to the appropriate level of wayleave rates in situations where there is no or little business case for the provision of broadband infrastructure. Indeed, a very wide range of values has been attributable to telecoms wayleaves, ranging from very high values for commercial applications in the City of London\textsuperscript{15} to very low values for small capacity networks,\textsuperscript{16} with neither extreme being a good comparator for the Parties’ Recommended Reference Rate. These wayleave rates have been paid on an annual or one-off basis with the payment method depending upon the preferences of the landowner and the infrastructure provider. Individual landowners/occupiers and their rural advisers are not experts in rural broadband wayleaves, and it is very easy for misapprehension about the value of a wayleave to stand in the way of broadband roll out. This leaves both Parties to the wayleave agreement uncertain about how much they should receive, and in turn raises concerns amongst investors about whether landowners will seek unrealistic wayleave rates for infrastructure which already lacks a clear business case for investment.

2.14 The Parties’ legal adviser held discussions with one of the main private rural broadband infrastructure providers, who highlighted the following particular points and concerns:

\textsuperscript{15} See for example, \textit{Mercury Communications Ltd. v. London and India Dock Investments Ltd.} (1994) 69 P&CR 135. In this case, an annual wayleave of £9,000 in respect of 230 metres of cable duct was set in 1993 (i.e. £39 per metre per annum).

\textsuperscript{16} See for example, \textit{Cabletel Surrey and Hampshire Ltd. v. Brookwood Cemetery} [2002] EWCA Civ 720. In this case a one-off wayleave payment of £0.70 per metre in respect of copper cabling was set in 2002.
2.14.1 Rural broadband infrastructure projects are still very much in their early days with providers struggling to establish themselves. Some providers such as NextGenUs have already entered into administration and others like Rutland Telecom have been taken over.

2.14.2 This is evidenced by the fact that to date very few rural broadband projects have been completed. However, it is anticipated that the number of projects will increase significantly and the provider concerned indicated that it has around 25 projects in the planning stage. Overall, it is anticipated that broadband roll out across the entire country will continue for many years.

2.14.3 As the number of projects grows, the wayleave issue will become increasingly important to providers. In most cases to date, the provider has been able to negotiate a wayleave rate as the relevant community has usually approached the provider for the provision of a broadband connection and, therefore, has a vested interest in the success and roll out of the project. However, it is anticipated that this will become increasingly difficult to achieve in all situations due to the need to cross land that will not benefit from the connection. This is particularly the case for land crossed in order to enable the backhaul connection of the community cabinet to the main trunk point. On average, the provider estimated that it is necessary to lay cable over 3.5–5 km for the backhaul connection.

2.14.4 To date, the provider estimates that around three per cent\(^{17}\) of routes have needed to be changed due to negotiation difficulties with landowners. However, the provider noted that these diversions can have significant consequences due to the increased costs associated with such diversions and particularly because in all of the cases to date the diversion has been to public land, for example via a road or verge. Annexe 6 sets out the estimated costs associated with such a diversion.

\(^{17}\) This relates to the provider’s experience in relation to two schemes and its dealings with around 300 landowners.
2.14.5 More generally, the provider explained that it would expect almost all diversions in future projects to be to the road or verge as opposed to another landowner’s land. By way of explanation, in general, it is difficult to divert to other private land as the landowner concerned will own large areas of land to either side of the optimal route through which the provider needs to pass (for example as part of the backhaul route). In this situation, if negotiations are unsuccessful or very prolonged, the abandonment of the project is the most likely outcome. However, short diversions to the public highway for end user connection purposes may be feasible (albeit more costly) where an agreement with an individual private landowner is not possible. By way of example, the infrastructure route might be diverted to run along a road parallel to end users’ front gardens rather than along a farmer’s field that runs parallel to their back gardens.

2.14.6 An issue that is often more significant for the provider is the time and expense associated with engaging in lengthy negotiations with landowners along the infrastructure route. While, ultimately, a wayleave is usually agreed, the provider explained that the process involves considerable time and delay. This is in large part because landowners want to be reassured that they are being offered a fair rate. In the absence of guidance, this is a difficult assessment for the landowner to make. The Parties believe that the recommendation of reference rates will be particularly useful in addressing this issue as the rates will provide both guidance and reassurance to landowners as to the likely level of a realistic and fair rate for the grant of a wayleave in rural areas thus reducing negotiation time/costs.

2.14.7 The provider estimated that a recommendation by the Parties could help to reduce overall project time by around 30 per cent as landowners simply want reassurance that they are receiving a fair rate. The provider explained that landowners are likely to be reassured by the guidance of the Parties due to their position as trusted organisations and that this should greatly speed up and simplify the negotiation process.

2.15 As explained above and in Annexe 4, it is possible to use the courts to obtain a wayleave by compulsion. However, in practice, it is
simply not feasible for not-for-profit rural broadband companies to bear the costs of securing wayleaves through court proceedings. Apart from the professional costs involved, in many County Courts across England and Wales it can commonly take three to four months for a hearing date to be set and the final judgment may take even longer. In some instances, the Parties understand from DCMS that the court process can take up to four years although the Parties have not been able to verify this. However, if it comes to court action, the rural broadband project will have effectively failed and is very unlikely to proceed as generally the infrastructure provider will have no interest in pursuing a lengthy and costly court process to implement a scheme that is not economically viable without State support. A lawyer at one of the Parties’ panel firms has confirmed that in his experience the legal costs of a landowner and infrastructure provider of taking a dispute to full trial could easily reach £40,000. Put in context, as shown in Annexe 6, the typical costs of laying broadband infrastructure along field boundaries is £3 – £12 per metre. As such, the costs and delays associated with seeking a wayleave over a field via a court process would very quickly exceed the costs of laying the infrastructure over the land concerned. A private infrastructure provider has also told the Parties that aside from cost and delay, it would be very reluctant to use the court process as one of its key drivers is to work with the community. The issuing of court proceedings would inevitably create the reverse impression.

2.16 Against this background, the Parties have considered a number of options with a view to facilitating the provision of broadband to rural communities (including the Parties’ respective members), and, in particular, to address the issues regarding wayleave agreements and wayleave rates. The Parties wish to propose a Recommended Reference Rate for wayleaves in rural/remote areas, the details of which are set out below. The Parties’ overall approach to addressing the wayleave issue through a standardised agreement\(^\text{18}\) has the backing of the Government as explained above. Furthermore, the Minister for Culture, Communications and Creative Industries has written to both Parties welcoming the news that the NFU and CLA

\(^{18}\) The parties have not asked the OFT to consider the terms of this agreement in its Short-form Opinion.
are working together to produce a rural broadband land agreement and this is commented upon further below.\(^{19}\)

3. THE PROPOSED RECOMMENDATIONS

The Proposed Recommended Reference Rate and its purpose

3.1. In the light of the above, the Parties wish to recommend to their respective members a wayleave reference rate that the Parties’ respective members could seek to achieve as a ‘payment’. By way of clarification, a new wayleave would be required for new broadband infrastructure even in cases where the landowner has already granted wayleaves in respect of other infrastructure (for example, electricity pylons and overhead wires or other telecommunications infrastructure). A wayleave is a bilateral agreement between the landowner and the provider in respect of individual infrastructure. As such a new wayleave would be required, even if the broadband infrastructure is laid along the same route or even in the same ducting as existing infrastructure.

