



OFCOM'S FIXED ACCESS MARKET REVIEWS

SKY'S RESPONSE TO (A) OPENREACH QUALITY OF SERVICE ELEMENTS OF THE DECEMBER 2013 CONSULTATION, AND (B) THE VULA MARGIN TEST ELEMENT OF THE JANUARY 2014 CONSULTATION

1. Executive Summary

- 1.1 This submission constitutes the response of British Sky Broadcasting Limited ("Sky") to (i) the parts of Ofcom's Fixed Access Market Review consultation dated 19 December 2013¹ ("the Consultation") that address Openreach's quality of service, and (ii) the part of Ofcom's Fixed Access Market Review consultation dated 16 January 2014² ("the January 2014 Consultation") that deals with Ofcom's further proposal in relation to the VULA margin test.
- 1.2 Sky welcomes Ofcom's acknowledgement that there is a significant issue to be addressed in relation to Openreach's quality of service, and Ofcom's proposals to regulate in this area for the first time. The inadequate quality of service delivered by Openreach has a detrimental effect on consumers, and impedes consumer switching among communications providers ("CPs") operating on the Openreach network, which is a significant policy priority for Ofcom.
- 1.3 Sky considers, however, that Ofcom's proposals do not go far enough, and therefore will not deliver the benefits to consumers and competition that Ofcom should be targeting. In particular:
- it is wrong to base service quality targets on the levels that CPs have been able to negotiate with BT. These naturally reflect BT's significant bargaining power, and are unlikely to be the measures that would be produced by negotiations between firms with more even bargaining power, or that firms operating in competitive markets would set;
 - it is wrong for Ofcom to accept BT's argument that improvements to quality of service can only be delivered with greater resources. This ignores a great deal of evidence about the ability of firms in Openreach's position to achieve step changes in service quality with no increases in resources, or while reducing costs; and
 - Openreach's market power means that it has little incentive to make service quality improvements, and this is reflected in the comparative paucity of effort that BT devotes to this issue while at the same time engaging in substantial new

¹ 'Fixed access market reviews: Openreach quality of service and approach to setting LLU and WLR Charge Controls', 19 December 2013. All paragraph references in this response are to the consultation document, unless otherwise stated.

² 'Fixed access market reviews: Further consultation on notification periods, compliance with requirements on the VULA margin, and approach to pricing for TRCs and SFIs', 16 January 2014 (the "January 2014 Consultation").

programmes of activity. It is Ofcom's role to take on responsibility for driving Openreach to strive for improvements in the quality of services it delivers, on behalf of UK consumers. Little is likely to change without further intervention by Ofcom.

- 1.4 Sky considers that Ofcom must now engage fully in investigating the potential for Openreach to deliver significant improvements in service quality with existing resources, or fewer resources, via improvements in its efficiency and effectiveness – for example, via the types of transformation programmes undertaken by many firms with businesses similar to Openreach.
- 1.5 The remainder of the comments in this submission are without prejudice to these significant flaws in Ofcom's approach.
- 1.6 The most striking feature of the regulated performance standards proposed by Ofcom is their undemanding nature. Ofcom accepts that Openreach's performance in 2012/13 was particularly bad, and therefore uses 2011/12 performance as a 'lower bound' to acceptable performance. Yet Ofcom proposes to set the targets for 2014/15 significantly below 2011/12 performance levels, and aim for levels by 2016/17 that, for two of the three regulated measures, are barely different or no different to 2011/12 levels.
- 1.7 At the same time, using a plainly flawed model provided by Openreach, Ofcom proposes to increase charges for WLA products in order to deliver BT the resources allegedly required to achieve these changes. The flaws in the Openreach model were clearly pointed out to Ofcom by Analysys Mason, and both (i) the report commissioned by Sky, with TalkTalk, from Frontier Economics, and (ii) a separate report commissioned by Sky from Alix Partners, reinforce their criticisms. The cost estimates generated by Openreach's model are not reliable and Ofcom cannot therefore adopt them.
- 1.8 Ofcom's analysis of these matters does not withstand proper scrutiny. Sky considers that, at a minimum, (i) a number of the minimum performance targets can be made more demanding, (ii) first year targets should be increased to at least match 2011/12 levels, and (iii) Ofcom should reject (or at least substantially reduce) the estimates of the level of additional resources requested by Openreach to deliver these modest improvements.
- 1.9 The other issues related to Openreach quality of service discussed in this response are as follows:
 - Definition of "provision appointment completion by appointment date" (Section 4). Sky reiterates its position that a provision appointment should not be regarded as being completed if the line fails within 28 days of provision. The reason given by Ofcom for rejecting that proposal is not cogent;
 - Granularity of service quality targets (Section 5). Sky agrees with Ofcom's proposal to adopt a uniform performance standard in 9 regions (plus Northern Ireland), rather than the 26 regions (plus Northern Ireland) proposed in Ofcom's July 2013 consultation. However: (i) CP forecasts required by BT under SLAs should be aligned with this approach, and (ii) this should not be permitted to justify Openreach removing more granular reporting of KPIs;
 - Scope of the service quality regime. Sky considers that there are strong reasons for including SMPF and particularly GEA within the scope of the regime, rather than limiting it to WLR and MPF;
 - Transparency of reporting data and KPIs; scrutiny of MBORCs. It is essential that CPs are provided with sufficient information to be able to monitor Openreach's performance. Sky supports Ofcom's proposals in relation to reporting, and to extend

the range of KPIs reported by Openreach. Sky considers that Ofcom should also play a role in scrutinising the legitimacy of MBORC declarations by Openreach; and

- Publication of guidance on enforcement. Clear guidance by Ofcom on the consequences for BT of breaching the proposed minimum standards will play a key role in ensuring the effectiveness of the new regime. It is therefore disappointing that Ofcom has not, to date, produced any such guidance. Sky considers that Ofcom should do so as soon as possible.

January 2014 Consultation

1.10 In Section 10 we comment briefly on Ofcom's January 2014 consultation on proposals to require six monthly reporting by BT in relation to the VULA margin. Sky supports that proposal. Moreover, we consider that Ofcom should publish its proposed guidance on the VULA margin as soon as possible, and that such publication does not need to be tied to publication of the final statement concluding the FAMR. Ofcom has also indicated that it would seek data from BT in order to run the test shortly after finalisation of its proposals. Sky considers that Ofcom should seek such data within four weeks of publication of its final guidance.

2. The need for a fundamental change in approach by Ofcom

2.1 Sky welcomes Ofcom's further consultation in relation to Openreach's quality of service as part of the Fixed Access Market Review. As Ofcom has acknowledged, the quality of services delivered by Openreach affects consumers both directly – for example in terms of the length of time that they must wait to get a new line installed, or have a fault repaired – and indirectly by disincentivising switching between CPs. Sky continues to consider that regulation by Ofcom of the quality of service delivered by Openreach is both necessary and appropriate.

2.2 We appreciate the significant initial efforts that Ofcom has made to engage with this issue, and to develop a regulatory framework in relation to it.

2.3 That said, however, Sky considers that there are flaws in Ofcom's approach, which fundamentally undermine the prospect of it delivering the benefits to consumers and competition that Ofcom should be targeting. In particular:

- (a) it is wholly inappropriate to use quality standards included in existing SLAs as the basis for regulated service quality standards; and
- (b) Ofcom's approach fails to consider the scope for higher quality of service delivered via efficiency improvements.

2.4 We discuss each of these in more detail in the following sub-sections.

2.5 Sky considers that a proper approach to the regulation of Openreach's service quality requires a fundamental change in approach by Ofcom. We discuss this subject in the final sub-section.

2(A) It is wholly inappropriate to use quality standards included in existing SLAs as the basis for regulated service quality standards

2.6 Ofcom's first question (question 3.1) asks whether respondents "*agree that it is appropriate to use the existing SLAs as the basic standard around which to set the new minimum standards*". Sky set out cogent reasons why this is not an appropriate approach

in its response to Ofcom's July 2013 Consultation³ (to which Ofcom does not appear to have had due regard). The answer to this question is both clear-cut and opposite to the approach that Ofcom proposes to take. Ofcom's approach to this issue does not have proper regard to BT's significant market power ("SMP").

