



Strategic Review of Telecommunications Phase 3 consultation document

Your Communications response to Ofcom's consultation on
undertakings

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We welcome your comments on this response. Please e-mail your comments to Dominic Carney at dominic.carney@yourcommunications.co.uk



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This response provides an overview of Your Communications (YC), a summary of YC's views on the key issues raised by the proposed Undertakings and an analysis of specific unresolved regulatory issues that are of high importance to Your Communications.

Your Communications-an overview

Your Communications (YC) was formed in 1994 as Norweb Communications, latterly Norweb Telecom Limited and finally Your Communications Limited in April 2001. Registered on the 10th of September 1999 as a private limited company, YC is a wholly owned subsidiary of United Utilities PLC.

In April 1994 YC, (under the name of Norweb), was awarded a national Public Telecommunications Operators (PTO) Licence by the department of Trade and Industry.

Since launch in 1994, major investment in state-of-the art optical fibre technologies, resources and networks has enabled YC to deliver direct services to an ever-increasing number of businesses around the country. Your Communications has a history of providing bespoke solutions for its customers. We work together with our customers to offer cost-effective solutions that meet their requirements.

Your Communications is regarded as one of Britain's top-performing business to business telecommunications companies.

We have an ongoing investment programme to upgrade and expand the existing network across the UK. To date, YC has invested more than £250 million in developing its network operations.

Our inter-city trunk route takes in Birmingham, London, Bristol, Manchester, Glasgow, Edinburgh and Leeds.

The inter-city national network provides YC with the framework to deliver direct services to major organisations in key regions of the UK. We have the potential for 1,280 gigabits per second of capacity and with the latest development of "Dense Wave Division Multiplexing" technology; our new broadband network is capable of handling up to 15.2 million telephone calls simultaneously.

The core network comprises over 3600 kilometres of fibre-optic cable and 120 points of presence. Access methods include direct fibre, point to point radio, point to multi-point radio, BT leased lines and indirect connectivity via BT-provided services such as CPS and WLR.

YC employs some 650 staff, predominantly in the North West of England. YC has a strong management team with a wide experience of the telecommunications market.

Executive Summary

Views on suitability of BT's Undertakings

Your Communications hold the view that both the key principle laid down by Ofcom – equivalence – and the mechanism that Ofcom has employed to reach a settlement with BT – the delivery of legally enforceable undertakings from BT with regard to its future treatment of access and backhaul services – constitute a bold and imaginative solution to a set of problems which have proven until now to be beyond resolution. Your Communications support the concept of BT's Access Services Division (ASD) as the core of the solution and look forward to working with the ASD in order to build a true business partnership going forward based on mutual trust and respect. We appreciate that business relationships are a two-way thing and will certainly play our part in breaking down the barriers and suspicions that have arisen between elements of BT and alternative network providers over the last two decades.

Your Communications commend Ofcom on the grasp of detail shown in the formulation of the Undertakings, and the “early wins” in areas such as Wholesale Line Rental. Those sections of the undertakings focused on the changeover to next generation networks are also appreciated in the main for their clarity and guidance.

We believe that this is a step change in regulation and that this settlement will deliver great benefit for “UK plc” over time. This said, and as with all great endeavours, we believe even more could be done by Ofcom and focus on some key issues below.

Issues of Substance

Your Communications wish to note that this is a partial settlement only. The Strategic Review does have other objectives in addition to the ones covered by BT's undertakings. Of chief interest to Your Communications are the following principles of the TSR.

- promote competition at the deepest levels of infrastructure where it will be effective and sustainable
- accommodate varying regulatory solutions for different products , and where appropriate, different geographies

As noted in our response to the Phase 2 consultation, Your Communications believe that these principles should lead directly to a) rights of access to BT's civil infrastructure and b) An end to national price averaging of BT's Leased Line products which distorts the market. These issues are not addressed in the Undertakings.

It is understood that further consultations – next generation network access and the next Wholesale Broadband market review – will address these issues. If this is the case, then Your Communications recommend that Ofcom publish a clear template which contains all planned outcomes and processes of the TSR so that industry can gain an overall view of what specific issues are being handled, and where and when they are being dealt with.

It is vital for the industry and the consumer that the output from the review is radical, forward looking and (as far as possible) future-proofed, at least up until 2010. The need to deal with access to BT's infrastructure is made clear below. If this issue is not dealt with now, then Your Communications fear that the potential gains to be made via the Undertakings will be eclipsed and lost in in-fighting as industry players reposition in order to implement next generation networks and services.