3.2. The primary purpose of the Recommended Reference Rate is to create a greater level of guidance for investors in rural broadband infrastructure, so that where the recommended rate is adopted by landowners, the infrastructure provider will know from the outset what the likely wayleave rate will be. It is hoped that this will enable providers to assess the viability of providing access to broadband, without the need to engage in costly, time-consuming and uncertain individual negotiations with landowners along the infrastructure route and have to deal with the prospect of needing to re-route to the road/verge or even abandon a project.

3.3. The secondary purpose of the Recommended Reference Rate is to guide and lower landowner expectations as to the realistic rates for this type of infrastructure. As explained above, a key issue is that landowners/occupiers and their advisers simply do not have a good understanding of realistic wayleave rates for rural broadband. Indeed, wayleave rates that have been set in respect of other types of infrastructure are not good comparators for rural broadband projects.

\(^{19}\) A copy of the letter is attached at Annexe 5.
and this is reflected by the fact that rates vary considerably. The following specific points are worth highlighting:

3.3.1. As explained above, there can be a huge difference between telecoms wayleave rates as demonstrated by the *Mercury Communications* and *CableTel v Brookwood* cases. While neither of these cases are good comparators for rural broadband projects, the Mercury Communications case, in particular, can set landowner/occupier expectations at very unrealistic levels. This case concerned commercial telecoms infrastructure, and set a wayleave rate of £39 per metre per annum nearly 20 years ago.

3.3.2. Wayleave rates in respect of more significant and heavy duty broadband infrastructure such as the high capacity optic fibre which is laid in ducts/chambers or mounted on electricity pylons that connect urban conurbations are also poor comparators. Currently, typical rates expected to be paid by companies such as Energis/Cable & Wireless for such infrastructure in rural areas are £0.44 - £0.70 per metre per annum. As explained below, the proposed Recommended Reference Rate is considerably lower than these rates.

3.3.3. More widely, while some landowners may have granted wayleaves for other types of infrastructure such as electricity power lines/pylons and high pressure gas pipelines, these types of infrastructure are very different to rural broadband infrastructure and are not appropriate comparators for rural broadband projects and associated wayleaves.

3.4. The Recommended Reference Rate has been formulated by the Parties’ internal advisers/surveyors with reference to cases such as the *CableTel v Brookwood* case which involved the provision of copper cabling to around 80 houses; consultation with relevant member committees/policy boards; and research by BT Openreach since the *CableTel v Brookwood* case. Indeed, the best comparators that the Parties have been able to use are the typical rates that BT Openreach expects to pay. Currently, the typical equivalent rate that BT Openreach expects to pay for duct/cable in rural areas is £0.32 per metre per annum or £4.10 as a one-off payment for
cabinet to distribution point cable. However, the Parties have been mindful not to enter into discussions with individual members or service providers in establishing the recommendations and, as explained below in paragraph 3.10, there will be no scope for sharing of information between the Parties or between the Parties and their members or between members once the Recommended Reference Rate is in place either.

3.5. Overall, the Recommended Reference Rate is low and is intended to reflect the fact that it relates to situations in which the provision of broadband to a rural/remote area is commercially unviable. More specifically, the proposals are as follows:

3.5.1. For ‘not for profit’ broadband where the infrastructure is being put in place by a Community Interest Company, the appropriate consideration may be for the CIC to provide a high speed broadband connection for the landowner/occupier’s own use, with no payment (or a nominal payment for example £1) for the wayleave. In situations where the landowner/occupier does not need to benefit from a broadband connection, the recommended wayleave reference rate set out below would be proposed.

3.5.2. For private supply broadband, the following reference rates are suggested, although landowners should bear in mind that many rural schemes are not commercially viable and that lower or nominal/waived rates may be appropriate, especially in very remote and/or sparsely populated areas. This is particularly the case where the private supplier is prepared to connect the landowner to the broadband network:

20 The typical BT Openreach rates for distribution point to end user premises cable are lower at £0.16 per metre per annum or £2.25 as a one off payment. However, the Parties have decided to opt for a single recommended reference rate on the basis of comments by infrastructure providers that a single rate is easier to manage. As such, the rate is intended to fall between these two points on the basis that it is anticipated that a significant proportion of the overall route will be for the backhaul connection (i.e. cabinet to distribution point) and that in many cases the wayleaves required from the cabinet to the end user will be granted on a zero rate basis in return for access to the network.

21 There is no defined list of private suppliers as these will change over time. However, the Parties do not intend that the recommendations will be of relevance to suppliers of commercial long distance high capacity trunk services such as Virgin and Energis.
a) Fibre/duct: £0.25 per metre per annum or £3.75 per metre as a one-off payment.22

b) Joint box/cabinet: £30.00 per annum or £450.00 as a one-off payment.

3.6. The Parties are proposing that the Recommended Reference Rate will remain in place for an initial period of three years and would then be reviewed to take account of inflation and any other relevant considerations.23 The Recommended Reference Rate is designed to provide guidance regarding rural broadband wayleaves only and it is anticipated that it will be of particular relevance to the hard to reach areas identified in Local Broadband Plans submitted to BDUK. On the basis that the proposed rates are recommendations only and landowners/infrastructure providers are free to agree other rates, the Parties do not intend to provide a precise definition of what constitutes a rural area. Indeed, as noted above, in some cases involving private suppliers, landowners may agree to waive the wayleave rate in return for a broadband connection. This is most likely to be the case where the landowner is also likely to be an end user of the broadband connection.

3.7. Overall, the purpose of the Recommended Reference Rate is to facilitate the investment in, and more rapid provision of, rural broadband infrastructure. As can be seen from the above rates, the Parties submit that they are not intended to profit landowners, but to increase access to rural broadband both for the landowners themselves and for the wider rural communities. There is no intention to benefit members of the Parties by increasing wayleave rates above market rates.

22 As explained in paragraph 2.13, there is no ‘usual position’ for landowners or infrastructure providers in terms of an annual or one-off payment. Different landowners and infrastructure providers will have different preferences.

23 However, note that a typical wayleave agreement is open ended in duration and will normally continue for the lifetime of the infrastructure (usually 25 years).
The scope of the Recommended Reference Rate

3.8. The Parties do not have the authority to bind their members to any particular set of terms or rates and, therefore, the Recommended Reference Rate will be a recommendation only.

3.9. The Recommended Reference Rate would be published by both Parties and would be promoted to the Parties’ respective members. In addition, the proposed rate would be made available to rural broadband infrastructure providers, so that the providers could suggest that landowners enter into wayleave agreements on the rate proposed. The Recommended Reference Rate will be publicly available and will not be restricted to members only. The Parties are also proposing to liaise with professional bodies such as the Royal Institution of Chartered Surveyors (RICS) and The Central Association of Agricultural Valuers (CAAV) to explain the proposed Recommended Reference Rate.

3.10. The Recommended Reference Rate does not involve any sharing of information between the Parties in relation to their respective members, or the sharing of information relating to the actual rates agreed between their respective members and any infrastructure providers (to which the Parties themselves are unlikely to be privy in any event).

The legal and economic context of the Recommended Reference Rate

3.11. As explained above, following the Government’s publication of the Report, the Government has encouraged the Parties to look for a solution to the wayleaves issue identified in the Report and the Minister for Culture, Communications and the Creative Industries, Mr Ed Vaizey, has written to the Parties and welcomed the news that the Parties are working together to produce a rural broadband agreement.24

3.12. Furthermore, the Parties submit that their approach, in seeking to deliver a solution to assist Government in its aim of delivering rural

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24 See Annexe 5.
broadband, is exactly the kind of approach advocated by the Government’s Big Society agenda.

