

CityFibre

Physical Infrastructure Market Review

Response submitted by CityFibre Infrastructure Holdings

1st February 2019

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1 Introduction

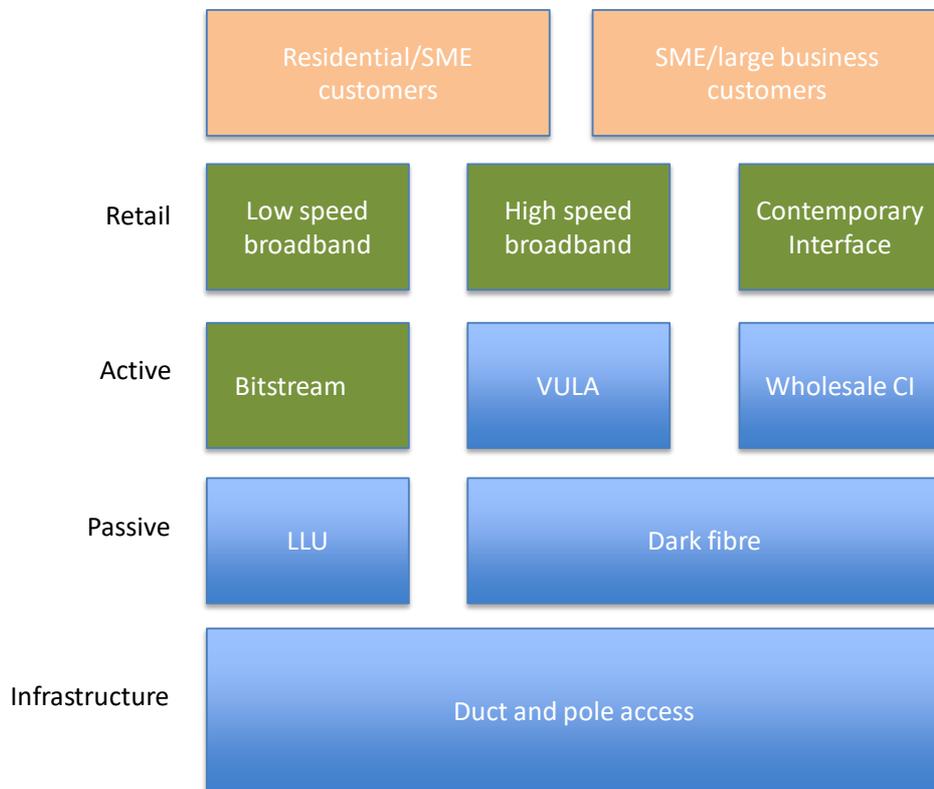
1.1 About CityFibre

- 1.1.1 CityFibre is the UK's leading alternative provider of wholesale full fibre network infrastructure. With major fibre infrastructure projects across 51 towns and cities throughout the UK, we provide a portfolio of active and dark fibre services to our customers which include service integrators, enterprise and consumer service providers, local authorities and mobile operators. CityFibre is making significant investments in a number of cities across the UK as we look to rapidly expand the number of homes and businesses which have access to full fibre. CityFibre has recently partnered with Vodafone to bring ultrafast Gigabit-capable full fibre broadband to up to one million UK homes and businesses by 2021 and is targeting five million by 2025. This commitment has been reinforced by a £2.5bn investment programme which identifies towns and cities primed for FTTP expansion to reach nearly every home and business and build is underway. CityFibre is based in London, United Kingdom, and is privately owned by a consortium of Antin Infrastructure Partners and West Street Infrastructure Partners.

2 Executive Summary

- 2.1.1 CityFibre welcomes Ofcom’s initiative to review the market for physical infrastructure access (the physical infrastructure market review – PIMR). The current inconsistencies between how access to physical infrastructure is regulated, depending on which downstream market the deployment is intended for, is causing market distortions and damaging infrastructure investment incentives.
- 2.1.2 CityFibre, however, has strong concerns that the Physical Infrastructure Access (PIA) product being developed by Openreach is not fit for purpose and will not be the accelerant to infrastructure investment envisaged by Ofcom and the Government. The greatest problem appears to lie in the relatively loose provisions for non-discrimination contained in the wholesale local access market review (WLAMR) in March 2018 and extended (although apparently in a diluted form) in the PIMR.
- 2.1.3 It is our experience throughout the PIA reference offer (RO) negotiation process (from March 2018 till now) that Openreach has sought to make the product as unfriendly as possible for its customers and has created a RO that results in PIA customers having materially different terms for using the Openreach’s PI, that Openreach itself (or downstream BT businesses)
- 2.1.4 CityFibre believes that the root cause of Openreach’s behaviour in the PIA RO negotiation process lies in the fact that Openreach is vertically integrated across three layers of access products. That is illustrated in the diagram below:

Vertical Relationships in Copper and Fibre Broadband Markets



Blue boxes indicate where Openreach is active

- 2.1.6 CityFibre believes that Ofcom needs to take urgent action to rectify this situation. In the long term, we recommend either functional separation of the PI part of Openreach from the rest of the business, or the forming of a separate company that owns only the physical infrastructure.
- 2.1.7 In the short term, we propose a number of changes to the proposed regulatory remedies to overcome the most overt instances of discrimination. Those changes can be introduced over a pre-specified period of time and would not prevent the lifting of usage and geographic PIA restrictions immediately upon the publication of Ofcom's final PIMR Statement.
- 2.1.8 CityFibre has hands-on experience as a PIA customer and can evidence where Openreach has acted in ways that a PIA customer could not replicate without being in breach of the RO (which becomes a bilateral contract, once signed by Openreach and another operator). Without strengthening of the non-discrimination provisions, the PIA product will not be used at scale.
- 2.1.9 CityFibre's investment and network deployment plans could make us the largest PIA customer in the UK, but our experience of the product and Openreach's behaviour to date means that we are unlikely to use the PIA product to the extent we could. If the PIA product is not made fit for scale deployment, some of our network expansion (particularly entry into new towns and cities) may be at risk.