- 2.7 Ofcom's July 2013 Consultation found clearly (and appropriately) that BT has SMP in the wholesale supply of LLU and WLR products. That finding is not open to credible challenge. One of the key reasons for Ofcom's finding that BT has SMP in relation to the supply of WLA products is that other CPs lack countervailing buyer power in their dealings with BT. Ofcom concluded:

*"We consider that there is likely to be insufficient countervailing buyer power to constrain BT's position as a supplier of WLA."*⁴

- 2.8 Ofcom has recognised the link between countervailing buyer power and bargaining power in previous analysis:

*"Countervailing buyer power ('CBP') is the extent to which the terminating provider's monopoly position may be counteracted by the latter's bargaining power. CBP is not an absolute concept but, rather, refers to the relative strength of the buyer in its negotiations with the prospective seller for the good or service in question."*⁵

- 2.9 Accordingly, a conclusion that CPs lack countervailing buyer power (as found by Ofcom in July 2013) means that CPs will also have weak bargaining power. This in turn means that the outcomes of negotiations between CPs and BT in relation to products in which BT has SMP will reflect the exercise of BT's bargaining strength, and will be sub-optimal relative to deals that would be reached by firms operating in a competitive market, or with more equal bargaining positions.

- 2.10 The plain implication is that it is implausible that the service standards that are included in the SLAs which CPs have been able to negotiate with BT are adequate – i.e., equivalent to, or even similar to, those that would be negotiated absent BT's SMP and therefore strong bargaining power. It cannot be assumed by Ofcom that the terms of any "agreement" reached between BT and CPs reflects a satisfactory outcome on the part of CPs, or consumers.

- 2.11 As indicated in Sky's response to the July 2013 Consultation, it is appropriate to consider parallels with Ofcom's regulation of BT's charges for wholesale products. Ofcom clearly recognises that, absent regulation, BT would exercise its SMP and set wholesale charges that are too high and which, if left unregulated, would cause significant detriment to consumers. Accordingly, during charge control reviews Ofcom devotes substantial effort, based on years of accumulated experience, to estimating appropriate levels of charges – reflecting those that a firm would set if it did not have SMP – and then constrains BT's charges to those levels.

- 2.12 It would obviously be absurd for Ofcom to replace such a process by one in which CPs were required to negotiate wholesale charges with BT, with Ofcom then simply adopting whatever charges BT and CPs had been able to "agree". It makes no more sense to adopt this approach in relation to appropriate targets for the quality of wholesale products and

³ 'Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30 – Consultation on the proposed markets, market power determinations and remedies', 3 July 2013 (the "July 2013 Consultation") and Sky's response dated 25 September 2013.

⁴ Paragraph 7.72 of the July 2013 Consultation.

⁵ Paragraph 7.46, 'Review of the fixed narrowband services wholesale markets; Consultation on the proposed markets, market power determinations and remedies', 19 March 2009.

services delivered by BT – where the exercise of BT’s SMP results in the setting of service quality targets that are, in general, too low. Yet this is precisely the approach that Ofcom appears to believe to be appropriate.

2.13 As discussed in more detail in sub-section 2(C), below, Ofcom needs to bring a similar level of investigative effort to determining appropriate service quality targets as it does to setting wholesale charge controls.

2.14 Ofcom continues to place weight on the observation that targets included in SLAs have been “agreed” between Openreach and CPs, implying that this means that targets are acceptable to other CPs, and legitimate. For example, in rejecting more detailed investigation of appropriate service level targets, Ofcom states:

*“...we do not consider that we are in a position, absent evidence that more stringent SLA standards are required to set alternative standards. **The existing SLA standards were agreed between industry** (sic) and there is no clear evidence that shorter timescales are required.”⁶ (Emphasis added.)*

2.15 Sky considers that this is plainly inappropriate. In a situation of significantly unequal bargaining power, the fact that those in weaker positions must give way to those in stronger positions in order to move forward cannot be considered to give legitimacy to the so-called “agreement” that has been reached. As Ofcom is fully aware, CPs often have agreed to SLAs only on the basis that discussions about their terms continues because they regard those terms as unsatisfactory. We consider that Ofcom should cease placing weight on the observation that existing SLAs have been “agreed” by CPs.

Consumers expect better standards of service

2.16 As Sky set out in its response to Ofcom’s July Consultation, Ofcom’s own consumer survey provides clear evidence that consumers expect a higher standard of service than that currently delivered by Openreach today – particularly in relation to the time they are required to wait to have a new line installed.⁷ Ofcom’s position, that an *average* waiting time of 12 days to have a new line installed – with many consumers having to wait much longer – is acceptable because this is the best that other CPs have been able to negotiate with BT is plainly untenable, and not in accordance with its duty to further the interests of consumers. Given the ability of many companies operating in competitive markets to provide far more timely service to consumers, BT’s position that the 12 day target is the best that it can deliver, and Ofcom’s acceptance of this proposition, both are plainly untenable.

2(B) Ofcom’s approach fails to consider the scope for higher quality of service delivered via efficiency improvements

2.17 Ofcom’s framework of analysis of the issue of Openreach’s service quality is predicated on a view, advanced by Openreach and apparently accepted by Ofcom, that the only way of delivering better quality of service is by adding more resources – in particular more engineers – which would result in higher costs and higher wholesale charges. Ofcom has, as a consequence, devoted significant effort to seeking to estimate how much additional

⁶ Paragraph 3.13.

⁷ We note that Ofcom rejects such evidence on the basis that it is not clear that consumers are willing to pay for the types of service levels that the survey showed that they expect. Sky considers that this is an inadequate basis for rejecting this evidence for two reasons. First, as discussed further below, Ofcom’s position rests on a belief that service quality can only be improved via increases in resources (and therefore higher prices to consumers) which is unproven. Second, even if Ofcom’s position was valid, there are techniques available (such as conjoint analysis) to determine how much consumers would be willing to pay for higher service standards.

funding Openreach requires in order to deliver the modest improvements in service quality that Ofcom proposes to require over the next charge control period.

2.18 This analytical framework is inappropriate – and of considerable surprise to experts in field force management.⁸ It fails to recognise the likelihood that there is significant scope for Openreach to deliver better quality services at existing levels of resources or even with fewer resources.

2.19 It is well known that one of the detriments of entrenched SMP is that it enables firms to enjoy ‘the quiet life’⁹; they have little need or incentive to seek ways of delivering better products and services, or to search for new, better ways of delivering existing products, to consumers (or other firms in the case of wholesale products). This lack of incentive is exacerbated in this case given that, in relation to WLA products, such improvements are likely disproportionately to favour BT’s competitors.¹⁰

2.20 In the past ten years transformation programmes among firms undertaking operational tasks similar to those undertaken by Openreach have become relatively common, both in the UK and other countries. These are firms where the core task is the effective and efficient management of (a) a large field force and (b) network assets, in order to deliver high quality services to end-users, often under significant time and cost pressures. The focus of such programmes normally is to improve service delivery significantly, while at the same time reducing costs. In the past five years in the UK some of the firms that have undertaken significant field force transformation programmes include:

- EDF Energy
- npower
- Scottish Power
- SSE (Scottish & Southern Energy)
- Thames Water
- UK Power Networks
- Virgin Media

2.21 Indeed, as Ofcom is aware from the Sky presentation given in September 2013, Sky itself has undertaken such a programme, with highly positive results.

2.22 The consistent experience is that such programmes, when undertaken in a holistic and committed way, are able to deliver significant gains in service delivery, often at the same time as reducing costs. The latter is an important point. Experience from such programmes shows that an assumption that higher quality service can only be delivered by increasing cost is inappropriate.