4. LIKELY IMPACT OF THE RECOMMENDED REFERENCE RATE

4.1. In this section, the Parties explain their views that, firstly, the Recommended Reference Rate will have no or an insignificant impact upon competition and, secondly, are justifiable irrespective of any potential impact on competition.

The impact of the Recommended Reference Rate

4.2. The Parties are membership organisations, and the Parties represent a significant number of English and Welsh farmers, landowners and rural businesses. As such, it is clear that many of the Parties’ members compete with each other as farmers and rural businesses.

4.3. However, the Parties submit that while their members may compete with each other in relation to their actual businesses, there is no meaningful market or competition between landowners for wayleaves. Indeed, the provision of access to land for infrastructure providers is incidental to the businesses of the Parties’ respective members. The Parties’ respective members are farmers, landowners and rural businesses whose core areas of business are in farming, letting land or rural enterprise. The provision of access to land for infrastructure providers is simply a by-product of owning the land. In this sense, the Recommended Reference Rate will have no impact upon the markets in which the Parties’ respective members compete with each other, for example in the markets relating to agricultural production or rural enterprise. Indeed, as shown in this Statement of Facts, the Parties submit that the income generated from wayleaves is low, uncertain and sporadic and does not impact upon the way in which the Parties’ members compete with each other or the prices at which they sell their products/services. By way of example, if a rural broadband cable crosses 100 metres of land then the annual payment if calculated on the basis of the recommended reference rate would be only £25.

4.4. To the extent that there is a market for the grant of wayleaves to infrastructure providers, the Parties consider that the proposed
agreement will have either no effect or an insignificant effect on competition. They highlight the following points:

4.4.1. The Recommended Reference Rate is very unlikely to influence the relevant parameters of competition at all on the basis that the Parties’ respective members are highly unlikely to compete with each other in relation to the provision of access to land for infrastructure providers. Indeed, infrastructure providers seek wayleaves over the land that provides the most efficient route rather than determining a route on the basis of negotiations with landowners on wayleave rates. In essence, the landowner is the recipient of an offer – he has no control over the route chosen by the company. It is not realistic to consider that there is a market on which rival pieces of land compete for the same wayleave. Rather, the "market" for the wayleave is limited to the particular pieces of land required for the infrastructure and the broadband project. In this sense, the Recommended Reference Rate will not limit competition between landowners on the basis that there is no competition between landowners in the first place. Further detail concerning the decision making process by infrastructure providers in terms of route and the associated costs are set out in Annexe 6. In particular, the Parties highlight that the costs associated with using a public highway or diverting to alternative land is considerable. Where the business case for a project is marginal, infrastructure providers have indicated that the project is simply not started if they cannot agree wayleaves with landowners, as the costs of diversion to another piece of land or the public highway are too high. Furthermore, as explained in paragraph 2.14.5 above, it is anticipated that in almost all cases any re-routing of a project will be across a road/verge rather than across other private land.

4.4.2. Most farming and other rural businesses regard the use of their land for broadband infrastructure as inconvenient and this, of course, is reflected in the fact that telecoms operators can force the grant of access through the courts. Landowners and farmers generally prefer to keep their land free of obstructions to their core business. Cables can obstruct farming operations which include deep field operations and overground work, where both underground and pole mounted services can cost time and money, and present a liability for damage.
4.4.3. The Parties recognise that it is impossible to be certain that there would never be an occasion on which landowners could compete with each other for the grant of a wayleave. Indeed, in some circumstances, it may be possible for the operator to route a line along parallel boundaries, although any diversion that involves more than minor additional distances is unlikely to be economically viable. Furthermore, the Parties consider that there will rarely be occasions where alternative realistic routes are available. Therefore any effect upon competition would be extremely limited given that these situations will relate to particular pieces of land for an individual broadband access project. This is borne out by experience to date as explained in paragraph 2.14.4 above.

4.4.4. Finally, the Parties note that the Recommended Reference Rate is just that. It will not be binding upon members or upon infrastructure providers. As such, landowners can seek different rates and terms and infrastructure providers are free to negotiate individually with any landowner or landowners.

4.5 Finally, the Parties highlight that the Recommended Reference Rate is intended to support the Government’s initiative to assist and fund the roll out of broadband to commercially unviable rural/remote areas. The Recommended Reference Rate is being proposed as a result of express Government encouragement to do so.25

5. ELIGIBILITY OF THE PROPOSED RECOMMENDED REFERENCE RATE FOR INDIVIDUAL EXEMPTION UNDER SECTION 9 COMPETITION ACT 1998 (CA98) AND ARTICLE 101(3) OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU)

Overview

5.1 In line with Government thinking, the Parties believe that the Recommended Reference Rate will enable/facilitate access by rural communities to broadband by reducing the overall cost of delivering broadband that is already commercially unviable and requires access to BDUK or other funding. The Recommended Reference Rate has

25 See section 5.16 of the Report.
two key objectives: (i) to act as a guide for land owners and occupiers and manage expectations downwards in terms of appropriate wayleave rates; and, by implication, (ii) to reduce the delays and costs associated with negotiating wayleave rates.

5.2 The economic and social benefits of access to broadband are well documented. In particular, the benefits of broadband are set out in the Report that has been referred to throughout this Statement.

5.3 The Parties set out below their views on the key specific justifications for the Recommended Reference Rate.

**Improving production or distribution**

5.4 Wayleave rates are highlighted in the report as one of the barriers to the investment in and roll out of broadband to commercially unviable rural areas.\(^{26}\) The Recommended Reference Rate is intended to assist with this problem.

5.5 The negotiation of wayleaves is increasingly not possible or delayed due to the inability of the Parties to agree the wayleave rates. It is possible to apply to the County Court for an order to gain access to land but this is time consuming and cases can take up to two years to decide. These factors create uncertainty for investment decisions and hinder or block the roll out of rural broadband schemes. Annexe 4 provides further detail of the court process.

5.6 The Recommended Reference Rate will facilitate the agreement of rates by reducing the time taken to reach agreement and provide guidance as to the likely appropriate rate for broadband infrastructure in rural areas. As explained above, the negotiation of wayleaves accounts for a significant proportion of the time involved in the roll out of a typical project. A simplified wayleave process would reduce costs for infrastructure providers by speeding up the process and may reduce the professional costs incurred by both the infrastructure provider and the landowner.

\(^{26}\) See sections 5.11 – 5.16 of the Report.
Promoting technical or economic progress

5.7 The Government’s stated aim is for the UK to have the best superfast broadband network in Europe by 2015.

5.9 It is recognised that a world class communications network will help the economy grow and recover from recession. The report refers to the prospect of 280,000 jobs being created.\(^{27}\) In particular, broadband enables small businesses to access new markets. The proposed Recommended Reference Rate will assist in bringing these benefits to the rural community as a whole as well as to the Parties’ respective members.

5.10 The delivery of public services using broadband is more efficient and cost effective and more inclusive. The report refers to superfast broadband improving the quality and delivery of public services (particularly healthcare services) to rural and remote areas.\(^ {28}\) There is also an increasing move by Government to conducting business via the internet, and this is a particular concern for farming and rural businesses (for example business returns etc.). In particular, the Government is increasingly calling on farmers to interact with Government using the internet; for example, the Government is looking to make it compulsory for future applications for CAP funding to be made online. The Government refers to this as ‘digital by default’. Farmers without broadband access will increasingly be put at a disadvantage. However, this cannot be done if businesses are unable to access and return data online due to the lack of a suitable broadband connection.