3 PIMR Introduction

- 3.1.1 CityFibre is a member of the IIG and we refer Ofcom to the IIG response to the PIMR, submitted to Ofcom on January 19th together with the IIG's response to the BCMR and RFR consultations. In this response we seek to not repeat the points raised in the IIG response, other than to provide brief summaries or as required for context in this response. This response does therefore not represent the entirety of CityFibre's views on the PIMR and should be read together with the IIG response.

4 PIMR product and geographic market definition

- 4.1.1 CityFibre refers Ofcom to the relevant sections of the IIG response. CityFibre has no further comments in relation to the PIMR product and geographic market definitions, other than as articulated in the IIG response.

5 PIMR SMP analysis

- 5.1.1 CityFibre agrees with Ofcom's conclusion that BT has SMP in the PI market across the UK, except in Hull.
- 5.1.2 We believe that the analysis presented by Ofcom is correct and we provide more comprehensive commentary on that analysis through the IIG response.
- 5.1.3 We particularly agree that Ofcom is correct in its focus on BT's network ubiquity and its effect in the PI market. The substantial advantages to BT in the form of lower costs and shorter service provision times are such that it is not possible for competing providers to compete fairly in the relevant downstream markets (whether wholesale or retail).

5.2 BT's position in relevant downstream markets

- 5.2.1 CityFibre considers that, even where BT has been found to not have SMP in certain geographic product markets downstream, such a finding is only possible due to remedies imposed at intermediate levels between PI and the relevant downstream market. Without those remedies in place, BT would enjoy a position of SMP across all markets. For the purpose of the PI market analysis, it is therefore appropriate that any competition identified in downstream markets,

which is dependent on other remedies, should not be taken into account given that the PI market is the furthest upstream market and so BT's market position in PI is not affected by remedies downstream of PI.

5.3 BT's position in the PI market

5.3.1 CityFibre has carefully reviewed Ofcom's analysis of BT's position in the PI market and it is our view that Ofcom's analysis is clear and comprehensive. We believe that Ofcom clearly demonstrates that other operators that control PI networks, including Virgin Media, which is the 2nd largest PI network in the UK simply do not impose a competitive constraint on BT, even if it were to offer access to its PI (which we note it has no apparent intention of doing).

5.4 Absence of countervailing buying power

5.4.1 CityFibre agrees strongly with Ofcom's conclusion that operators wishing to purchase access to BT's PI network do not have any countervailing buyer power at all.

5.5 Competition concerns arising from BT's SMP in the PI market

5.5.1 The impact of BT's dominance in the PI market must not be underestimated. Regardless of potential downstream remedies designed to overcome downstream competition concerns in those markets, the root cause of what would be BT's dominance across all fixed markets in the absence of regulation is its dominance in the PI market.

5.5.2 A clear fit-for-purpose non-discriminatory PI remedy has the potential to remove the need for complex downstream remedies and truly open the UK for competition in fixed electronic communications services.

5.5.3 CityFibre has made announcements of its intention to invest £2.5bn in the construction of new all-fibre networks to serve all downstream markets. Specifically, this takes the form of a plan to deploy full fibre networks to 5 million premises by 2024. CityFibre has named an initial tranche of 37 towns and cities where this deployment is intended to take place¹. [§<].

6 **PIMR Remedies**

1.1 General Remedies

6.1.1 CityFibre agrees with the contents of the IIG submission with regards to the suitability of ATI as an alternative to DPA and in particular that the ATI does not provide a suitable access platform for scale deployment of new networks and that the lack of non-discrimination provisions in the ATI makes it entirely unsuitable as a remedy to prevent the abuse of market power.

Requirement to provide network access on reasonable request and for operators to request new forms of access

6.1.2 With regards to the need for a general remedy for Openreach to provide access on reasonable request, in addition to the points already covered by the IIG response, CityFibre agrees with Ofcom's assessment that this remedy is necessary, even though a specific access remedy is also imposed. Not having this more flexible remedy could result in substantial delays to the

¹ <https://www.cityfibre.com/news/cityfibre-announces-2-5bn-investment-plan-expand-full-fibre-network-unlock-uks-next-generation-broadband/>

development of new forms or access or changes to the current form of access, with consumers suffering as a consequence of innovation being stifled.

- 6.1.3 CityFibre, however, believes that Ofcom should consider whether the current general access remedy could be improved as the current statement of requirements (SOR) process is not customer focused and is in many instances used by Openreach to delay the introduction of the changes requested for as long as possible.