2.23 For example, a recent publication by UK Power Networks, a heavily regulated firm, states:

“Our Business Transformation programme is already under way... The programme is delivering a fundamental change to our business processes targeted to achieve step change improvements to customer service, cost efficiency and the ability to respond to future requirements. Our goal is to deliver a more efficient and customer centric organisation by April 2015... We have also delivered a step change in improvement in our quality of supply performance as customer interruptions and customer minutes

⁸ Sky has significant internal field force management expertise and also draws on support from external experts.

⁹ This observation is often attributed to John Hicks’ article ‘Annual Survey of Economic Theory: The Theory of Monopoly’, 3 *Econometrica* 1, 8 (1935).

¹⁰ There is little doubt that Openreach’s management has been strongly incentivised, and made significant achievements, in reducing Openreach’s costs, principally to the benefit of BT’s shareholders. Cost reductions within Openreach have been a significant source of BT’s increasing profitability over the past few years.

lost continue to fall, down 30 per cent and 42 per cent respectively, since 2009/10. We have also improved our customer service, with complaints down 81%.”¹¹

- 2.24 We would urge Ofcom to read UK Power Networks’ document closely, to see what can be achieved when a regulated entity has a genuine desire to deliver step change improvements in its operations.
- 2.25 We have seen no evidence either in Ofcom’s documents, or via our own interactions with Openreach, that Openreach has devoted similar levels of effort to improving the efficiency and productivity of its operations. On the contrary, based on our interactions with Openreach we consider that it is probable that significant improvements in service quality could be delivered by improving Openreach’s efficiency, without the need for substantial additional resources (or even with fewer resources).
- 2.26 Openreach’s customers can only lament the absence of any such holistic programme, attitude towards improvement within Openreach, or ambition to turn it into a “customer centric organisation”. Instead, they face constant feet dragging, “MBORCs”, “glass ceilings” and excuses for poor performance (notably rain).
- 2.27 More generally, there appears to be a substantial gulf between the level of effort BT is prepared to devote to improving performance within Openreach compared to other parts of its business. BT’s presentations to investors regularly focus on the successes it has had in areas of its business where it has been prepared to devote significant effort – for example, in reducing its cost base, rural broadband roll-out, and development of premium sports channels. Yet Openreach’s submissions to Ofcom in the context of its quality of service review focus almost entirely on the difficulties it faces, and its alleged inability to overcome those difficulties without significant additional resources. In view of BT’s demonstrated ability successfully to undertake projects of very significant scale and complexity, its protestations as to its inability to improve Openreach’s service quality without significant additional resources are not credible and cannot be accepted by Ofcom.

2(C) A change in approach by Ofcom is required

- 2.28 While the absence of an ambition significantly to improve service quality on the part of Openreach is understandable, it is disappointing that Ofcom seemingly lacks any appetite to drive improvements in the quality of the provision of wholesale telecommunications services.
- 2.29 Effective utility regulation is founded on the principle that regulators assume responsibility for creating the pressure on monopolies faced by firms operating in competitive markets in order to deliver appropriate outcomes in terms of the quality and price of their services. In industries characterised by entrenched long term natural monopoly, such as that in which Openreach operates, regulators must act as a substitute for competitive forces, on behalf of consumers.
- 2.30 In relation to service quality, it is plain that Openreach will face effective pressure to improve its performance significantly only if and when Ofcom assumes responsibility for creating that pressure. Currently, while Ofcom has recognised that there is a serious problem with Openreach’s service quality that needs to be addressed via regulation, it refuses to take on a role of demanding better performance by Openreach, accepting broadly that current service quality targets are ‘good enough’, or as good as Openreach

¹¹ ‘UK Power Networks, Business Plan (2015 – 2023), Annex 12, Business Transformation’, July 2013. Available at: http://library.ukpowernetworks.co.uk/library/en/RIIO/RIIO_ED1_Business_Plan/UKPN_Business_Transformation.pdf, and attached at **Annex 2**.

can be expected to deliver, and arguing that it does not have the evidence necessary to set alternative (improved) targets to those included in SLAs. For example, as noted above, Ofcom states:

“we do not consider that we are in a position, absent evidence that more stringent SLA standards are required to set alternative standards.”¹²

- 2.31 This failure by Ofcom to take on responsibility for seeking to drive Openreach to deliver significantly better quality of service – to strive for step change improvements targeted by other regulated firms in the UK – does not accord with its duty to further the interests of UK consumers.
- 2.32 The key focus of Ofcom’s scrutiny should now be whether there is scope to increase service quality delivery in Openreach without significant additional resources – for example via the types of modern transformation programmes discussed above, which are widespread among other similarly placed firms. If this is found to be the case, that should be sufficient for Ofcom to set more demanding service quality targets for Openreach – to create the pressure on Openreach to improve performance that is plainly absent.
- 2.33 There is a substantial body of experience available to Ofcom in relation to leading practices in the area of field force management. It includes experience of best practice in relation to some of the key areas that need to be optimised in order to improve the quality of service delivery significantly and minimise operating costs, including those set out in Table 1 below.

Table 1
Key areas that need to be addressed in optimising field force management

Examples of key areas	Examples of issues in each area
Process standardisation	<ul style="list-style-type: none"> • Whether field tests and diagnosis processes are carried out consistently
Forecasting & planning processes	<ul style="list-style-type: none"> • Extent of investment in analytics • Optimising forecasting accuracy
Operational practices	<ul style="list-style-type: none"> • Home-based versus operation from centralised depots • Level of automation of inventory management processes
Pre-requisite management	<ul style="list-style-type: none"> • Ensuring that engineers have the right equipment and tools when they turn up to a job
Work structure	<ul style="list-style-type: none"> • Whether engineers are single-skilled or multi-skilled
Scheduling efficiency	<ul style="list-style-type: none"> • Whether engineers operate in tightly defined geographic areas, or are allocated so as to minimise wasted traveling time
Appointment management	<ul style="list-style-type: none"> • Finding times for appointments that suit customers but achieve scheduling efficiency
Customer service & interaction	<ul style="list-style-type: none"> • Systems for letting customers know when engineers will be arriving • Enabling customers to track engineer progress • Obtaining customer feedback
System integration and end-to-end visibility of operations	<ul style="list-style-type: none"> • Implementing systems that provide real-time, live data on performance
Monitoring and metrics	<ul style="list-style-type: none"> • Granularity, breadth and focus of KPIs • Frequency and availability of reporting against KPIs
Organisational change	<ul style="list-style-type: none"> • Ratios of supervisors to technical staff • Determination of areas of responsibility of

¹² Paragraph 3.13.

	supervisors
System tuning	<ul style="list-style-type: none"> Approaches to evolving field service solutions as work and customers change
Systems and technology	<ul style="list-style-type: none"> Providing the right technology to streamline work processes and maximise engineer effectiveness
Workplace culture	<ul style="list-style-type: none"> Creating a high morale, motivated and customer-focused work force

2.34 Ofcom should seek to determine whether Openreach is operating as efficiently and effectively as it should be expected to, by reference to the types of areas set out in Table 1, and KPIs related to them, such as measures of:

- the efficiency of Openreach’s forecasting and planning processes;
- the efficiency of Openreach’s scheduling rules;
- the effectiveness of Openreach’s systems and technology;
- the proportion of tasks that are completed ‘right first time’;
- the productivity of Openreach’s engineers (for example, in terms of number of jobs completed per day, and the level of ‘wasted time’ (sometimes referred to as ‘windscreen time’)); and
- staff morale, absenteeism and sickness rates.¹³

2.35 The most obvious way of undertaking the required analysis is via benchmarking against other operators, both in terms of KPIs, but also in terms of the extent to which BT has adopted best practice approaches to performing the tasks undertaken by Openreach.

2.36 Sky appreciates that this is not an area in which Ofcom itself currently has significant expertise. However there is a broad, highly specialised and experienced array of consultancies with substantial expertise in this area, able to advise Ofcom. Similarly, other UK regulators (for example the CAA, Ofgem, OFWAT and ORR) have substantial amounts of experience in considering these issues on which Ofcom could draw.