5.11 Superfast broadband allows the delivery of online entertainment and provides greater options for consumers.\(^ {29}\)

5.12 There are other social, economic and environmental benefits such as home working.

5.13 In the absence of an ability to deliver broadband to rural and remote areas, there is a clear risk that a ‘digital divide’ will widen where a

\(^{27}\) See section 1.25 of the Report.
\(^{28}\) See sections 1.22 – 1.25 of the Report.
\(^{29}\) See section 1.26 of the Report.
The proportion of the population will be unable to use and access the same range of services as the rest of the country. The Parties submit that the Recommended Reference Rate will assist in the economic development of rural and remote areas of the country. Indeed, by way of example, the state of agriculture in the past decade has made farmers seek to diversify in order to generate additional income streams. However, the success of diversification is severely hampered if the business cannot rely on an adequate broadband service. This is particularly true of the rural tourism sector where marketing and bookings are increasingly made via websites, and farmers and rural businesses with diversified projects who are without broadband will increasingly struggle to market themselves, putting the diversified business at risk. It is also of note that the Federation of Small Businesses has recently called on the Government to close the digital divide between rural and urban businesses.

**Indispensability**

5.14 The Parties submit that there is no less restrictive way to achieve the aims associated with the Recommended Reference Rate. In the absence of a Recommended Reference Rate, the Parties believe that wayleave rate uncertainty will continue to discourage investment and lead to long and protracted wayleave negotiations. The Parties note that the Law Commission is currently consulting on the functioning of the Electronic Communications Code and that it is expected to recommend changes to the Code which may speed up the process of obtaining a wayleave. However, proposals are unlikely to be made before 2013 and new legislation is not anticipated until 2015. Furthermore, it is not clear that the reform of the Code will address all of the issues associated with the agreement of rural broadband wayleaves.

5.15 Landowners and farmers are obviously focussed on their core enterprises. They seldom need to consider proposals for wayleaves. Although many will host both electricity and BT Openreach apparatus, in most cases this was erected many years ago and

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30 See section 1.11 of the Report.
32 Law Commission Consultation Paper No 205.
represents only a small regular payment and in some cases an ongoing disturbance to their farming and land management operations.\textsuperscript{33} Moreover, save for the very high value commercial telecoms schemes, wayleaves pay such low rates that dedicating time and effort to understanding and negotiating them is not an efficient use of a landowner or land manager’s time.\textsuperscript{34}

5.16 As explained above, while broadband providers can resort to the courts, they seek to avoid doing so as the process is costly, slow, and not certain of delivering the speedy outcome that is required to ensure efficient project delivery. Furthermore, the likely level of the sums involved simply does not justify lengthy individual negotiation or resort to the courts.

5.17 As an example, the average size of a farm in the UK is around 57 hectares, which if in a square would be 755m square. If a provider was to lay a cable along the entire length of the farm (highly unlikely) and the owner had no need of a broadband connection, the total recommended wayleave payment would be a maximum of £188.25 per annum or a one off payment of £2,831.25. In the vast majority of cases the distances involved, and therefore the sums of money involved, would be significantly lower than this.

5.18 Also, the Parties are not aware of broadband providers using alternative dispute resolution mechanisms as an alternative to the court process and they consider that they are unlikely to be an economic and efficient way in which to agree a wayleave rate. Furthermore, the Parties note that arbitrations are not usually made public and, as such, any rate level decisions would not provide guidance to other landowners. The Parties also note that in other areas such as agricultural rent negotiations, arbitrations have proven to be just as expensive and nearly as time consuming as court cases. Further details on the Parties’ experiences of arbitration are set out in Annexe 7.

\textsuperscript{33} As explained above, any new equipment placed on a landowner’s/occupier’s land requires a separate wayleave. It is not possible to use the existing infrastructure of another operator and avoid the need for a wayleave.

\textsuperscript{34} As indicated above, the \textit{CableTel} case and work by BT Openreach show that realistic wayleave rates are low. For example, a wayleave with BT Openreach in respect of 100m would typically generate an annual payment of £32.
5.19 Another potential means of providing guidance to landowners and providers as to a reasonable level of wayleave rates would be for the NFU and/or CLA to keep a register of wayleave rates that are agreed as new rural broadband schemes are put in place. However, while this could be argued to be less restrictive of competition, it could also be argued that a detailed table of rates that have been negotiated in different areas could be interpreted by landowners as the NFU/CLA providing fixed rates in any case. In this way, it may be no less restrictive than the Recommended Reference Rate that the Parties propose. The Parties would be very reluctant to use their membership fees to fund and maintain such a register. Furthermore, such an approach is likely to be less effective than Recommended Reference Rate as (i) a comprehensive set of achieved rates could prove complicated for landowners and providers to interpret, as it may not be straightforward to ascertain which of the achieved rates are most readily comparable to any other landowner’s situation; (ii) the register is only likely to have much use as a reference tool once it has been established for some time which will not assist the roll out of broadband within the timescales envisaged by the Government or in the in the short to medium term; and (iii) in fact, and most importantly, any register is very unlikely to be comprehensive as the Parties cannot compel landowners to provide details of wayleave rates to them and there is no obvious incentive for them to do so. As such, overall, the Parties do not consider that such a tool would be effective in providing guidance to landowners nor in providing certainty to broadband providers.

5.20 The Parties would underline that they are proposing recommended wayleave rates only. These recommendations will not be binding upon their respective members or broadband infrastructure providers in any way.

5.21 The Recommended Reference Rate will only apply to wayleaves in cases where the provision of infrastructure is otherwise commercially unviable and/or where the Parties expect that BDUK or other funding is available.

5.22 The Parties do not believe that there is any practicable and less restrictive way to achieve the aims of the Recommended Reference Rate, bearing in mind that the aim of the arrangement is to provide
guidance to landowners and infrastructure providers on wayleave rates in order to facilitate the roll out of broadband in rural areas.

No elimination of competition

5.23 As explained above, the Recommended Reference Rate is for guidance only. The Parties to wayleave agreements will be free to negotiate higher or lower rates. Also, as outlined above, it is extremely rare that landowners would compete against each other for wayleave agreements. In the few cases where re-routing has occurred (so far three per cent of landowners for one infrastructure provider), this has not been via neighbouring landowners’ properties, but rather via the public highway.

6 THE PARTIES’ APPROACH TO THE OFT

6.1 The Parties are mindful of the competition law provisions under which the Parties, and their respective members, operate.

6.2 They recognise that the Recommended Reference Rate could be interpreted as a horizontal price agreement between the Parties and their respective members. In addition, in theory, there could be competition between infrastructure providers in relation to rural broadband (notwithstanding the lack of a business case for such infrastructure as set out above).

6.3 This is a novel type of proposal and the Parties consider that there is insufficient guidance and jurisprudence for them to self-assess with the necessary degree of certainty whether or not the proposed Recommended Reference Rate would infringe EU or UK competition law. The particular questions raised by the Parties are set out in the section below.

6.4 In the light of these concerns and notwithstanding the Government’s backing for the Recommended Reference Rate, the Parties do not wish to make the proposed recommendation until after they have approached and received a short-form opinion from the OFT which will allow the Parties to self-assess the compliance of the Recommended Reference Rate with competition law. The Parties note that the OFT invites farming businesses to seek such
opinions in its Frequently Asked Questions guidance for farming businesses (OFT740rev). The Parties consider that a failure to make the Recommended Reference Rate would be to the detriment of consumers who might otherwise have benefitted from the provision of rural broadband, and to the detriment of the Parties’ respective members for whom access to rural broadband is becoming business critical.