Points for clarification

Outside of the key issues above, Your Communications raise a few points that would benefit from clarification with regard to the undertakings. One strong candidate issue for clarification is the legal relationship of the Undertakings to the EU framework. It is understood that the use of the Enterprise Act provides complementary support for the EU framework and the UK Communications Act, enabling some of the potential weaknesses (such as limited remedies) to be overcome. However, on a "going forward" basis the question arises as to how ongoing and perhaps structural weaknesses in the UK telecommunications market will be addressed. If the EU framework is not fit-for-purpose for resolving all issues of dominance in the UK market (as is implied by Ofcom's proposed use of the Enterprise Act), then can the undertakings be amended and added to in order to ensure the necessary restraints on the incumbent? Given the changes that can be foreseen to take place in the telecommunications market over the next five years, it is important that the regulatory process is both flexible and dynamic.

Finally, Your Communications comment on some specific issues regarding Next Generation Networks. We appreciate that this is the subject of a separate consultation, but would also note that many of the issues involved are specifically addressed by BT's undertakings. Therefore we have made a composite response to the two consultations.

Main Response

The case for rights of access to BT's civil infrastructure

Your Communications are of the opinion that BT continue to maintain market dominance largely through the monopoly of infrastructure in the “last mile” .We believe that access to BT's civil infrastructure should thus be made available to alternative network providers in order to ensure the delivery of the equivalence sought by Ofcom for providers in the UK telecommunications market. Further, YC are of the opinion that the focus in the Undertakings on Local Loop Unbundling is thus only a very partial response to BT's dominance. Finally, we believe that the introduction of next generation networks and its “one pipe” access concept will only increase the need for infrastructure access and not decrease it.

The chief reason for infrastructure access being ignored is, we submit, a) due to past errors and inconsistencies in the way in which product markets have been defined for market review and b) pressure from BT over the years to ensure that competition is not allowed into its duct space. This section will demonstrate that infrastructure is both a source of continuing market dominance and a key upstream market; that this fact is recognised in legislation but has been disregarded in market reviews to date; that BT continue to derive dominance from their local infrastructure; ***and that without access to this local infrastructure being granted to alternative network providers, then segments of the UK telecommunications market will continue to be inefficient and unfit for purpose.***

The case in detail

Firstly, it should be noted that the EC Access Directiveⁱ is crystal clear when it defines “access” that this includes civil infrastructure:

“it covers inter alia: access to physical infrastructure including buildings, ducts and masts”(Article 2a)

The Communications Actⁱⁱ is somewhat more opaque; nevertheless Sections 151(3) and 151(4) together combine to make clear the following –

“References to network access are references to ... any services, facilities or arrangements (not comprised in interconnection but) are any services, facilities or arrangements by means of which a communications provider.... Is able to make use of anything mentioned in subsection (4)”
 Subsection (4) states that (inter alia), *the things referred to in subsection (3b) are ...any apparatusⁱⁱⁱ comprised in such a network or used for the purpose of such a network or service.”*

It is clear from the above then that access obligations should include access being granted to network infrastructure as well as network products. This however seems to have been resisted in the UK for the past twenty years. The cause of this failure must lie with the market review procedure and the way in which this has been carried out in the past in relevant markets.

A good example of the lack of clarity is exhibited in the review of the Leased Lines market.^{iv} Consider the following,

*“The WDM (Wave Division Multiplexing) element of the service is therefore an **upstream** characteristic of the products described above (TISBO, AISBO). It can be used as an input into different products that are in distinct (downstream) economic markets.”^{iv}*

So far so good, Ofcom’s stated preferred approach (for market review) is to:

*“Define all markets in the absence of regulation, starting downstream and then moving upstream, with the aim of defining the most upstream market; assess market power in the furthest upstream market, defined in the absence of market regulation, and identify **appropriate remedies in that upstream market**. Then redefine all markets further downstream in the presence of that upstream regulation.”^{iv}*

On first principles therefore, Ofcom are moving upstream as they outlined. They then go on to state,

*“Based on these findings, Ofcom does not propose to conduct a review of the WDM market as it falls outside the scope of the European Commission’s market set, in the same way as no review will be conducted of any other input markets into TISBO or AISBO that may exist, **such as access fibre.**”^{iv}*

We do not believe that Ofcom’s discretion is so fettered by the scope of the EC market set that it must ignore its own fundamental principles of market analysis. If this were the case, then why lay out these principles in the first place?