2.37 Investigating such issues fully does not mean that Ofcom needs to, or should, assume responsibility for telling Openreach how to run its business. It also does not mean that Ofcom needs to determine, with precision, the levels of efficiency gains that Openreach is able to achieve, or how efficiencies should be achieved. All that is required is that Ofcom establishes, to a reasonable standard, that there is scope for improvement in performance, such that it is reasonable to require such improvements. By setting more demanding service quality targets, backed by effective sanction, Ofcom will create the pressure on Openreach required for it to focus on achieving step changes in the quality of its service delivery.

2.38 Sky also considers that Ofcom can set demanding performance targets without needing to adopt the type of deterministic analysis used in relation to setting charge controls. Indeed, in the past Ofcom has set Openreach’s SLGs without the need for such a detailed assessment.¹⁴ Sky considers that a similar approach is required here. In order to set meaningful service performance targets that would bring significant improvement to Openreach service quality and consumer benefits, Ofcom would need to have a reasonable basis for believing, derived from thorough analysis, that there is scope for Openreach to improve its operations (if it is required to do so) in order to deliver better quality services within existing resources (or with fewer resources). It should not, however, be necessary for Ofcom to determine precisely how Openreach would achieve the improved service

¹³ These types of questions are indicative of the types of issues Sky believes that Ofcom should be exploring, rather than an exhaustive list.

¹⁴ ‘Service Level Guarantees: incentivising performance – Statement and Directions’, 20 March 2008. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/slg/statement/statement.pdf>.

quality targets. Sky considers (and Ofcom appears to accept) that this is a prime example of an area of regulation in which there is a need for the exercise of informed judgement on the part of the regulator.

Collection of relevant data and information

- 2.39 Ofcom has resiled from creating significant pressure on Openreach to improve service quality partly on the basis that it does not have the information “*required to set alternative standards*” and has placed an onus on CPs to provide it with the data it believes it needs in order to act.
- 2.40 Sky, of course, stands ready to provide Ofcom with any information that it is able to provide, whether that is required to inform benchmarking analysis, or data on the numbers of Sky customers affected by poor Openreach performance. It is, however, difficult to do this in the abstract, without clearly specified requests from Ofcom for data or information. In the absence of such requests, Sky considers that it is not appropriate for Ofcom to rely on not having relevant data or information as a reason for failing to act.
- 2.41 In relation to consumer detriment in particular, Ofcom is well placed to conduct an assessment of this issue, for example via consumer surveys or information gathered from CPs and Openreach, in the same way that it has undertaken such assessments in many previous inquiries.¹⁵
- 2.42 It is also not appropriate for Ofcom to look to other CPs to provide evidence on the scope for Openreach to improve its efficiency. While other CPs are able to provide anecdotal evidence about inefficiencies within Openreach, this cannot suffice as a sound basis for effective and appropriate regulation. Other CPs do not have the visibility of Openreach’s business, or the Openreach data, needed to make a proper assessment of its efficiency and effectiveness. Only Ofcom, with its information gathering powers, is able to obtain the internal information and data from Openreach needed to make such an assessment.

The need for an ongoing process

- 2.43 Sky recognises that it has been difficult for Ofcom to devote a sufficient level of resources to this issue during the FAMR, in view of the significant range of other issues that it has had to address (including setting of new charge controls), and there is now limited time available to devote the level of effort to it that would be necessary properly to investigate the types of issues raised above. However, we consider that this issue is of such importance to consumers, and consumer switching (as recognised by Ofcom in the Consultation)¹⁶, that Ofcom, in accordance with its statutory duty to further the interests of consumers, cannot simply return to it as part of the next fixed access market review. Indeed, the fact that there is no significant commitment to continue to investigate this issue during 2014/15 in Ofcom’s draft annual plan is of considerable concern to Sky.¹⁷
- 2.44 Instead, Sky considers that Ofcom should signal clearly in the final statement (or statement and further consultation) to the FAMR that it intends to continue to examine the issue of appropriate targets for Openreach service quality and amend the current approach, if necessary.

¹⁵ By way of example, see the consumer research conducted by Ofcom in relation to proposals to change the system for mobile number portability, at: http://stakeholders.ofcom.org.uk/consultations/gc18_mnp/research/.

¹⁶ Paragraphs 3.59-3.60.

¹⁷ See further Sky’s response to Ofcom’s draft Annual Plan for 2014/15 which will be submitted by 14 February 2014.

3. The minimum standards proposed by Ofcom

- 3.1 Despite stakeholder requests for Ofcom to set more demanding service quality targets which go beyond those in current SLAs, Ofcom has proposed to maintain its original proposal as set out in the July 2013 Consultation to adopt the minimum service quality standards currently set in existing SLAs as the basis for the proposed minimum performance condition.¹⁸ Sky remains of the view that this is inappropriate. It does not accord with Ofcom's duty to further the interests of consumers, and misses a significant opportunity to address one of the key impediments to switching by consumers, which is a policy priority for Ofcom.
- 3.2 The remainder of this response discusses Ofcom's proposals without prejudice to Sky's fundamental objections to them.
- 3.3 Instead of seeking to determine appropriate targets for service quality in relation to WLA products delivered by Openreach, Ofcom proposes to focus on improvements to the frequency with which current targets are required to be met (labelled by Ofcom as the "minimum standards"). These proposals are extremely disappointing. Not only are the improvements proposed by Ofcom undemanding, Ofcom fully accepts Openreach's argument that the only way that these minor improvements can be achieved is via significant increases in wholesale charges, and proposes to use a flawed model provided by BT to calculate the proposed increases in wholesale charges. BT's Chief Executive has recently argued that BT will require an additional £20 million per annum to achieve these modest performance improvements – yet has previously lauded BT's ability to take £4.7 billion of cost out of BT's business in the past four years with "*more opportunities ahead*".¹⁹
- 3.4 These proposals are extraordinary, in terms of the extent to which they fail appropriately to further the interests of UK consumers, and unsupportable. Sky considers that they do not withstand scrutiny.

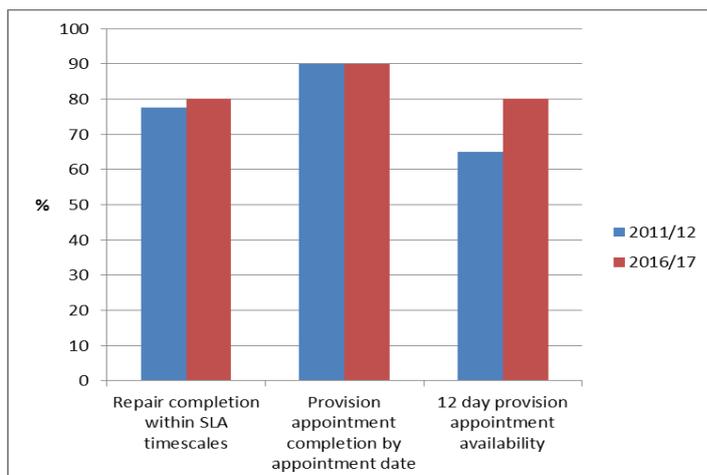
The proposed performance standards

- 3.5 The most striking feature of the performance standards proposed by Ofcom is how undemanding they are, with the possible exception of the improvement in the frequency with which the 12 day provision appointment availability target must be met.
- 3.6 **Figure 1** below compares BT's performance in relation to service quality targets in 2011/12, and the minimum performance levels (excluding consideration of MBORCs) that Ofcom proposes BT will be required to meet by the end of 2016/17. This shows clearly that in two out of the three targets, either no or extremely little improvement is required of BT – over a five year period. In Sky's view, this does not accord with what would be expected of a company in Openreach's position if it was operating in a competitive market.

¹⁸ Paragraph 3.19.