6.5 The Parties believe that there will be a wider interest in the application of competition law provisions to proposals of this type. Recommended Reference Rate is not intended to directly benefit the Parties’ members financially but rather the Parties’ intention is to deliver benefits to their respective members and the wider rural community through the better provision of broadband access. Under the Government’s Big Society agenda, third parties will increasingly be encouraged to work together to deliver Government objectives for the wider public benefit. Such parties may be cautious about cooperating with each other, or entering into agreements to facilitate the delivery of Government objectives, where the agreement might be caught by competition law provisions. Therefore, the Parties believe that there will be a wider interest in the publication of guidance and clarification as to whether, and to what extent, competition law provisions apply to this type of proposal.

6.6 For these reasons, the Parties have asked the OFT to issue a Short-form Opinion on how and to what extent competition law provisions apply to the Recommended Reference Rate.

7 THE PARTIES’ QUESTIONS TO THE OFT

7.1 Does the Recommended Reference Rate that the Parties propose to issue to members as to rural wayleave rates fall within Chapter I of the Competition Act 1998 (CA98) or Article 101 TFEU? In particular:

7.1.1 Does the OFT consider that the Recommended Reference Rate is an object restriction?

7.1.2 If not, does the OFT consider that it is likely to have an appreciable effect upon competition?
7.2 If the Recommended Reference Rate is caught by Chapter I CA98/Article 101(1) TFEU:

7.2.1 Does the OFT consider that the benefits outlined in section 4 are relevant benefits under section 9(1)(a) CA98 1998 and/or the first part of Article 101(3) TFEU (namely benefits that contribute to improving the production or distribution of goods or to promoting technical or economic progress)?

7.2.2 If so, does the OFT consider that the Recommended Reference Rate does not:

a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or

b) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question,

for the purposes of section 9(1)(b) CA98 and/or Article 101(3)(a) and (b) TFEU?

7.3 In the light of the OFT’s opinion, the Parties will self-assess whether the Recommended Reference Rate falls within the scope of Chapter I CA98/Article 101(1) TFEU and, if so, whether the Recommended Reference Rate would be eligible for exemption under section 9 CA98/Article 101(3) TFEU.
ANNEXE 1

Broadband

This Annexe sets out basic details in relation to the broadband network, the importance of the backbone and backhaul and the providers of broadband services.

Defining broadband

It is important to establish the difference between narrowband and broadband. Narrowband is the speed of the connection between a computer and the internet using a standard telephone dial-up connection. Broadband, however, is a far faster connection to the internet using modern telecommunications equipment (such as fibre-optic cable).

There is often a misconceived idea that, in terms of speed, anything over the basic dial-up service provided by a telephone company should be considered broadband. In such a situation, broadband could be defined as providing internet access at speeds over 36.6 kilobits per second (kb/ps). However, the goalposts tend to move as new technology enters the market.

Different bandwidth ranges have been used in defining broadband. According to the Organisation for Economic Co-operation and Development (OECD), broadband should be defined as download data speeds faster than 256kb/ps. However, America’s Federal Communications Commission (FCC) defines a basic broadband speed of at least four megabits per second (Mb/ps) download (the speed at which information is received) and one Mb/ps upload (the speed at which information is sent). In the UK, the Government’s Universal Service Commitment (USC) effectively puts a benchmark of at least 2 Mb/ps.

Broadband can be provided via a telephone line (Digital Subscriber Line (DSL)), via cable, via wireless and via satellite and allows the user the ability to access the internet in real time. Broadband has several advantages:

- The connection to the internet is always on, allowing for continuous internet access. Using DSL means that the telephone line can be used at the same time, unlike a dial-up connection.
its ability to handle large amounts of data. A large file that might take 10 minutes or longer to download with a conventional narrowband dial-up connection of 36 kilobits per second (kb/ps) can be downloaded in less than a minute using broadband.

- Broadband makes it much easier to upload information or update a company website. This has a direct impact on productivity and makes it easier for the company to operate and remain competitive. Uploading files to the company website via a narrowband connection can be very slow, time consuming and often frustrating when the connection is lost.

- It helps businesses achieve cost savings. Without broadband, costs can be incurred through the postal service, particularly if overseas customers are involved. Broadband can cut costs by enabling large amounts of information to be transmitted quickly and easily.

- Using a Voice over Internet Protocol (VoIP) system allows telephone calls to be either free (through the broadband connection) or at a significantly reduced cost. For example, a fish business that imports stock from Thailand requiring at least two telephone calls a day is able to save £15,000 a year in costs through using VoIP.

**Voice over Internet Protocol (VoIP)**

Voice over Internet Protocol, better known as VoIP, allows the user to make telephone calls over the internet. Although it has been available for at least thirty years, it is only now with the advent of newer technology that it is being used on a wider basis.

Essentially, VoIP works by recording the person’s voice and compressing it into samples. These are then collected and transmitted as digital information over the IP network, thus, sending the voice over the internet.

VoIP provides a cheaper method of making overseas telephone calls.

**The backbone**

The internet is a worldwide network that conforms to specific methods of transferring data in order to establish a standardised communication system.
Anyone with access can send and receive information over the internet by using internet-enabled software (which understands the online protocols or language of the internet).

The backbone of the internet consists of a powerful set of telephone lines, capable of transferring data at a very fast rate of about 45 megabytes per second (MB/ps). Using the analogy of a geographic map, these are the motorways or highways. This explains why the internet is often referred to as the information superhighway.

The backbone of the internet is operated and maintained by various companies and organisations working cooperatively without centralised ownership. An element of spare capacity is built into the backbone of the internet so that if major lines go down, traffic can be rerouted, just as cars are diverted when a motorway is temporarily under repair. Although this may slow internet traffic, it will not ‘break’ the internet.

**Backhaul**

In a hierarchical telecommunications network, the backhaul of the network is defined as the intermediate links between the backbone (core network) and the small sub-networks at the edge (edge networks) of the entire hierarchical network. Using the analogy of the hierarchical network as a human skeleton, the backbone is the spine, the backhaul links are the limbs, the edge networks are the hands and feet and the individual links within the edge networks are the fingers and toes.

Backhaul is leased and maintained by various Internet Service Providers (ISPs) that use routers to direct traffic. Every computer connected to the internet is assigned a unique Internet Protocol (IP) address. When the user clicks on a link, the browser sends out a request that is addressed to the website that houses the content that is required. Routers along the way read the data packet’s address and relay it along the best route available.

When the data packet arrives at the website, the server reads the request and sends the requested page back to the computer via a return address in the data packet. This is the computer’s IP address. The data packet is routed back (in practice, several data packets) and the browser interprets the content and displays the page. Using the motorway analogy once more, the moving data packets are the cars on the road.
Telcos

A telecommunications company (telco) can be defined as one that provides services such as telephony and data communications. In the broadband sector, the best known telcos in the UK, BT and Virgin Media, also act as Internet Service Providers (ISPs). It is likely over time that the difference between a telco and an ISP will disappear as the trend for supplier convergence continues.

Internet Service Providers (ISPs)

An Internet Service Provider (ISP) is a company that supplies internet connectivity to home and business customers. ISPs support one or more forms of internet access, ranging from traditional dial-up to Digital Subscriber Line (DSL) and cable broadband.

ISPs often provide internet email accounts to users, allowing them to communicate with one another by sending and receiving electronic messages through the ISP server. Other services offered by ISPs include remote data storage, web hosting and access to software tools.