Requirement to not unduly discriminate

- 1.1.1 The current non-discrimination obligation in the DPA remedy mandated in the WLAMR (and which Ofcom is proposing to replicate in the PIMR) is a major concern for CityFibre. As set out in the IIG response, CityFibre (along with other IIG members) has participated actively in the PIA Reference Offer (RO) process since April 2018 and it is absolutely clear to us that, despite Ofcom expressing its intention that the non-discrimination obligation should result in Equivalence of Inputs (EoI) in all but name, what has actually transpired is in fact much worse than what used to be the case in reference offers before the creation of Openreach in 2005.

- 1.1.2 In addition to the points raised in the IIG response, CityFibre sets out below an analysis of how the current situation has arisen and what we believe Ofcom needs to do to rectify it.

- 6.1.4 Ofcom explains its proposed “no-undue discrimination” obligation and its reasons for taking this approach at pages 51 – 55 of the consultation document. Ofcom appears to consider that the cost of introducing Equivalence of Inputs (EOI) would be disproportionate, and therefore opts for the less strict “no undue discrimination” obligation. However, it proposes to interpret this requirement *“in relation to network access as requiring strict equivalence in respect of processes and sub-processes that contribute to the supply and consumption of network access...”* (4.35).

- 6.1.5 Ofcom recognises that there will be some instances where processes and systems used by Openreach are different to those used by other operators. In these circumstances, Ofcom does not propose an up-front obligation on Openreach to justify all such instances. Instead, it proposes to extend the monitoring system established under the WLAMR to ensure that Openreach complies with the non-discrimination obligation (4.40 – 4.41).

- 6.1.6 CityFibre considers that this approach will prove inadequate and indeed it seems to be at odds with the non-discrimination provisions set out in the WLAMR in March 2018 paragraph 3.46, which stated:

“we will interpret the no undue discrimination SMP condition in relation to PIA as requiring strict equivalence in respect of all processes and sub-products that contribute to the supply and consumption of duct access, with discrimination permitted only in cases where BT demonstrates that a difference in respect of a specific process step or sub-product is justified.”

- 6.1.7 CityFibre’s experience in the PIA RO negotiation process since April 2018, has been that the relatively strongly worded non-discrimination provisions in the WLAMR have been largely ignored by Openreach. Any request from operators for parity between BT and other operators in the way they access and use Openreach’s physical infrastructure have been met by statements that Openreach will not productise its one use of its own network and that KPIs will be sufficient to demonstrate non-discrimination.

- 6.1.8 It is CityFibre’s view that the proposals set out by Ofcom are insufficient to prevent Openreach from discriminating against its downstream rivals. In fact, taking the decisions by Ofcom set out in this PIMR and the BCMR, it is our view that Openreach has as strong incentives to discriminate as BT had before the functional separation of Openreach. Further, Openreach will continue to

have the means to discriminate and remedies put in place will not be enough to prevent it from harming its downstream competitors. Our reasons for coming to this conclusion are twofold.

6.1.9 First, at a strategic level, Openreach's position as the vertically integrated provider of PIA, dark fibre access (DFA) and wholesale Contemporary Interface (CI) products undermines the original purpose of creating Openreach as a separated entity and transfers to Openreach the incentive to discriminate that used to lie within BT Group as a whole. The integration of these three products in Openreach is a retrograde step, taking the structure of the industry back to the days before the Telecoms Strategic Review undertaken by Ofcom in 2004/05.

6.1.10 Secondly, although CityFibre has accepted, in its response to the WLAMR, that EOI would be disproportionate, our experience since then has shown how Openreach has been willing and able to game the looser requirement to its own advantage. We are therefore of the view that Ofcom needs to be more assertive in its implementation of the no undue discrimination requirement. Rather than a further relaxation of the interpretation of undue discrimination, Ofcom should take the opportunity of the PIMR to strengthen the approach to non-discrimination to ensure equivalence of outcome even if strict EOI is not mandated.

6.1.11 We provide further consideration on each of these two points below.

Vertical Integration and Separation

6.1.12 In the Strategic Review of Telecommunications (TSR) conducted by Ofcom in 2004/05, Ofcom established that the vertical integration of BT was one of the key problems in the market, holding back competitive investment and sustainable competition. Ofcom concluded that the no undue discrimination remedy that had been available was inadequate to address the competition problems caused by economic bottlenecks.

6.1.13 In a highly critical sentence in the second TSR consultation document, Ofcom stated that competing operators who rely on BT for access *"have experienced twenty years of:*

- Slow product development;
- Inferior quality wholesale products;
- Poor transactional processes; and
- A general lack of transparency"²

6.1.14 To address this problem, Ofcom not only proposed EOI, but also a set of organisational changes to BT known as "functional separation". The core element of this separation was the creation of Openreach as a separated business unit in which management and staff were remunerated in a manner that reflected only the performance of Openreach and its responsibility to deliver EOI³. This separation of management incentives was supposed to break the link between the preferences of Openreach's management and the performance of the rest of BT.

6.1.15 Ofcom's Strategic Review of Digital Communications (DCR), held in 2015, found that BT still had an incentive to indulge in what it termed "strategic discrimination", for example in the design of its network. The DCR resulted in the "legal separation" of Openreach as a separate company

² Ofcom (2004) Strategic Review of Telecommunications: Phase 2 Consultation Document, para. 1.19

³ Ofcom (2005) Final Statements on the Strategic Review of Telecommunications and Undertakings in Lieu of a Reference under the Enterprise Act 2002, para. 5.36

within the BT Group, under the governance of a Board consisting for BT and independent Directors.