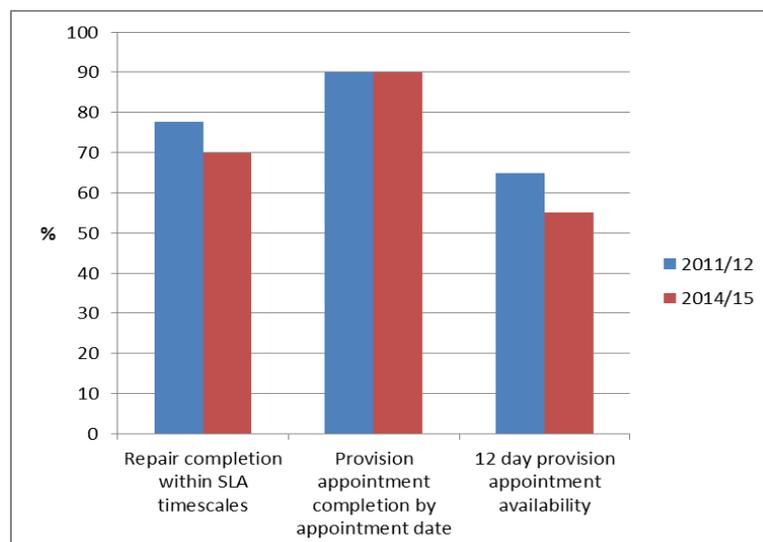
¹⁹ See page 3 of BT Group PLC, Q3 2013/14 results conference call transcript, 31 January 2014, in relation to the estimate of £20 million in additional Openreach costs, and slide 37 of 'Q4/full year 2012/13 results and business update - Part 1', 10 May 2013 in relation to cost savings. The Q3 2013/14 results transcript is available at: <http://www.btplc.com/Sharesandperformance/Quarterlyresults/PDFdownloads/q314-transcript.pdf>, while the May 2013 presentation is available at: http://www.btplc.com/Sharesandperformance/Quarterlyresults/PDFdownloads/q413_slides_update_part1.pdf.

Figure 1
BT's performance in 2011/12 compared to the 2016/17 targets proposed by Ofcom



3.7 Of even greater concern is that Ofcom proposes that the minimum service quality standards at the start of the period are set significantly below the levels achieved by BT in 2011/12 for two of the three service targets (see **Figure 2**).

Figure 2
BT's performance in 2011/12 compared to the targets for 2014/15 proposed by Ofcom



3.8 This means, in effect, that BT is demanding, and Ofcom is proposing to accept that significant additional resources are necessary to return service delivery quality five years later to where it was in 2011/12.

3.9 Sky considers that something has gone significantly awry in either Ofcom's analysis or its exercise of its judgement to arrive at a conclusion that this is an appropriate way forward – even within the limited scope of requiring improvements to the frequency with which BT meets service quality targets that are, in some cases, insufficiently demanding.

- 3.10 One reason for this may be Ofcom’s approach to determining an appropriate end-of-period target. Ofcom arrives at that target by first determining upper and lower bounds for a reasonable range for the target, and then selecting a point within that range (using a degree of regulatory judgement, balancing a number of factors). In relation to repair completion and 12 day provision appointment availability, Ofcom states that it considers that the point within the range it selects “*should be towards the upper end of our range*”²⁰, and gives cogent reasons for this approach²¹. Yet in both cases, as shown in **Table 2**, the point selected by Ofcom is below the mid-point of the range. It is not possible to discern the reason for this obvious anomaly.

Table 2
Comparison of Ofcom 2016/17 targets for repair completion and provision appointment availability with mid points of ranges for these targets

	Mid point of Ofcom’s range	2016/17 target
Repair completion within SLA timescales	81.35	80
12 day provision appointment availability	82.5	80

- 3.11 Potential minimum standards for 2016/17 for these service quality targets that were “*towards the upper end of our range*” would instead be in the order of 84% and 93%, respectively²². Sky considers that there is a strong case for increasing the target repair completion minimum standard (excluding MBORCs) upwards to be more in line with Ofcom’s stated ambition that it is “*towards the upper end of our range*”.
- 3.12 Sky considers that there is no good reason for not requiring first year minimum standards to be those achieved by Openreach in 2011/12 – i.e., the performance determined by Ofcom to be the bottom of its range – for all three service quality measures. This would simply have the effect of flattening the glide path to the final year targets. While this would of course require some recovery activity on Openreach’s part by the end of 2014/15, given that service quality has deteriorated since 2011/12, this should be readily achievable.

The lower bound of the range for minimum service quality standards

- 3.13 Ofcom proposes that Openreach performance in 2011/12 is used as the lower level for the range, rather than its performance in the latest year for which data are available (2012/13).²³ As Ofcom recognises, using performance in 2012/13 as the benchmark would not be appropriate as it is clear that over this period Sky and other CPs experienced exceedingly poor service from Openreach where performance was well below SLA targets. To set the minimum service standards using performance over that period would result in performance targets which are too low and create the wrong incentives for Openreach in terms of the setting of future performance standards.

²⁰ Paragraph 3.80.

²¹ Ofcom points to the strong positive relationship between performance, consumer satisfaction and competitive outcomes in seeking to push the minimum standard to the upper end of the range - see paragraphs 3.59, 3.60 and 3.79.

²² These figures are approximately 80% of the difference between the upper bound and the lower bound.

²³ Paragraph 3.37.

Treatment of force majeure and MBORCs

(i) Repairs

- 3.14 Sky agrees that including an allowance for fault repair performance impacted by force majeure or MBORC declarations within the minimum standards is necessary and appropriate. It will minimise the scope for Openreach to render targets ineffective via the use of MBORC declarations, and make both enforcement and compliance more straightforward.
- 3.15 On the basis of a relatively brief assessment of the number of MBORCs in relation to repair SLAs, Ofcom determines that in 2012/13 (which was a challenging year for repairs) the rate of MBORC declarations against the relevant SLAs was a little above 2.5%. Given the importance of this figure, Sky considers that Ofcom should subject it to rigorous scrutiny to determine whether it is reasonable. In particular, we believe that proper scrutiny would be likely to show that a significant proportion of the MBORCs called in 2012/13 were not reasonable, and therefore should not be included in the reduction applied to the regulated minimum standard.
- 3.16 Ofcom then rounds the 2.5% figure to 3% as the amount by which the minimum standard is to be reduced.
- 3.17 In relation to issues of service quality, targets often are specified with high degrees of accuracy. For example, in relation to postal regulation (administered by Ofcom), service quality targets often are set to an accuracy of 0.5%, and in many cases to 0.99%.²⁴ Accordingly, in Sky's view it is inappropriate for Ofcom to reduce performance targets by up to 0.5% simply as a matter of rounding.

(ii) Provisioning

- 3.18 In relation to provisioning Ofcom proposes a reduction of a full percentage point in the targets on the basis that:

*"although MBORCs have been rare to date, [Openreach] cannot rule out the possibility that MBORC (sic) will be applied to provision again in extreme weather events (e.g. like the October 2013 St Jude storm)."*²⁵

- 3.19 This is plainly an inappropriate approach, resulting in a significant unwarranted relaxation in the standards. Given that MBORCs are relatively rare in relation to these service standards it would be more appropriate not to include an allowance for them in the minimum standards, and instead to take significant exceptional events (such as the St. Jude storm) into account as a mitigating factor if they can be shown by BT to be the cause of its failure to achieve the regulated minimum standards (if such a situation arises). This could be made clear in guidance.

4. Definition of "provision appointment completion by appointment date"

- 4.1 The "provision appointment completion by appointment date" service level relates to tasks such as provision of new lines being completed on time. As Sky has argued previously, it is imperative that the definition of this service takes into account not only whether the task has been completed on time, but also whether the customer is left with a working line. Whilst there is significant detriment to consumers from BT failing to complete tasks on time, there is equal or greater detriment from being left with a line that is not working, or

²⁴ See, for example, 'Annual monitoring update on the postal market: Financial year 2012-13', 22 November 2013.