There is in fact a strong case in law to be made for Ofcom being able to act in a much more unfettered manner. So, Recital 15 of the Access Directive notes that

“The imposition of a specific obligation on an undertaking with significant market power does not require an additional market analysis but a justification that the obligation in question is appropriate and proportionate in relation to the nature of the problem identified”ⁱ

The Communications Act also provides general powers to Ofcom to apply access-related conditions without reference to market analysis or the EC market set;

“Access-related conditions may include conditions appearing to Ofcom to be appropriate for securing that persons to whom the electronic communications code applies participate, in cases where there are no viable alternative arrangements that may be made, in arrangements for a) sharing the use of electronic communications apparatus and b) apportioning and making contribution towards costs incurred in relation to shared electronic communications apparatus.”ⁱⁱ

Indeed it is interesting to note that Ofcom considered its powers here in Phase 2 of the Review,

“Legally it would be possible for Ofcom to apply conditions requiring infrastructure-sharing. The most appropriate route for imposing such conditions would be under section 73(3) of the Communications Act, as an “access-related” condition. Such obligations could be, but need not be, confined to operators with SMP in a relevant market.”^{ix}

It is clear from the above that Ofcom have neither to conduct a market analysis nor find evidence of SMP in order to impose infrastructure sharing. Without doubt therefore, there is no requirement for Ofcom to be limited in its scope to the EC market set.

Nevertheless, this analysis has provided a key reason allowing regulatory authorities to ignore infrastructure as an upstream market in the UK.

Another prop to this argument has been provided by the 2004 Review of the Wholesale Local Access market. The key problem here in our opinion is the market definition. Ofcom (section 3.15) initially note that

“A local access connection might also be provided using other means (in addition to copper loop and cable) such as a fibre connection direct to the end user’s premises, a fixed wireless link ... or mobile technology.”^v

Given the large range of distinct markets for access services (corporate, SME, SOHO, residential – all of which are also very different markets in terms of both the scope and scale of their telecommunications markets) it is not a surprise that there is a plurality of access methods. Disappointingly, Ofcom in their conclusion on the market move away from this position and note that,

“Ofcom maintains that on balance it is appropriate to define a single wholesale local access market for both business and residential users” and “in summary, Ofcom’s preliminary view is that it is appropriate to define a relevant wholesale product market for loop-based and cable-based local access.”^{vi}

Put together, these two strands lock Ofcom into focusing on copper as the key upstream delivery medium for local access and, where fibre and upstream services (dark fibre, duct access) could be considered, have instead constrained themselves to consideration of downstream market inputs – essentially BT wholesale network services.

This regulatory approach is storing up problems for the future in our view. We will demonstrate that there is plenty of evidence **now** to support the case for dark fibre and duct access being recognised both as a key upstream input and a bottleneck in the business market segment, with growing evidence that this will become even more of a bottleneck area in the near term.

In its Leased Lines review^{iv} Ofcom note that, based on analysis of the reach of competitive networks, BT has a captive potential market of 50 to 60% of all businesses employing over 250 people, and

“on a forward looking basis BT will have a considerable advantage over other players”.^{iv}

It is interesting to note that the degree of dominance reflected here, and gained solely as a result of BT’s infrastructural “reach” is adjudged by Ofcom to be an underestimate. This is because Ofcom have had to use a “dig” distance from competitor networks of 300 metres, even though communications providers consulted indicated that they would typically only extend to a maximum of 100 metres. Ofcom note,

“this approach will lead to an overstatement of the extent of competition and an understatement of BT’s advantage over other communications providers”.^v

Within Central London, Ofcom carried out an additional piece of analysis that compared the number of points of presence of BT with that of the next largest communications network. Ofcom notes,

*“this comparison showed that BT has **seven hundred** times the number of points of presence”^v*

It is clear from the above that, at least in the business market in central business districts, BT have a huge advantage based on “enduring upstream market power”. This looks unlikely the change in the near term, and presently not as a result of the TSR. This dominance is purely down to its exclusive ownership and control of civil infrastructure and is nothing to do with downstream product markets.