- 6.1.16 The purpose of both functional and legal separation was to change the incentives of Openreach so that it had no incentive to discriminate in favour of BT's downstream divisions and against BT's rivals in downstream markets. This purpose is summed up in Tropina et al (2010), which states:
- 6.1.17 *"Regardless of the form [of separation] that is adopted the motive is the same, namely, to resolve the tensions that exist within industries characterised by containing both competitive and non-competitive elements."*⁴
- 6.1.18 Cadman (2010) describes functional separation as a means to implementing EOI rather than an end in itself⁵ and de Bijl (2005) says that the key argument in favour of separation is that it eliminates the vertically integrated dominant firm's incentives to raise rivals' costs through non-price discrimination⁶.
- 6.1.19 All these authors agree that a vertically integrated firm with market power in the upstream bottleneck has the incentive and ability to foreclose downstream markets to competition. Separating the upstream business from the downstream elements will remove such incentives and so should result in a more level competitive playing field downstream. This was also the original motivation of Ofcom to impose functional separation and behind the recent change to legal separation. Ofcom's proposal document to establish legal separation was entitled *"Strengthening Openreach's strategic and operation independence"*.
- 6.1.20 However, the combined effect of the PIMR and BCMR is that Openreach will be responsible for supplying PIA, DFA and CI products. It will, therefore, once again be vertically integrated: selling products at all levels of the value chain to the very firms with which it competes downstream. Openreach is already in a similar position to this in the WLA market where it has been selling PIA for a number of years, although there has been very little take up of the product.
- 6.1.21 What this means is that the incentives to discriminate, which functional and legal separation were supposed to remove from BT, will now be transferred to Openreach and will be just as strong as

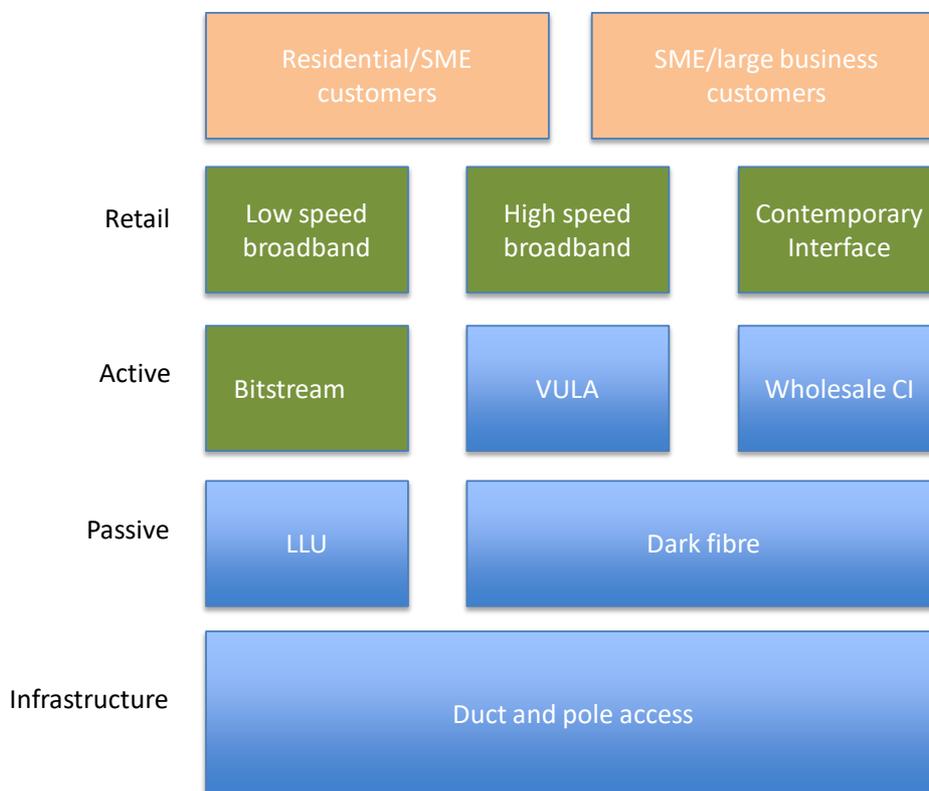
⁴ Tropina, T., Whalley, J., & Curwen, P. (2010). Functional separation within the European Union: Debates and challenges. *Telematics and Informatics*, 27(3), 231-241.

⁵ Cadman, R. (2010). Means not ends: Deterring discrimination through equivalence and functional separation. *Telecommunications Policy*, 34(7), 366-374.

⁶ De Bijl, P. W. (2005). Structural separation and access in telecommunications markets. *Journal of Network industries*, (2), 95-114.

those incentives were before the TSR. The illustration below of the different levels in the fixed broadband market, shows that Openreach (in blue) is active in three out of four levels.

Vertical Relationships in Copper and Fibre Broadband Markets



Blue boxes indicate where Openreach is active

6.1.22 CityFibre is extremely concerned about this apparent reversal of policy by Ofcom, which led the world in the separation of the upstream business unit that controls the enduring economic bottleneck. Coming so soon after agreeing the legal separation of Openreach in the DCR, we now see Openreach as being given the very incentives to discriminate that separation was supposed to remove.

6.1.23 Such behaviour is not just possible in theory. CityFibre, and other CPs have direct experience of such behaviour, which is described below.