²⁵ Paragraph 3.104.

ceases to work properly within a short period of time. [CONFIDENTIAL]. This is a very high level of early life failures (“ELFs”).

4.2 Accordingly, Sky considers that the definition of proposed regulated minimum standard of “provision appointment completion by appointment date” needs to specify that a provision cannot be counted as being complete if it gives rise to an ELF within 28 days following the provision.

4.3 Failure to have regard to the quality of the job done when setting the performance standard for this task provides obvious scope for dysfunctional outcomes, which will result in detriment to consumers. In particular, if the service quality standard is based solely on whether or not an engineer completes an appointment, and during a given period BT faces a risk of failing to meet the standard, it will have an incentive to rush jobs to catch up, raising the risk of an increased rate of ELFs.

4.4 In the Consultation, Ofcom rejects this proposal. Ofcom states:

“We do not consider this is appropriate, as this is related to a standard for faults rather than simply service delivery.”²⁶

4.5 This argument is not cogent. The standard for faults repair relates to the time to fix existing lines that have, for some reason, stopped working properly. The standard for completion of provision appointments relates to an entirely different issue, namely the installation of new lines that should be expected to work properly. Where a new line provision produces a fault within 28 days (an ELF), clearly the new line provision job cannot be considered to have been completed satisfactorily. Therefore lines that produce ELFs must be removed from the count of successfully completed jobs. The time to repair the ELF naturally is covered by the fault repair minimum service standard.

5. Granularity of targets

5.1 One of the issues raised in the Consultation is the number of regions within the UK in which BT is required to meet the performance targets set by Ofcom. In the July 2013 Consultation Ofcom proposed to use 27 regions, reflecting the basis on which Openreach requires CPs to provide monthly forecasts of their forthcoming demands.

5.2 At Openreach's request, Ofcom has now revised its original proposal, and now proposes to require Openreach to meet the regulated minimum service standards in a far smaller number of regions: 9 General Manager (GM) areas, plus Northern Ireland.²⁷

5.3 Sky considers, however, that if GM areas, plus Northern Ireland, are used as the basis for regulated minimum standards for service quality as advocated by Openreach, the requirements for CP forecasting set out in the current Copper Appointment Availability SLA should be aligned with this approach. It is understood that Openreach considers that accurate CP forecasting is needed to enable effective resource management. On this basis, if the number of “performance” regions is reduced then the CP forecasting regions should match these to allow Openreach to match accurately its regional resource requirements to CP forecasts. If CP forecast regions are different there would be an increased risk of resource management error and therefore delay.

5.4 Openreach has also argued that it would be appropriate to set minimum standards only at the national level as it already addresses “geographic hot spots”²⁸ in the most efficient

²⁶ Paragraph 3.88.

²⁷ Paragraphs 3.25 and 3.26.

²⁸ Paragraph 348 of Openreach's response to the July 2013 Consultation.

manner. However, as set out in Sky's response to Ofcom's July 2013 Consultation, Sky supports Ofcom's view that setting a national target could potentially result in Openreach delivering consistently worse outcomes for competition and consumers in certain regions.²⁹ We welcome the fact that Ofcom has not accepted BT's argument.

The performance standard should be consistent across all regions

- 5.5 Ofcom argues that it would appear desirable to have the same target in each region to ensure a consistent minimum quality of service everywhere in the UK.³⁰
- 5.6 Sky agrees with this position. We do not consider that there should be any variation in the performance measure by region for two key reasons:
- (a) Openreach is able to flex resource allocations across regions to ensure that it is able to meet a common minimum standard; and
 - (b) Openreach's products and services are priced and sold uniformly on a national basis. Similarly, CPs such as Sky, who rely on Openreach services, wish to offer services nationally at uniform prices. Allowing variation between regions would risk resulting in customers in some regions receiving a lower standard of service while paying the same price for the same product as other customers.

6. The use and results of the EY model

- 6.1 Ofcom concludes that the modest service quality improvements that it proposes to require over the next three years will lead to an increase in Openreach's costs, and proposes that those additional costs should therefore result in higher regulated wholesale charges.
- 6.2 In order to attempt to estimate the level of the additional resources required, Ofcom relies on a "Resource Simulation Model", or Discrete Event Simulation Model provided to BT by Ernst & Young ("EY").

6(A) The process followed by Ofcom in relation to this model has been flawed

- 6.3 At the outset Sky reiterates its concern with the process that has been followed in relation to use of the EY model to develop cost estimates for improving Openreach's quality of service. Sky considers that it is particularly undesirable for Ofcom to be a position of relying on a complex model provided by the firm that is requesting higher regulated charges, and which is not open to full scrutiny by those affected by the proposed higher charges.
- 6.4 Even if the model was reliable (which it does not appear to be, as discussed further below), third parties have not been given adequate opportunity to provide informed comment on it. Third parties were first alerted to the existence of the EY model in Ofcom's July 2013 Charge Control consultation.³¹ However, no details about the model, such as how it operated, were published at that time.³²
- 6.5 In the current Consultation, whilst more detail has been published, together with a critique of the model by Analysys Mason, the level of detail published remains inadequate for

²⁹ Paragraph 3.23.

³⁰ Paragraph 3.28.

³¹ Paragraphs 5.12-5.22 of 'Fixed access market reviews: Approach to setting LLU and WLR Charge Controls', 11 July 2013 (the "July 2013 Charge Control Consultation").

³² Indeed, Sky requested details from Ofcom but no further detail was provided until the December 2013 consultation.

stakeholders to be able to provide informed comment on it. This is exacerbated by the short timeframe provided for consultation (8 weeks, including the Christmas period), which is inadequate to obtain proper expert input required given the highly specialised subject matter of the model. Whilst Sky has commissioned reports on the model from Alix Partners and (together with TalkTalk) Frontier Economics, their reports include significant caveats relating to the short time that they have had to comment on the model, and the difficulty in doing so given the limited amount of information they have available to them. Sky considers that all evidence suggests that provision of information about the EY model, and more time to analyse it, would only be likely to reinforce their findings as to its flaws.

6(B) The results of the model cannot be relied upon

6.6 Sky considers that it is readily apparent that the results of the model are not sufficiently reliable to be used as an input into setting charge controls. The Analysys Mason report identifies a series of important issues with the model, which they describe as “*material issues with the model*”, and states that the approach adopted “*may lead to a systematic overestimate of resource requirements*”.³³ Ofcom considers each of the problems identified by Analysys Mason. Whilst it is able to reject some of them, it accepts that there is an “*upward bias*” in determining resource requirements associated with higher service quality levels, and uncertainty associated with the specific nature of distribution used to sample the time taken to complete jobs.³⁴

6.7 These concerns are reinforced significantly by the findings of both Alix Partners and Frontier Economics in their reviews of the EY model (attached at **Annex 3** and **Annex 4** respectively). They conclude that both the approach to modelling this issue, and the actual modelling make the results wholly unreliable. Frontier Economics describes the model as “*fundamentally misspecified*”³⁵. They find that:

- *The model is fundamentally mis-specified, failing to reflect causality;*
- *One of the key assumptions in the model, the distribution of completion times, does not fit the observable data;*
- *The assumptions of how the distribution of completion times changes as QoS changes are not supported by any evidence;*
- *The assumptions made by Openreach of the changes in the distribution time with higher QoS seem counter-intuitive, and appears to lead to increases in peak resource requirements above that which would be required to meet the increase in QoS efficiently; and*
- *The assumption that an increase in resources at peak times would translate into a proportionate increase in costs does not reflect the ability to deliver higher peak resources for certain types of job without hiring full time staff.”³⁶*

6.8 As a result of their review, Alix Partners find that “*there are a number of potential issues with the EY model that may lead to a considerable overestimation of the resources required to meet targets*”³⁷. The potential flaws in the model noted by Alix Partners are as follows:

³³ Page 51 of the Analysys Mason Report provided at Annex 9 of the Consultation.

³⁴ Paragraph A5.77.

³⁵ Executive Summary of Frontier Economics’ report.