Demand aggregation

One of the key requirements for an infrastructure provider or telco to invest in broadband technology, whether it is first generation (Asymmetric Digital Subscriber Line (ADSL)) or superfast broadband, is the ability to be able to ensure a return on investment. By establishing the potential customer base for broadband services, it is possible to calculate whether the investment made is economic or not. This is known as demand aggregation.

Organisations have attempted to create models that show aggregated demand in a given area. However, one of the biggest problems faced is the actual commitment of a customer. Without such a commitment, it remains unlikely that there will be sufficient information for an investment decision to be made. This is very much the case for rural, sparsely populated areas. Indeed, the inability to match sufficient demand to a particular level of investment is the main reason given by telcos, such as BT, not to invest in a particular area. In addition, demand aggregation is also extremely difficult to quantify with the result that significant rural areas continue to be left unconnected which simply extends the rural-urban digital divide.
Local Loop Unbundling (LLU)

LLU is the method where the infrastructure provider, such as BT, makes its local network (the copper cables that run from customers’ premises to the telephone exchange) available to other companies. Operators are then able to upgrade individual lines using Digital Subscriber Line (DSL) technology to offer services such as always-on high-speed internet access, direct to the customer.

Operators have the choice of the following options to gain access to the local loop.

- **Physical space within the telephone exchange** – Each pair of copper wires runs from the customer’s home to the Primary Connection Point (PCP). The PCP is the green cabinet that is located at the side of the road. The PCP connects the wires from the customer’s home to a pair of wires from the exchange. Inside the exchange the wires in the external cable are terminated on the Main Distribution Frame (MDF) and then are connected to the internal exchange equipment.

- **Distant location** – This is where an operator houses its equipment away from the exchange and uses a tie cable to connect the incumbent’s exchange with this remote site. The remote site can be a building or a green cabinet on the side of a road.

- **Line sharing** – European Union (EU) regulations allow for line sharing which enables the operator and the exchange to share the same line. Consumers can acquire data services from an operator while retaining the voice services of the exchange. Some operators may choose to offer data services only. Therefore, line sharing allows consumers to retain their BT service for voice calls while getting higher bandwidth services from another operator without needing to install a second telephone line.

- **Sub Loop Unbundling (SLU)** – EU regulations also require that other operators can interconnect with the local access network at a point between the exchange and the end user. This arrangement is referred to as Sub Loop Unbundling (SLU). In SLU, the connection point is the PCP (see above). SLU can be used for emerging technologies such as Very High Bit-rate Digital Subscriber Line (VDSL) where the equipment needs
to be much closer to the home to deliver very high bandwidth services. An optical fibre would deliver the high-speed services to the local green cabinet and VDSL would be used to send them along the copper pair to the consumer’s premises.

**Speed**

Speed is measured in kilobits per second (kb/ps) and megabits per second (Mb/ps). The faster the connection, the more efficient the broadband service.

**Line speed**

Line speed is the maximum speed a consumer’s telephone line can support, and depends on factors such as distance from the exchange or line quality. The line speed will always be slightly higher than that actually received as 10-15% of transmitted data (or bits) are protocol overheads for managing the connection.

**Throughput speed**

Throughput speed is the actual speed received by the consumer when he connects to the internet. This will depend on:

- the ISP’s traffic management policy
- the number of subscribers sharing the connection (also known as contention)
- congestion across the internet
- the speed of the recipient website’s connection to the internet.

In addition, old or out of date computer hardware or poor in-house wiring may also reduce throughput speed.

**Asymmetric Digital Subscriber Line (ADSL)**

**ADSL1**

Asymmetric Digital Subscriber Line (ADSL) is a high-speed internet access service that uses existing copper telephone lines to send and receive data at speeds that far exceed conventional dial-up modems.
The fastest dial-up modems are rated at 56 kilobits per second (kb/ps), although the average tends to be 36kb/ps. However, ADSL1 allows for speeds of at least 256kb/ps up to eight megabits per second (Mb/ps), although this depends on the type of ADSL connection as well as the distance from the exchange. ADSL uses standard telephone lines (copper wires) to transmit upstream and downstream data on a digital frequency. These set the datastreams apart from analogue signal telephones. As the ADSL signal is operating on a different frequency, the telephone can be used normally, even when on the internet. Therefore, an additional telephone line for broadband is not required. However, filters are used on the telephone line in order to remove any white noise that might be generated.

A key ADSL1 term is ‘asymmetric’. It means download speeds are faster than upload speeds when using the internet. The reason for this is that web requests tend to require fairly low levels of bandwidth. Given that most home users download much more data than they upload, ADSL1 is more efficient and thus more economically viable.

ADSL1 is an always-on service, meaning that as long as the computer is actually powered, it will automatically stay connected to the internet unless the operator manually disconnects via software or hardware. ADSL1 also allows for networks to be created using one line through wireless routers. This is particularly advantageous where there is more than one computer in the house and all require a broadband connection.

ADSL1 requires an ISP and an ADSL modem.

ADSL2

ADSL2 is a revised version of ADSL1. ADSL2 is designed to work approximately twice as quickly as ADSL1. In theory, this means speeds of up to 24Mb/ps for downloads and 3.5Mb/ps for uploads although it is very rare for these to be achieved, even in urban areas.

ADSL2 works on the same principles as ADSL1, but uses an advanced form of the technology to cope with faster speeds. However, as it requires new equipment at both ends of the connection, it will mean that the telephone exchange needs to be upgraded to cope with ADSL2. Those who want to use
ADSL2 services (where available) will also need a new modem router. However, changes to the telephone line are not necessary.

As well as offering faster speeds on a line, ADSL2 also makes it possible to use two phone lines for a single connection. This is known as using ‘bonded lines’. Doing this will increase the speed available, although it will not necessarily double the speed.

Nevertheless, as with ADSL1, ADSL2 is still affected by the distance between the customer and the local telephone exchange. This is due to the signal degrading more the further it has to travel over copper wires. Customers who live further away from the exchange will inevitably receive slower speeds. This is unlike fibre-optic connections where speed is not affected by distance.

For those in rural areas, where distance from the exchange is a major issue, the opportunities for receiving ADSL2 broadband at any significant speed remain slim.

Symmetric Digital Subscriber Line (SDSL)

Symmetric Digital Subscriber Line (or SDSL) allows for the sending and receiving of data on a single broadband connection at the same speed. With ADSL download speeds will be faster than upload speeds, whereas with SDSL they will be the same. However, SDSL requires a dedicated phone line, unlike ADSL. A second problem with SDSL is that it can only be shared with 10 other users instead of 49 other users as is the case with ADSL.

Given its ability to be able to download and upload data at the same speed, SDSL is ideal for small businesses that very much depend on fast upload speeds.

Very High Bit-rate Digital Subscriber Line (VDSL)

Very High Bit-rate Digital Subscriber Line (or VDSL) is the next generation DSL technology operating at speeds of 52Mb/ps download and 12Mb/ps upload. VDSL is based on either Quadrature Amplitude Modulation (QAM) or Discrete Multitone Modulation (DMT). According to many manufacturers, DMT is more commonly used.
The advantage of VDSL is that it is able to provide services such as High-Definition Television (HDTV) and video on demand, effectively being the first technology to provide a home entertainment package.

Although it uses the telephone network and standard copper wires, it is able to use the remaining capacity of the copper wire because voice communication or telephony only uses a fraction of the capacity. Using the analogy of a three-lane motorway, voice communication uses the slowest lane available. VDSL is, however, able to use both the middle and fast lanes in order to transmit data.