The Behaviour of BT

6.1.24 CityFibre has direct experience of the discriminatory behaviour of Openreach in the provision of PIA. We refer Ofcom to the IIG response to the BCMR and PIMR and specifically to paras. 13.1.7 – 13.1.29 where the IIG sets out its experience of Openreach’s behaviour in the current PIA negotiations. CityFibre, as a member of the IIG, fully endorses these comments and wishes them to be considered part of this response.

6.1.25 [REDACTED].

6.1.26 [REDACTED].

6.1.27 [REDACTED].

6.1.28 [REDACTED].

6.1.29 [X].

Proposed Solutions

- 6.1.30 As discussed above, Openreach not only has the ability to behave in such a manner, but also the incentive to do so because it is selling products both to CityFibre (and other investors) and in competition with CityFibre. This goes against the fundamental principles of separation as Openreach has a clear incentive to discriminate against its own customers and, as we are experiencing, it is willing and able to do so.
- 6.1.31 Rather than accepting that Openreach is a vertically integrated company with market power at the upstream level (at present at all levels), with all the same incentives to discriminate we find in such structures, our view is that Ofcom should seriously consider creating a “duct co” as a legally separated company within the BT Group, or even as a structurally separate independent company, that provides PIA on equal terms to Openreach and to other network builders such as CityFibre.
- 6.1.32 We would envisage Duct Co as being similar to Openreach in that it is a separated provider of the most upstream input, ducts and poles, only. It would not be involved in providing any products downstream of PI. Duct Co would provide access to all operators, including Openreach, on terms as close to EOI as possible. Duct Co should be a legally separated division on BT, subject to the same mix of internal and external governance as the current version of Openreach.
- 6.1.33 Such a radical move would restore the level playing field that removes the incentives for Openreach to discriminate and so create a more competitive downstream market.
- 6.1.34 If such a move is not feasible, then Ofcom should consider the functional separation of the provision of PIA products. This functional separation should closely match to original functional separation of Openreach as set out in the 2005 Undertakings⁷. The functionally separate duct co would also be under the obligation to provide all downstream customers on terms very close to EOI.
- 6.1.35 Whilst we view functional separation as a less powerful tool to remove the incentive for discrimination than a “duct co”, it would be considerably better than the arrangement that will emerge from this PIMR and BCMR.
- 6.1.36 The solutions set out above should be reviewed and implemented as soon as practically feasible. In the interim, however, recognising that they would take some time to implement, it is imperative that Ofcom makes all efforts to strengthen the current non-discrimination provisions for PIA. We do not believe that this need delay the removal of the usage and geographic restriction of the remedy, as the work to improve conditions can be undertaken after the unrestricted product is launched.
- 6.1.37 We believe that Ofcom should include in the PIMR Statement an obligation for BT to specifically ensure that BT’s terms of using its own passive infrastructure (ducts and poles) should not differ from the terms on which the PIA product is offered to other operators. This would not mean that BT has to consume PIA (at this point, but we do believe that that is necessary in the longer term to eradicate Openreach’s incentives to discriminate), but that BT’s ability to use the passive infrastructure is no better than that which applies to PIA users. Below we set out specific proposals for areas which should be addressed as a priority:

⁷ Op cit. footnote 2

1. Currently, a CP cannot serve a customer it has passed with its network until it has submitted its build completion pack and received a licence from Openreach. To ensure that CPs are not disadvantaged by this rule, relative to how BT can use its network, BT needs to establish a rule that imposes the equivalent restriction on BT. Non-discrimination could be achieved through estimating the average build period for a CP (the PIA RO sets a maximum duration of six months), perhaps four months, and impose that timeline on BT for the provision of service to a customer where it does not already have a fibre connection. Naturally, the issue could also be addressed by removing the restriction on CPs.
2. Currently a CP cannot perform a NA repair on Openreach's infrastructure until Openreach has approved that repair as a NA. Although it has not as yet been formalised in the RO, we understand that Openreach will commit to 5.5 working days to do this (0.5 working days to acknowledge the request and 5 working days to assess the repair, set a date by which Openreach can repair it and quote a price for the repair (from Openreach's standard price list)). The non-discrimination could be achieved by imposing the same process on Openreach – this is a system where EoI could potentially be implemented very early on, as Openreach has assured CPs that it goes through a very similar process itself. Openreach has proposed that CPs could potentially over time gain a 'trusted partner' type of status, which might reduce the level of verification required by Openreach (perhaps paper-based only, rather than site visits). Openreach has explained that it has experienced a lot of problems with its subcontractors wanting to perform repairs that may not be strictly necessary – so it would be reasonable to assume that Openreach cannot be considered a 'trusted partner' at this time.
3. Currently CPs must comply with every single line of Openreach's technical and operational documentation, but there are no obligations for Openreach to do so at all. It would be very difficult to monitor Openreach's performance, but we believe that a reasonable level of non-discrimination could be achieved by Openreach committing to the same level of compliance for all NAs it performs for CPs and for any work performed by Openreach after April 1st 2019. Openreach has extensive audit powers under the RO, it may not be sensible for CPs to have similar audit powers, but it would be reasonable that a CP that observes work done by Openreach that is not compliant can note this and that there should be consequences for Openreach of not having complied.
4. Consequences of non-compliance with the RO are substantial for CPs. A single breach (which could be a very minor non-compliance with technical or operational rules) means that Openreach can refuse to accept orders for NAs, for example. These terms are entirely unreasonable and, as they clearly do not apply to Openreach (even if point 3 above were addressed), Ofcom should mandate that Openreach cannot refuse any PIA service for any other reason than a material breach. CityFibre understands that CPs must be accountable for compliance with the terms of the RO, but those terms are presently set to be entirely unreasonable and that in itself constitutes significant discrimination against CPs as the product becomes unusable and unpredictable, whereas for Openreach the use of its own passive infrastructure is simple business as usual.
5. The current draft RO provides that minor non-payment incidents constitute a material breach and therefore Openreach can refuse service and, in some instances, terminate the agreement. CityFibre agrees that CPs must be accountable to pay the monies due for using PIA services, but the charging and invoicing framework is yet to be documented by Openreach and current users of PIA have experienced unpredictable invoicing and payment processes. Such conditions may lead to processing delays in CPs and thus missing payment deadlines, and it is therefore unreasonable that missing two or more