Looking forward, how is the situation likely to change? It could be posited that LLU would come into its own as a driver for competition, as DSL technology drives higher speeds out of the copper bearer. However, this is not what BT’s chief technologists see happening. As 21CN rolls out and becomes a

*“single converged network carrying all services” then “all of the current disparate service interfaces are maintained at the edge of the network while being combined on to a common backhaul and core network. Single customer access is based on copper with digital subscriber line technology, **while small and large business will use higher bandwidth links provided using optical fibre**”.^{vii}*

The inexorable logic here is that as networks become more and more “multi-service” then so the need for a single “fat” pipe to the premise increases and so the capability to control infrastructure in which to lay these pipes will increasingly ensure dominance.

BT appear to be planning to make this market non-contestable in a big way. Not only have they made it clear in discussions with Your Communications that there will be no access to their infrastructure for competitors (at least without regulatory intervention), but it also looks like they are looking to move functionality out of the customer premises and into the network, where it is less contestable.

*“The MSAN terminates their physical access infrastructure and enables efficient access to metro nodes. **For specific fibre-delivered business services, the MSAN will include NTE functionality**”.^{viii}*

Your Communications believe that Ofcom needs to take a forward-looking approach to this threat of foreclosure. It is Your Communications' considered view that fibre will become increasingly the physical medium of choice in the local access layer for business provision. Further, we think that this is already clearly happening and that this trend will continue and deepen over the next two to three years. Three years out, this trend will be reinforced by the logic of the 21CN rollout, which will only require one pipe for access.

BT totally dominates this market in the local access loop. Presently, competitors have very little option but to buy higher level services from BT in order to gain network reach, even though all they may require is infrastructure access in the last mile. As Ofcom have recognised *"a very high proportion of the roll-out costs of fibre are in the civil infrastructure."*^{ix}

This creates a no-win for dilemma for alternative network providers. They can either purchase higher level services from BT that they do not require (for instance Wholesale Extension Services, when all they may need is duct access), or they can build out their own infrastructure at huge cost to themselves, and significant external cost to the community in terms of disruption, noise and traffic delays. We do not believe that Ofcom wish this sorry state of affairs continue, and in all likelihood worsen. Indeed, Your Communications took great heart from Ofcom's sentiments on this issue in TSR2,

"Ofcom believes that a pre-condition for contestability in the investment in the investment in fibre-based next generation broadband access is that there is open access to existing civil infrastructure on an on-demand basis. In that case, the inherent advantage of those with existing networks in the race to deploy next generation access networks would be eroded"^{ix}

Ofcom appear to have pulled back from this position in Phase 3. Your Communications recommend that prior to completing the Strategic Review, Ofcom review the mechanisms for ensuring that access to BT's infrastructure is provided on a targeted and fit-for-purpose basis as suggested by Your Communications in its response to the Phase 2 consultation. We firmly believe that a failure by Ofcom to produce a resolution to the problem addressed above will lead to the Review being labelled, with hindsight, as both protective of BT's continuing dominance and backward-looking in its scope.

The case for Leased Lines geographic markets

In spite of continued investment in our own infrastructure, and the rapid growth in revenues over the past ten years of operation, profit flows and therefore the opportunity for self-funding investment have proven to be elusive. One reason for this could well be that, whereas Your Communications has to bear the full cost of its build-out of services in regions where it chooses to deploy its own infrastructure, BT presently supply price-regulated connectivity services on an “average” basis across the UK. This of course means that BT’s costs, and therefore prices, will be underestimated and therefore under-recovered in many non-metropolitan areas. As Your Communications provides service across large swathes of exurbia and rural Lancashire and Cumbria, this in turn means that Your Communications is competing against BT regional operations that are effectively subsidised.

As a special case of this perceived disadvantage, Your Communications would like Ofcom to consider the following scenario:

- a large company decides to build out on a green field site in rural Lancashire
- the company is account managed , and BT find out about the new build via BT Retail operations
- BT Retail arrange for ASD to build new infrastructure out to the customer’s premise
- Your Communications find out about the company’s plans for a new build a month later and state that they would be happy to provide services “to the door”
- The company informs Your Communications that BT ASD have been provided with exclusive rights of connection to the company’s own ducts and risers
- Your Communications thus approaches BT ASD and request access to the relevant infrastructure
- BT ASD refuse the request
- BT Retail request BTW to provide fibre services so that BTR can supply Lan Extension Services (LES) to the customer
- ASD build the necessary infrastructure for the service for BTW , BTW provide the wholesale service to BTR and BTR supply the retail service to the customer
- The build for this specific job costs in the region of say £3 Million, but BTR pay the wholesale service price only, say £20K installation and £15K per annum for the service, and charge the customer a minimum mark-up
- Thus BT are able to build out extensive facilities capable of multiple uses whilst charging only a fraction of this build cost to the customer. We believe this is endemic within greenfield and rural sites and therefore a big problem looking forward
- Businesses cluster around the initial build, but because of BT’s infrastructure presence it is impossible for Your Communications to gain a foothold in any of the new businesses