However, its main disadvantage is that in order to exploit VDSL effectively, the user has to be less than half a kilometre from the exchange. Nevertheless, the use of fibre-optic cables may mean that such short distances to the exchange are now not actually a problem. In the event of fibre being installed, VDSL signals convert from analogue (copper wire) to fibre and then back to analogue. Using a VDSL gateway device at the Primary Connection Point (PCP) (such as the green cabinet), the signal is able to use the fibre cable. By doing this, distance is no longer an issue as the exchange converts the signal to allow it to use the fibre cable to the green cabinet which is then forwarded along the copper wire to the VDSL modem at the home. In a sense, it is very similar to Fibre to the Cabinet (FTTC) technology.

**Cable (hybrid fibre-coaxial)**

A cable modem allows data to be sent over the cable television infrastructure by using unused bandwidth on the network. Therefore, those using cable broadband actually need to live in an area where cable television is available. However, a telephone line is not required.

The main supplier is Virgin Media. The installation process sees a cable modem attached to a coaxial cable which goes outside the house and into a green cabinet on the roadside.

As with ADSL, cable download speeds are significantly higher than upload speeds although cable broadband has potentially far higher speeds than those available to ADSL users. However, cable penetration in the UK tends to be limited to urban areas and it is considered as unlikely that there will be a business case for effective roll-out of cable broadband to rural areas.
Fibre-optic

Fibre cable as an alternative

Fibre-optic broadband is an increasingly widespread alternative to ADSL broadband. Unlike ADSL, fibre-optic broadband does not use copper wires to transmit information between the computer and the internet and there is almost no limit to what can be sent through fibre-optic cables, meaning that the primary benefits of fibre-optic broadband are in the volume and speed of data that can be transferred.

The costs associated with a fibre-optic network mean that commercial infrastructure providers are usually unwilling to make the investment necessary in rural areas because there is unlikely to be sufficient demand and, therefore, little return on investment.

Fibre to the Cabinet (FTTC)

Fibre to the Cabinet (FTTC) increases broadband speeds by shortening the distance from the electronic equipment to the customer. This means that fibre cables are laid to the green roadside cabinets, which are usually close to the home or business. However, in rural areas there is still likely to be an issue of distance as individual premises may be some distance from the cabinet.

Fibre to the Home (FTTH) or Premises (FTTP)

Fibre to the Home (FTTH) or Premises (FTTP) uses fibre all the way to the user’s property, usually terminating at a box on the wall. The speed of the connection will depend on the equipment at either end of the link. Speeds provided through FTTH/P are often in the region of 50Mb/ps to 100Mb/ps although much faster speeds are available.

Gigabit Passive Optical Network (GPON)

Gigabit Passive Optical Network (GPON) is a shared fibre technology. New fibre cables are installed in a point-to-multipoint configuration, with branches at one or more points in the network. Passive Optical Networks (PONs) are termed ‘passive’ because, unlike FTTC, they do not contain any electronic equipment.
between the exchange and the consumer’s premises but rather use ‘passive splitters’ at the branching points to share light across multiple fibres.

Point-to-Point (P2P)

Point-to-Point (P2P) networks provide a dedicated fibre to each end-user. They are also known as ‘home run’ networks. This configuration offers high levels of connectivity – both download and upload. P2P FTTH is easier to upgrade than GPON because there is no equipment in the field (electronics or splitters) and there is no fibre sharing so users can be upgraded individually.

Satellite

For those who are unable to either receive Asymmetric Digital Subscriber Line (ADSL) or cable, or where mobile broadband does not work, satellite broadband may be the answer. The internet feed is beamed from a satellite to a dish installed at the subscriber’s home. Some satellite broadband services can now deliver speeds of up to eight megabits per second (Mb/ps) download and 128 kilobits per second (kb/ps) upload. Although the upload speed is less than the download speed, it is still significantly faster than the traditional dial-up connection.

However, there are disadvantages. Firstly, it is more expensive to set up than DSL or cable and, accordingly, is also more expensive to subscribe to. Secondly, the dish must point to the southern sky to receive a signal from the geo-orbiting satellite and adverse weather conditions can affect the service. Thirdly, there can be signal delay, also known as ‘latency’.

Mobile broadband

Mobile broadband is different from the standard fixed-line broadband systems (such as ADSL) as it works via the mobile phone network. Whereas fixed-line systems work either on a copper wire or fibre-optic infrastructure, mobile broadband is a wireless solution.

In order to access mobile broadband, a dongle (a piece of hardware that allows connection to the internet) or Universal Serial Bus (USB) stick needs to be bought from an ISP. This is plugged into the laptop or PC and the software automatically downloads, providing a high-speed broadband connection.
Mobile broadband functions on the third-generation (3G) network which can theoretically allow for download speeds of up to 7.2Mb/ps. However, this is very rare in practice and it is unlikely that the network would cope in the event that everyone moved to mobile rather than fixed line access.

The problem of adequate mobile signal coverage means that the 3G network is not available in many rural areas.
ANNEXE 2

*Britain's Superfast Broadband Future*, DCMS, December 2010:

ANNEXE 3

Community Interest Companies

Community Interest Companies (CICs) are limited companies that exist to provide benefits to a community, or a specific section of a community. The CIC has the flexibility of the familiar company form, and access to a range of financing options, so may be appropriate for those working for a social purpose. Its key features include an asset lock and a community interest statement.

Setting up a CIC

Registering as a CIC is a single process. When registering, a choice must be made between a company limited by share or a company limited by guarantee. CICs must comply with the CIC regulations and company law. When registering the company with Companies House, additional documents, including a community interest statement describing the social purpose, are needed. The CIC Regulator will approve the application if the statement passes the community interest test – i.e. the business activities to be undertaken will be carried out for the benefit of the community or a section of it, or that the CIC's purpose is in the community's or wider public’s interest.

CICs cannot have charitable status but a charity can set up a CIC subsidiary company. This means they do not get the tax benefits of a charity, but in return they do not have the strict reporting requirements of a charity.

How CICs operate

CICs have to follow specific rules, including the following:

- CICs must have an asset lock. This means that the company cannot generally transfer its profits or assets for less than their full market value except as permitted by regulation.
- If the CIC is set up as a company limited by shares, there is the option of issuing shares that pay a capped dividend to investors. The cap is set by the CIC Regulator to protect the asset lock.
- Together with the annual accounts, there must be an annual community interest company report for public record. The report must show what
the CIC has done during the year to pursue its pre-specified community interest and involve the individuals or groups with a particular interest in the CIC.

- Certain voting rights changed on 1 October 2009. A CIC's chairperson no longer has the right to have a second or casting vote at a board meeting when the votes are equally divided. An alternate director can no longer - in the absence of their appointer - have a separate vote on behalf of their appointer as well as their own vote.
ANNEXE 4

What is a wayleave?

A wayleave is a contract under which one party has rights over another party’s land. It is not an easement or a lease (which are land rights capable of registration) but a lesser right, normally granted on a rolling basis with defined rights. In the case of broadband wayleaves and in order to protect the infrastructure provider’s ability to provide broadband connection, it is anticipated that it would be agreed that landowners/occupiers could not terminate the wayleave without a court order.

Wayleaves are used by the electricity and telecoms industries, largely owing to the statutory protection afforded the rights under the Electricity Act 1989 and the Telecommunications Act 1984 (as amended).

Many wayleaves are granted in return for payment. Those laid under the Electricity Act generally require the payment of compensation for losses suffered by the grantor, and those under the Telecommunication Act generally require open market payments to be made (usually on an annual basis).