payments constitutes a material breach with very significant consequences. CityFibre believes that the invoicing and payment processes need a running in period, as has been agreed for forecasting and the application of SLGs, of one year, during which payments missed for less than 30 days would not constitute a breach. Comparison with Openreach's own use of the network with regards payment terms is not possible as there are no actual payments. Whilst we understand that CPs must be held accountable against fair payment terms, it is important that terms such as these (which by definition do not apply to Openreach) are checked for reasonableness as it could otherwise easily become a means of discriminating against all operators other than Openreach to whom the terms do not apply.

6.1.38 The IIG response sets out a number of examples of where the PIA RO negotiations have failed to arrive at reasonable outcomes, instead resulting in highly discriminatory provisions and conditions in the RO. We will not repeat those here, but add some further thoughts:

Forecasting

6.1.39 CityFibre considers that the forecasting requirements Openreach is imposing on PIA customers do not reflect the benefits to Openreach of receiving such forecasts. Openreach has not demonstrated that the level of use anticipated by other operators will be such that it could significantly affect Openreach's resource planning. For example, Openreach is refusing to introduce a tolerance level that includes Openreach's own consumption of physical infrastructure – that is, Openreach has accepted that if an operator either over- or under-forecasts for a period in a specific area, then there are no consequences if the total forecast from all PIA customers for that period and that area is met within a +/- 10% tolerance level, but Openreach is refusing to have the tolerance level refer to the total use of Openreach's physical infrastructure (that is, PIA customers and Openreach itself, rather than just PIA customers).

6.1.40 CityFibre and other CPs agree that they need to supply forecasts to the extent that those forecasts are genuinely required by Openreach to undertake resource planning, but by insisting that its own use of the physical infrastructure is excluded from the industry tolerance, Openreach is exaggerating the impact of over- or under-forecasting by PIA customers and seeks to impose consequences (in the form of no SLGs being applicable to work undertaken by Openreach for the individual PIA customer that has not met its forecast).

6.1.41 The IIG response comments on the following components of the proposed set of general remedies:

- The ability to connect customers during a network deployment
- The linking of NoI Orders for the purposes of calculating the NAF available to the competitive operator
- The compliance with Engineering Principles and other requirements of the RO
- Transparency and KPIs
- Requirement to publish a Reference Offer
- SLAs and SLGs
- Requirements to notify charges, terms and conditions; technical information; Regulatory Financial Reporting; Accounting separation; Cost accounting; and Quality of service requirements

- Implementation timeframe

6.1.42 CityFibre fully supports the analysis set out in the IIG response and this response should be read alongside the IIG response.

Pricing and regulatory financial reporting

6.1.43 CityFibre notes that Ofcom proposes that BT should apply internal transfer charges in its regulatory financial reporting⁸ and that, where it does so, its pricing should be set such as to cover such transfer charges⁹. CityFibre agrees with those proposals, but has severe concerns that the proposed pricing of inter-exchange dark fibre as set out in the BCMR consultation is not consistent with those principles. We explain our concerns and analysis in Annex 1 to this response.

6.2 Quality of Service remedy

6.2.1 Ofcom proposes to impose a general remedy to allow it to specify Quality of Service (QoS) standards on Openreach for the PIA service, but is not at present proposing any such specific QoS standards.

6.2.2 Given the experience CityFibre and other operators have had since April in negotiating the new PIA RO, and our experience in using the PIA service in Coventry (as explained above), we believe that Ofcom should impose a number of QoS standards immediately and that BT should be held accountable to those.

6.2.3 Specifically, as there are presently no SLAs for the performance of specific types of NAs by Openreach, CityFibre believes that minimum service levels should be introduced to provide a level of transparency and predictability for PIA customers that depend on Openreach performing certain NAs in order that they can reach customers sites and meet SLAs in end customer terms and conditions.

7 PIMR Specific remedies

7.1.1 CityFibre considers it critical that unrestricted DPA is made available as not doing so distorts investment incentives between the WLA and the BC markets. CityFibre, therefore, welcomes Ofcom's proposal to do so and looks forward to working with Ofcom, the OTA and other stakeholders to make this a reality.

7.1.2 The IIG response presented a thorough analysis on the specific remedies proposed by Ofcom and, with the exception of how the PIA charges are set, CityFibre has no further comments in this area.