Could this happen in reality? We believe that there are many instances of this happening already. The main reason is that information asymmetry provides BT with “first mover advantage” in such a scenario, and once this advantage is gained then the fact that companies such as Your Communications cannot access BT’s infrastructure in effect makes the market in question non-contestable.

There are of course wholesale services that can be purchased from BT in order to compete. However, these may be terminated at some distance from the site in question, even though Your Communications has points of presence much closer to the site. This will carry a cost. In addition, the cable provisioning teams, cable laying equipment and infrastructure management and maintenance systems that Your Communications have purchased and maintain will be to a large degree under-utilised if the main route to market is only via another telco’s wholesale services. There are therefore very real incremental and alternative costs faced by network providers who are forced to also purchase only relatively downstream products from the incumbent.

Points for clarification and next generation networks

The issues in this section are forward-looking and involve issues around BT’s 21CN network. Therefore, these issues cross over into the Next Generation Networks: Further Consultation.

Many of the policies, which have been proposed for next generation SMP products within the undertakings, are fully supported by Your Communications. We are pleased to note that BT have undertaken to ensure *“no foreclosure of unbundled network access”^x* and *“no retail services to be launched without associated wholesale inputs”*. In addition we are delighted that Ofcom see it as *“important to establish the principle that (regarding broadband dialtone) BT should ensure that LLU operators do not suffer a material competitive disadvantage as a result of this capability”*

Migration

Your Communications have concerns about the planned closure of some of BT’s exchanges over the next few years. This concerns both access and interconnect issues. Interconnect has been discussed fairly thoroughly, but there is more uncertainty where access is concerned. So:

- On closure of an exchange, how will terminating circuits be rehomed?
- What will be the notice period?
- What will be the target downtime for this migration? Will compensation be provided for the downtime being exceeded?

Industry-led processes

Your Communications believe that there is a lack of clarity regarding both the purpose and the powers of the bodies to be involved in these processes going forward. Key issues here relate to:

NGNCo – this group will be responsible for “operational planning and oversight” of the transition from existing to NGN networks. Questions here include, what will be overseen? will all NGN networks be covered, or does this just relate to BT’s network , as a result of the undertakings?

NICC – Your Communications note that the analysis of NICC and its proposed future role is disputed by NICC itself in its response to the NGN condoc. We agree with their conclusion that “NCC needs a commercial focus for its work. Ideally, this should come from a single body to avoid the possibility of a conflict of priorities being given to NICC for its work. If more than one body is established, the responsibilities of each body must be clear and they must not overlap. NICC does not see this level of clarity in the proposed Ofcom NGN Process proposals and is concerned that the consultation suggest that technical work is not part of NICC responsibilities.”^{xi}

Your Communications recognise that this “planning gap” is an industry problem and something for industry to solve not something to be left to Ofcom to deal with. We look forward to working with our colleagues on this issue in the coming months.

end

References

ⁱ Directive 2002/19/EC of the European Parliament and of the Council (7 March 2002)

ⁱⁱ Communications Act 2003

ⁱⁱⁱ Apparatus : the things collectively in which preparation consists, and by which its processes are maintained; equipments , materials , machinery; material appendages or arrangements
Shorter Oxford English Dictionary On Historical Principles , Little Fowler and Coulson

^{iv} Leased Lines market review, Ofcom 2004

^v Wholesale Local Access market review, Ofcom 2004

^{vii} Networks and systems for BT in the 21st Century. Reeve, Bilton, Holmes and Bross in BT Technology Journal , Volume 23, Number 1 January 2005

^{viii} A new service infrastructure architecture. Crane, as above

^{ix} Strategic Review of Telecommunications, Phase 2 Policy Annexes , Annex I ; Ofcom

^x Next Generation Networks: Further Consultation ; Ofcom , June 2005

^{xi} NICC response to Ofcom NGN Further Consultation , August 2005