³⁶ *Ibid.*

³⁷ Executive Summary of Alix Partners’ report.

- “(a) Presupposing a large amount of resources remain idle while there is a queue of jobs that are about to be delayed;
- (b) Understating the impact of flexibility between engineers of different skill levels e.g. where some proportion of idle high skill engineers could be assigned to lower skill jobs;
- (c) Using a probability (gamma) function that fits quite poorly with how completion times are actually distributed, particularly the completion times for provision. The error this causes is likely to be larger as performance levels increase (due to assuming a fixed mode); and
- (d) Assuming Openreach would seek to enhance performance evenly throughout the year, rather than a cost-minimising path to meet targets.”³⁸

6.9 In these circumstances, Ofcom’s conclusion that the model “provides us with a reasonable basis to assess the resource increments and therefore the cost impacts associated with the imposition of minimum standards” is plainly untenable.³⁹ The reality is that the model, in its current form, cannot provide reasonable estimates of the additional costs associated with the higher quality standards proposed by Ofcom.

6.10 It appears that Ofcom has chosen to rely on the results of the EY model, despite its clear shortcomings, in light of: (a) Ofcom being persuaded that the only way that Openreach can deliver improvements in service quality is by being provided with more resources, and (b) the EY model being the only quasi-scientific way of evaluating the additional resources allegedly required to deliver service quality improvements. Even if the first point (addressed in Section 2 above) is set to one side, given the potential for significant unwarranted transfers in resources from other CPs to BT that arise from errors in the EY model, and its now obvious shortcomings, Sky considers that it is not tenable for Ofcom to continue to rely on the cost increment figures set out in the Consultation.

6.11 This leaves the question of how Ofcom should now proceed. In Sky’s view, the approach that Ofcom should adopt is analogous to that which it has followed in relation to setting the minimum quality standards, i.e., to rely on its regulatory judgement in selecting an appropriate point within a lower and upper bound for cost increments. The figures that emerge from the application of the EY model are clearly upper bounds, while zero comprises a reasonable lower bound. In Sky’s view, bearing in mind the relatively undemanding nature of the required performance improvements, and the significant likelihood that there is scope for efficiency improvements within Openreach without the need for significant additional resources, Ofcom should seek to set figures for cost increments that are towards the lower end of these ranges.

7. Scope of the service quality regime

7.1 Ofcom has proposed that the minimum standards will apply to three quality of service measures in relation to WLR and MPF.⁴⁰ As stated in its response to the July 2013 Consultation, Sky considers that the proposals should also apply to GEA.

³⁸ *Ibid.*

³⁹ Paragraph 3.74.

⁴⁰ Paragraph 3.31. Contrary to the statement in the consultation, Ofcom has since confirmed that it does not intend to apply its proposals to SMPF. As noted in Sky’s response to the July 2013 Consultation, Sky considers that the minimum service standards for repair completion and provision appointment completion should also apply to SMPF.

7.2 As Ofcom is aware, the take up of superfast broadband (“SFBB”) continues to grow and Sky expects to have [CONFIDENTIAL] SFBB subscribers by the start of the next market review period. It is also clear that supporting the growth of SFBB is a policy priority for Ofcom.⁴¹ Sky considers that Ofcom needs to take steps to support the continued growth of SFBB and should set appropriate performance targets for GEA. In the alternative, Ofcom should state clearly that it will actively monitor and require Openreach to report on the repair and provisioning of GEA (both appointed and non-appointed (wires-only) provisioning) and that it will move to set appropriate service performance SMP conditions, if required.

8. Transparency of reporting data and KPIs

8.1 Sky considers that it is essential that CPs are provided with sufficient information to be able to monitor Openreach’s performance. Currently, Sky receives limited performance data on repair and appointment completion and we would not be able to validate Openreach’s performance in line with Ofcom’s proposed minimum performance condition (across the proposed 9 GM areas (plus Northern Ireland)). Accordingly, Sky supports Ofcom’s proposal to require BT to provide KPIs at the GM area level so that performance can be monitored by region in line with Ofcom’s proposal to set the minimum standard.⁴²

8.2 However, in relation to reporting, Sky also notes that Openreach currently reports service performance and issues at the Senior Operational Manager (SOM) and Operational Manager (OM) level. Sky understands that this is necessary for its stated management of “hot spots” and also enables CPs to manage service issues in parallel. While the regulated minimum standards may be set and monitored at the GM level, Ofcom should ensure that this new reporting requirement does not come at the expense of the current more detailed reporting for CPs by Openreach.

KPIs

8.3 In the July 2013 Consultation, Ofcom noted the need for Openreach to provide a comprehensive set of KPIs to address competition and non-discrimination risks, the needs of CPs’ customers and to provide transparency for non-CP stakeholders.⁴³ Sky supports these aims and the need for comprehensive KPIs.

8.4 Furthermore, Ofcom proposes to minimise the risk of BT focusing on the delivery of services up to the minimum performance standard and then de-prioritising repairs or provisions which fall beyond the SLA (the “tail”) by effective monitoring of the “tail”.⁴⁴

8.5 To enable this Ofcom proposes to introduce additional KPIs and to “*discuss with Openreach as to how such KPIs are presented in the public domain*”⁴⁵. Sky considers that it is important for CPs to participate in that discussion and the final setting of the detail in KPI definition and presentation. CPs are well placed to input into this process given their experience with the products, their associated services, and their delivery, which will enable them to ensure that the fine detail of specifying and presenting KPIs is set accurately. It is also critical that the proposed expanded set of KPIs are consistent with existing KPIs in terms of terminology and reporting to ensure ease of read-across and understanding by CPs.

⁴¹ See further Ofcom’s draft Annual Plan for 2014/15, Figure 2 (Ofcom priorities for 2014/15). <http://stakeholders.ofcom.org.uk/binaries/consultations/draft-annual-plan-2014-15/summary/draft-annual-plan-2014-15.pdf>.

⁴² Paragraph 3.27.

⁴³ Paragraphs 10.246 – 10.274 of the July 2013 Consultation.

⁴⁴ Paragraph 3.124.

⁴⁵ Paragraph 3.126-127.

Scrutiny of MBORCs

8.6 Sky notes that while Ofcom found no evidence of tactical declarations of MBORCs by Openreach, Sky considers that Openreach has a wide discretion to declare MBORCs. Sky welcomes Ofcom's confirmation that it will provide greater scrutiny and review of BT's use of MBORCs in the final statement. Sky considers that it is essential for there to be a greater level of transparency in the MBORC process. Ofcom must examine/interrogate the reasons for declaring MBORCs and set an objective test as well as providing CPs with the opportunity to escalate or dispute MBORC declarations.

9. Absence of guidance on enforcement

9.1 For the new quality of service regime to operate effectively BT must be fully aware of the consequences for breach of the new conditions, and, in particular, when and how much it would be fined for breaches. In Sky's response to the July 2013 Consultation, we proposed that Ofcom issue detailed guidelines on Ofcom's approach to assessing and quantifying the level of a fine and its timescale for review and enforcement.⁴⁶ Unfortunately, Ofcom has not addressed this in the Consultation. We urge Ofcom to provide an indication of its approach in the final statement.

9.2 Of particular concern is the need to address the prospect of Openreach arguing that its failure to achieve its minimum service obligations is caused by CPs' failure to provide Openreach with accurate forecasts. We note Openreach's calls within its response to Ofcom's July 2013 Consultation for Ofcom to both extend "*the principle of linking CP forecasting and SLG payments*" and "*update the [Ofcom] 2008 direction to allow the linkage between CP forecast accuracy and SLG payments*"⁴⁷. These calls should be rejected.

10. January 2014 Consultation: proposals relating to the VULA margin

10.1 Ofcom has proposed to add to the SMP condition that requires BT to provide VULA on fair and reasonable terms, conditions and charges, a requirement for BT to provide certain information needed to monitor compliance with this obligation in respect of the VULA margin every six months.⁴⁸ Sky agrees with this proposal.