7.2 End of contract processes

7.2.1 At present, an operator must remove its fibre (the customer connection portion) when a customer terminates its contract with the operator, and the new operator then needs to install its own fibre. CityFibre proposed in the WLAMR consultation in 2017/18 that it would much more sensible that the operator leaves its fibre in place for the new operator to use.

7.2.2 Forcing operators to remove and re-install fibres increases the likelihood of causing damage to other installations and also increases the cost of providing service. More fundamentally, it introduces a complicated, multi-party engineering process for removing and replacing fibre which

⁸ [RFR consultation para 4.42.

⁹ See PIMR paragraph 4.39.

substantially increases the inconvenience to consumers (as it will be extremely difficult to maintain continuity of service throughout the switching process). Each engineering operation required at pole-top also increases the risk that the switching process causes collateral impacts on other consumers receiving services delivered via the same civil infrastructure.

- 7.2.3 This is an issue that now needs to be urgently examined as a policy problem by Ofcom, and suitable regulatory provisions put in place. Whilst the logical and sensible model to which the industry should evolve is clearly one where there is transfer of the fibre asset at the point that the consumer switches provider, we are pessimistic that this will be resolved via a purely intra-industry dialogue, not least given that at the outset the costs and risks of the current PIA requirements fall disproportionately on the new entrant such as CityFibre which has to factor into its business planning the potential 'double whammy' of both losing a customer in a future switch and having to bear the cost of removal of its apparatus.
- 7.2.4 We have studied closely the development of 'mutualisation' policies in France that address similar scenarios and allow pre-existing 'final drop' deployments to be re-used when the consumer switches provider. We recognise that there are significant subsidiary questions that would need to be resolved in developing a coherent policy on this question: for example the need, in an environment where fibre reuse is anticipated, for there to be some degree of standardisation of apparatus and interfaces, and some significant questions about how extensive the 'reuse' should be (from pole top: from an aggregation point further back in the network). We stand ready to engage constructively on discussions on how to resolve this point but we repeat that we consider this is now an urgent issue for Ofcom to address.

7.2.5

7.3 Network adjustments and ancillary services

- 7.3.1 CityFibre's views and analysis of issues relating to NAs and ancillary services are set out in the IIG response.
- 7.3.2 We have sought to avoid replication of points between this response and the response submitted by the IIG, so this response should be read along-side the IIG response.
- 7.3.3 CityFibre does want to highlight, however, its strong concerns in relation to the NA process proposed by Openreach. The process appears to be designed to make the NA process as complex and unwieldy as possible and to disincentivise PIA customers from using the NA process and instead just performing the necessary repairs at their own cost.

7.4 Wayleaves

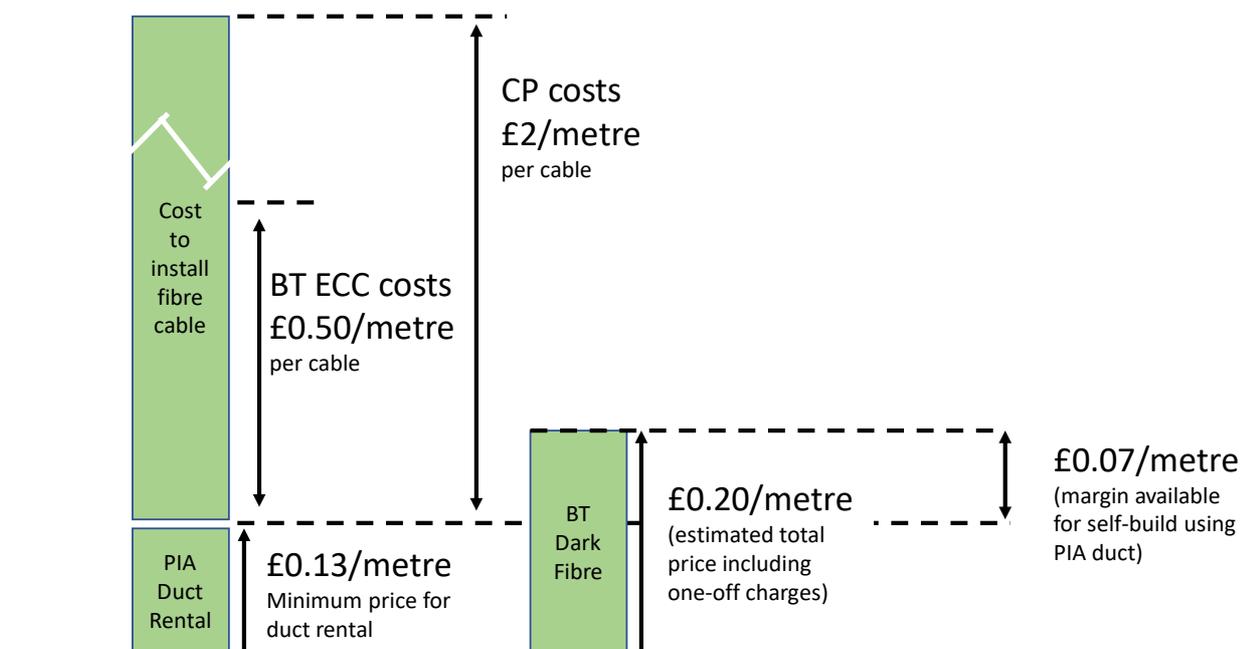
- 7.4.1 Openreach considers that any wayleave information it may hold that is relevant to a PIA order, does not form part of the PIA product. Consequently, Openreach provides no wayleave information as part of the standard PIA product.
- 7.4.2 BT does offer a service, charged by the hour and uncapped, to search its archives for relevant wayleave information. If an operator uses this service, BT only provides information about whether a wayleave exists and (potentially) details of the wayleave grantor(s), nothing more.
- 7.4.3 The CityFibre believes that all available relevant wayleave information should form part of the standard PIA product, including information about the start and termination dates of the agreement. This information will assist the operator in assessing the suitability of the particular PIA product. We fully support Ofcom introducing this change to the DPA remedy at this time.