If agreement cannot be reached with the occupier of the land then the law affords operators under the Oftel general licence (Licenced Code System Operators) the right to secure a wayleave by compulsion by application to the County Court.

Wayleave agreements

A wayleave agreement for broadband infrastructure will be governed by contract. However, all telecoms wayleaves are subject to the provisions of Schedule 2 to the Telecommunications Act 1984 (as amended by Schedule 3 of the Communications Act 2003) which take precedence over contractual terms.

Typically, a wayleave agreement sets out terms such as:

- description of the land/property
- description of the apparatus
- plan highlighting position of the apparatus
• payment
• connections
• rights of the operator
• responsibilities of the operator
• responsibilities of the owner
• notices
• dispute resolution
• termination.

Parties to a wayleave agreement

Wayleave agreements are made between the grantor (the party with sufficient rights in land to grant the agreement) and the grantee (that is, the broadband/infrastructure supplier).

In most cases the landowner is the person with the right to grant the wayleave, although the Telecommunications Act enables occupiers to grant an operator sufficient rights to install apparatus. In these cases, the Act provides that the grantee must compensate the landowner for any loss he suffers as a result.

In the rural sector most farm tenancy agreements reserve the right to grant wayleaves exclusively to the landowner, and a farm tenant who granted a wayleave without his landlord’s written consent may place his tenancy at risk.

Why a wayleave agreement is a necessary precondition to broadband roll out?

The most reliable and cost effective broadband services are provided by physical lines/cables.

Lines/cables can be laid along the public highway but this imposes significant costs on operators. Highway excavation and restoration is many times the cost per metre of laying a line/cable in farmland.

Lines/cables cannot be laid on private land without either:

• the consent in writing of the landowner/occupier, or
• the award of rights against the will of the landowner/occupier by a County Court.
Anyone laying lines/cables on private land without written consent would be trespassing.

As explained in Annexe 1, mobile broadband and satellite broadband are alternatives to broadband that is provided via cable. A wayleave agreement would not be required for this type of broadband as no access to land is required. However, these types of broadband are not considered to be a large scale consumer alternative to broadband provided by line/cable due to cost and signal problems.
ANNEXE 5

Letters to the parties from Ed Vaizey MP, Minister for Culture, Communications and Creative Industries.
CMS 189239/DC

Peter Kendall
President
National Farmers Union
Agriculture House
Stoneleigh Park
Stoneleigh
Warwickshire
CV8 2TZ

19 October 2011

Dear Mr Kendall

CLA & NFU rural broadband land agreement

A couple of months ago my officials advised me that the CLA and NFU were working together to produce a rural broadband land agreement. This came as extremely welcome news as it has the potential to make an important contribution to the Government's ambitions for rural broadband deployment by providing certainty to communications providers and reducing the cost and time taken in negotiating individual land access agreements.

I would appreciate it if you could update me on progress, and in particular whether it is likely to be published in time for the Autumn Statement at the end of November. I stand ready to provide a supportive statement when it does issue. If there is anything else that I can do to assist, please let me know. The agreement will be important for communications companies considering bidding in forthcoming broadband procurements.

I am also sending this letter to William Worsley, President of the CLA.

[Signature]

Ed Vaizey MP
Minister for Culture, Communications and Creative Industries
CMS 189239/DC

William Worsley  
President  
Country Land & Business Association  
LONDON  
SW1X 8PQ  
19 October 2011

Dear Mr Worsley

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I am also sending this letter to Peter Kendall, President of the NFU.

[Signature]

Ed Vaizey MP  
Minister for Culture, Communications and Creative Industries
ANNEXE 6

Broadband roll out: a provider’s view

Set out below is a summary of information provided by a private infrastructure provider on its decision making process for an infrastructure route:

• An initial design identifies what appears to be the ‘optimum’ route in terms of passing all the properties that need to be served at the lowest apparent cost.

• Customers who order a connection must agree to a wayleave for the provision of the service. However there are many cases where the route requires the use of third party private land. A diagram of a typical rural route is attached to this Annexe. The green route runs around field boundaries and the blue route runs down the public highway in the verge.

• As shown on the diagram, the route uses field boundaries even though a more direct route would be along the road. This is for cost and efficiency/speed reasons. The laying of direct buried cable along field boundaries is much quicker and cheaper than using roadway or road verges for many reasons including the ability to soft dig rather than hard dig/make good; direct burial of cable rather than the use of ducting; fewer health and safety precautions required; and, no need to disrupt the public highway.

• In rural areas, estimated civil works costs (such as labour costs, equipment hire, reinstatement costs, etc., but not wayleave rates) to build a network are as follows:

  o field boundaries: £3,000 to £12,000 per kilometre
  o road verge or footway: £20,000 to £50,000 per kilometre
  o roadway: £60,000 to £80,000 per kilometre.

• In addition, there are the costs of the actual physical infrastructure. The majority of these costs are in respect of the fibre optic cable itself which costs around £1.20 per metre.

• A typical project breakdown in terms of costs is as follows:
- civil works – 68 per cent
- backhaul connection – nine per cent
- passive equipment – 23 per cent.

- The civil works are split as follows:

<table>
<thead>
<tr>
<th>Civil works – route</th>
<th>Distance (% of route)</th>
<th>Cost (% of civil cost)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fields</td>
<td>68</td>
<td>30</td>
</tr>
<tr>
<td>Verge</td>
<td>17</td>
<td>25</td>
</tr>
<tr>
<td>Footway</td>
<td>14</td>
<td>42</td>
</tr>
<tr>
<td>Road</td>
<td>1</td>
<td>3</td>
</tr>
</tbody>
</table>

- As shown above, the civil works (laying the infrastructure) are the largest element of a project with the use of fields being the biggest component thereof in terms of distance but a much smaller proportion of overall cost.

- Wayleave payments are usually funded from ongoing rental payments by broadband customers once the project is completed.

- The cost difference means that an inability to agree a wayleave rate along the most efficient/optimum route can effectively block a project as the need to circumvent a particular landowner or divert to the public highway will have a significant impact upon the costs of a marginal project. By way of example, on the basis of the above figures, even a very short diversion of 500 metres would add £1,500 to £6,000 to the capital costs of the project if an alternative field is used. If the diversion was to verges, footways or highways then a similar diversion could add £10,000 - £40,000 to the costs. On the basis that the infrastructure provider targets a network build cost of £1,000 – £2,000 per property, any diversion from the optimum route can have a significant impact upon these costs.
ANNEXE 7

The Parties’ experience of arbitration

- Few arbitrations are handled by written representations.

- Time delays are often a problem, and in particular, it is not uncommon for one party to delay the process for a considerable period of time. There have been reports of agents (whether acting for the landlord or the tenant) not responding to arbitrators’ correspondence for several months and there have also been suggestions that some arbitrators are corresponding too often.

- There have been problems on both sides; with landlords or their agents not coming forward with a proposed rental figure and/or tenants not coming forward with offers, even once an arbitrator has been appointed; and landlords’ agents being slow to provide evidence required (including budgets and detailed comparables).

- Due to this, 12 to 18 months can go by before a conclusion is reached even if the dispute is not ultimately resolved by means of arbitration.

Costs

The cost of arbitration can be very significant with overall costs being up to around £40,000. The arbitrator makes the final award as to who will pay what amount of the overall costs.

Overall comments

- In reality, arbitration tends to be adversarial, costly and lengthy.
- Most landowners have suggested that arbitration is a last resort.