10.2 Ofcom also indicates that it intends to seek the first report from BT "*shortly after the publication of our final proposals on the VULA margin*"⁴⁹. As Sky has raised with Ofcom, this statement is ambiguous. We understand from discussion with Ofcom that "*publication of our final proposals*" refers to publication of the final version of Ofcom's guidance on fair, reasonable and non-discriminatory VULA margins. Sky urges Ofcom to move quickly to publish that guidance, which need not be tied to publication of the final statement concluding the FAMR.

10.3 Similarly, Ofcom should clarify what it means by the term "*shortly after*" publication of its final proposals. Sky considers that Ofcom should ask BT for the relevant data within one month of publication of the final guidance. A period of this duration is often used when requesting data from firms during regulatory inquiries, and should be more than sufficient for BT to provide the relevant data, particularly in view of the fact that BT already maintains a model of VULA margins for compliance purposes.

⁴⁶ Paragraphs 3.31 to 3.33 of Sky's response to the July 2013 Consultation.

⁴⁷ Paragraph 240 of Openreach's response to Ofcom's July 2013 Consultation

⁴⁸ Draft SMP Condition 1.2.

⁴⁹ Paragraph 4.8 of the January 2014 Consultation.

- 10.4 Finally, Sky notes that Ofcom does not propose to include a specific power to require BT to report on request outside of the biannual reports and instead proposes to rely on its section 135 information gathering powers.⁵⁰ Sky considers that Ofcom should reconsider this position and include a specific SMP condition to enable it to require BT to report on request, or issue a direction to this effect, over and above the s.135 process as this would strengthen Ofcom's enforcement options.

Sky

February 2014

⁵⁰ *Ibid.*

Annex 1

Comments on Openreach's response to the July 2013 Consultation

- A.1. Openreach's response to Ofcom's July 2013 Consultation, makes a number of assertions in relation to service quality issues that do not withstand scrutiny. These include the following, which are discussed further below.
- it is "virtually impossible to forecast the type of [fault] event, circumstances and incidents that cause most faults, it is even more difficult to forecast the engineering skills required to fix the fault on the day"⁵¹;
 - Openreach "only has 18 hours, up to 6.00pm the next day to fix the fault" that was reported up to midnight on the preceding day⁵²;
 - "the challenge of completing repairs on time is exacerbated by the fact that many jobs require engineers with specialist skill sets"⁵³; and
 - "an upper threshold of the best possible service or 'glass ceiling' will always exist"⁵⁴.
- A.2. Openreach argues that "service" is fully defined by a set of key elements in what it refers to as "the service equation"⁵⁵.
- A.3. A key omission from Openreach's "service equation" is the inclusion of any reference, evidence, or analysis of productivity or preferably net labour productivity⁵⁶. Net productivity is a critical parameter to understand and actively manage in any field workforce. By not including any consideration of net productivity, Openreach are treating it as a constant, and are therefore mandating that increased demand results in higher resource and cost levels. We would consider net productivity to be both variable and controllable, and indeed this has been one of the key levers for performance improvement in the Sky field workforce over the last 5 years. We consider the implicit assumption that net productivity is constant to be a fundamental flaw in Openreach's description of "the service equation".

The role of demand volatility

- A.4. In its discussion of "the service equation", Openreach makes much of the contribution of "demand volatility" driven both by unpredictable fault repairs and weather. Table 1 in Openreach's submission highlights that ELF's contribute over seven times more faults than in-life failures for MPF. However, ELF's, by their very nature, will typically occur following work done by Openreach itself and are hence quite predictable and addressable. Of

⁵¹ Paragraph 47. (All paragraph references in this annex are to Openreach's response to Ofcom's July 2013 Consultation.)

⁵² Paragraph 40.

⁵³ Paragraph 70.

⁵⁴ Paragraph 80.

⁵⁵ Paragraph 17.

⁵⁶ "Net labour productivity" can be and is defined by organisations in a number of different ways. The most revealing and hence most useful and most easily comparable measure for field force personnel is the productive time of an engineer spent in front of the customer divided by the total time the engineer is employed. This is the measure used for management within Sky. Often productivity figures are inflated by first reducing the denominator (the gross time an engineer is employed) through deducting factors such as sick time, training time, etc. and then inflating the numerator (the productive time spent with the customer) through including factors such as time spent in the van planning the visit, time contacting or discussing the visit with the customer, etc. All such "refinements" to the measure of net productivity both obfuscate the measure and diminish the various opportunities able to be worked on to directly increase the engineer's productivity with the customer.

concern is the fact that the number of ELF's has been increasing, which directly reflects on the quality and error proofing in the work of Openreach's engineers.

- A.5. Whilst Sky agrees that specific instances and types of inclement weather can be difficult to predict, Openreach notes that in reality its network is affected by a broad range of weather event types. Statistically, a broader range of weather conditions and events will display a far smoother incidence profile, and should therefore generate a far more predictable fault demand profile than Openreach suggests.

Openreach "only has 18 hours, up to 6.00pm the next day to fix the fault" that was reported up to midnight on the preceding day⁵⁷

- A.6. The claim that faults reported up to midnight provide Openreach with as little as 18 hours to repair them is factually incorrect. Service Maintenance Level 2 (that which applies to MPF faults) is defined on the Openreach web site as being offered "*Monday to Saturday 8am – 6pm excluding Public and Bank Holidays*". Thus any fault reported after 6pm will be treated as if it was reported at 8am on the following working day.

The challenge of completing repairs on time is exacerbated by the fact that many jobs require engineers with specialist skill sets

- A.7. Openreach's reports to the OTA suggest that it has on average an intake of about 65,000 faults per week, of many different types. It is Sky's experience that in all large demand volumes, the distribution of fault types will follow a 'Pareto' profile, with large numbers of 'standard' or 'routine' work (and therefore skills required) and small numbers of specialist tasks. The Openreach statement implies that an engineer arriving on site to fix a fault is as likely to need to replace a telegraph pole as a face plate, which we consider to be implausible. It would be useful for Openreach to provide a Pareto breakdown of volume by job types to substantiate this, and validate that the vast majority of its work profile is of a 'standard' nature, with a predictable, non-specialist skill requirement.

- A.8. The same will hold true for job durations. Clearly these will vary, but when averaged out at normal levels of productivity, they are fairly predictable. More important is the question of how well Openreach organises itself to deal with the variability it faces. Multiskilling would be a strategy to address fault variability and team based work movement/sharing a strategy for dealing with job duration variability. It should be for Openreach to provide evidence of the problem and how its management to address the challenge, represents best practice.

- A.9. Openreach states that many jobs require specialist skills. This is an extension of the claim of unpredictability of job type. The frequency of such jobs must be low compared with the majority. With proper analysis Openreach should be shaping the design of its skills mix and geographic deployment to match the distribution of job types and volumes. It should look to the opportunity to improve that analysis and internal organisation if it finds it is unable to respond to the demand – rather than simply claiming that an improvement requires more resources.

"Glass ceilings" on service delivery

- A.10. Table 2 of Openreach's submission lists key factors that "*establish*" a "*Glass Ceiling*" that Openreach claims constrains its ability to improve both fault repairs and provisions beyond predetermined percentages. Nothing in its list is truly fixed and Openreach has proven this itself with initiatives such as the 'R15k program' which delivered significant improvements in fault repair (as Openreach has reported to the OTA). It is disappointing

⁵⁷ Paragraph 40.

that Openreach struggles as an organisation both to sustain many of the improvement initiatives and to deliver them in conjunction with others. No business operating in a competitive market would or could be satisfied with accepting the notion of a cap on its ability to improve service quality – particularly where those “ceilings” appear to be at relatively low levels – and Ofcom should not accept such a proposition from Openreach.

Annex 2
UK Power Networks, Business Plan (2015 - 2023), Annex 12, Business Transformation', July 2013

Annex 3
[Frontier Economics Report]

Annex 4
[Alix Partners report]