7.4.4 CityFibre notes that wayleaves issues are looming increasingly large as potential practical constraints on use of PIA. For example, in our deployments in Edinburgh, Aberdeen and Stirling we are encountering large numbers of pre-existing Openreach pole deployments where the pole itself is located on private land and hence being able to reuse the pole top under PIA will require either the obtaining of a separate wayleave or the reuse of BT's pre-existing wayleave. To the extent that Openreach is able to assume a deemed consent to make use of an existing wayleave, but require those seeking to use PIA to obtain separate wayleaves, this will clearly constitute a materially discriminatory approach.

8 Annex 1: Non-discrimination in price setting - impact on BCMR

- 8.1.1 This annex considers the pricing of PIA services in the context of non-discrimination, and the inter-relationship between unrestricted PIA and the BCMR proposal for interexchange dark fibre. The issues raised in this annex should therefore be considered by the Ofcom teams responsible for both the BCMR and the PIMR.
- 8.1.2 CityFibre notes that Ofcom requires that BT should apply internal transfer charges for its own use of its physical infrastructure¹⁰ and that, where BT charges itself internal transfer charges, these should be consistent with the charging principles applied to charges paid by CPs, to the extent that a different approach cannot be justified.¹¹ We also note that Ofcom state that EoI is the most appropriate form of non-discrimination obligation for network access, although strict EoI is relaxed where there are practicality and cost issues in achieving it¹².
- 8.1.3 CityFibre is concerned that Ofcom's stated requirements for non-discrimination in the PIMR are not consistent with the pricing for inter-exchange dark fibre proposed in the BCMR. Figure 1 below shows the relationship between PIA duct rental and dark fibre pricing.

Figure 1: PIA and dark fibre pricing



- 8.1.4 The current minimum price for duct rental using PIA is £0.13/m; this assumes duct of 3+ bores and makes no allowance for ancillary charges, so represents a best case (lowest price) as in reality single and 2-bore ducts are likely to be encountered, and ancillary charges will be incurred.
- 8.1.5 Ofcom's estimated price for inter-exchange dark fibre is £0.20/m¹³. This suggests that the headroom available for the costs of fibre installed into BT duct is £0.07/m; this is very much a

¹⁰ RFR consultation para 4.42

¹¹ PIMR para 4.39

¹² PIMR paras 4.30-4.33

¹³ Using Ofcom's assumptions of 7.1km average circuit distance and 3 year service duration.

maximum figure, and increased PIA costs would severely reduce or eliminate the headroom (for example, single-bore duct PIA costs £0.28/m, which would result in negative headroom).

- 8.1.6 We further note that the current price charged by Openreach to install blown-fibre cable and tube in existing ducts is £5.57/m. If capitalised over 20 years, this amounts to £0.28/m annual depreciation charge; even without considering operational costs such as repair and maintenance, this is clearly much higher than the maximum headroom available of £0.07/m. While it is understood that Openreach may utilise more than one fibre pair in each cable, and that this would result in a lower cost per fibre pair, it seems unlikely that the non-competitive inter-exchange routes where dark fibre would be mandated would require fibre utilisation of greater than 4 pairs per cable, which would be the level required to ensure a bare minimum of economic space between the prices of PIA and dark fibre remedies.
- 8.1.7 While in our response to the BCMR [3]. CityFibre believes that this highlights a fundamental inconsistency between the pricing of dark fibre proposed in the BCMR, and the EoI principles that are intended to apply to Openreach in the way it sells duct access and dark fibre to itself for the provision of active and passive services.
- 8.1.8 As stated in our response to the BCMR, CityFibre believes that the introduction of inter-exchange dark fibre at the same time as unrestricted PIA is not justifiable, and would have a negative effect on infrastructure competition. Our analysis here further reinforces that view; if dark fibre were to be introduced in the same locations as PIA, then it is necessary to ensure that prices are set in an economically rational way, such that competing operators are able to make consistent build-buy decisions at different levels in the value chain.
- 8.1.9 One way to achieve this would be to set the dark fibre prices at REO costs, using a fibre cable utilisation that could be reasonably assumed by a new investor in inter-exchange infrastructure. An alternative may be to use a modified EEO approach, using BT's costs but adjusted for competitive economies of scale. In either case, it would be necessary to ensure that the approach Ofcom adopted for PIA and dark fibre pricing allowed Openreach to comply with EoI (in principle, even if not explicitly in the short term). It seems clear that the proposed approach does not allow that, and that the proposed dark fibre price is too low.
- 8.1.10 CityFibre believes, in order to determine an appropriate level for dark fibre pricing, Ofcom would need to conduct a great deal more analysis; this would need to include a consideration of inter-exchange fibre cable utilisations currently achieved by BT, utilisations that could reasonably be expected by CPs and usage of different types of duct.