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Dear Graham,

17 December 2012

Business Connectivity Review (Further Consultation Published 15 November)

As a general observation, Level 3 Communications UK Limited and Level 3 Communications Limited (together referred to as "Level 3") views the BCMR as a vital initiative in order to support further network investment and deliver sustainable competition in the provision of connectivity services to business consumers. Accordingly, we offer the following comments in response to Ofcom's further BCMR consultation.

We note Ofcom's intention to complete its work and proceed to issue a final Statement during the first quarter of 2013. The interim arrangements that have been in place since the expiry of the previous remedies in September cannot deliver the regulatory certainty that the market seeks and we therefore encourage Ofcom to conclude the review as soon as is feasible in order that a longer-term solution is put in place.

Question 1: Do you have any comments on our proposal to include the Slough sectors in the WECLA?

In Level 3's response to the main BCMR consultation, we raised a number of fundamental concerns regarding the analysis methodology and in particular the assumptions that have been made in relation to network reach and the significance of the existence of alternative networks within geographic areas. Our reading of other consultees' responses indicates that we were not alone in raising such concerns. While we anticipate that Ofcom will address these matters in its final Statement, we are nevertheless surprised that a very significant change to the geographic market boundaries has been proposed without explaining why Ofcom's proposed methodology and assumptions should prevail over the concerns of consultees.

Not only do we maintain that the 200m reach assumption must be supported by suitable evidence, but we also question the presumption that the mere fact two or more OCPs' networks pass through the same 200m 'buffer areas' around large business sites would determine that an entire postcode sector is deemed to be of High Network Reach. As an example of why we question the proposed approach, it may be the case that two OCPs are active solely in the residential/SBC market in the same area and hence will not materially affect the supply of services to large enterprises.

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Insofar as the specific proposal to extend the zone to Maidenhead is concerned, we are unconvinced by the arguments that have been made for virtual contiguity. If the Maidenhead/Slough area is sufficiently large to withstand its own test of competitiveness then it should be identified as such. The notion of an 'economic linkage' across the postcode sector SL3 0 could create a dangerous precedent since there is a prospect that the concept of jumping across a single post code could be developed further until two, three or more post code areas are ignored in order to create virtual contiguity, which we believe could result in serious market distortions.

We do agree with Ofcom's observation in para 2.25 that the evidence obtained in relation to customer purchasing habits is inconclusive and should be ignored for the purpose of the contiguity question.

In relation to Ofcom's analysis of the impact of alternative infrastructure, and specifically Figure 2.3, we would welcome greater clarity as to the relevance of the quoted sector proportions (per the explanation given in 2.29(ii)).

Question 2: Do you have any comments about the proposed amendments to the Proposed SLG Direction?

We note that Ofcom's proposal to introduce compensation caps is intended to correct an unintended omission in the previous BCMR (2008). While we do not disagree with the intention per se, we are disappointed that Ofcom has not published any fresh analysis which underlies the proposed decision. Indeed, it is unclear from the consultation document whether any new analysis has actually been carried out in relation to SLGs.

In the June 2012 consultation, Ofcom rightly explained (at para 10.71) that the SLA/SLG regime was designed to incentivize BT to ensure that performance meets the specified targets and to compensate CPs when performance does not meet the targets. We observe that (i) BT did not appeal the 2008 decision on SLAs/SLGs through the normal statutory procedure and (ii) OCPs' requirements appear to be unfulfilled by the current regime. We strongly question whether it is safe to rely solely on performance data from roughly five years ago as the rationale for a decision to disturb the accepted status quo.

We are particularly concerned to note that during the course of BCMR 2008, CPs have experienced a worsening crisis regarding BT's provision of Ethernet and copper-based services. The specific problem areas have been discussed extensively within OTA and a considerable body of evidence has been built up over recent years, so we would expect Ofcom to avail itself of this information in order that an informed decision can be taken on the question of performance incentives and compensation.

We do not propose here to recount all the individual areas where BT's performance has failed to meet their obligations although we would be happy to present further information if this would be of assistance. Rather, the general point we make is that BT's performance has worsened considerably since 2008 despite the SLA/SLG incentives that are currently in place. In our view, the factual evidence would point to the introduction of a more onerous compensation regime rather than less.

Level 3 contends that it would be appropriate for the final decision on the removal of caps to be deferred until review is undertaken of the effectiveness of the measures put in place following Ofcom's earlier work on this matter in 2008 ("Service Level Guarantees: Incentivising Performance") in order to accurately assess BT's historic performance in meeting its specified targets. From a due process perspective, a further review would give all stakeholders greater confidence that Ofcom's final decision is justified.

Question 3: Do you have any comments about our proposal that BT should be subject to cost accounting obligations and not required to publish DLRIC & DSAC figures?

We have previously commented that we believe it is too early for Ofcom to remove the obligation of cost orientation and this remains our position. The repeated problems that BT has recently suffered with the accuracy of their RFS data have substantially been revealed as a result of challenges by OCPs regarding compliance with cost orientation requirements. We maintain that there is a greater risk of harm to the sector arising from the premature removal of cost orientation obligations than there would be from maintaining the obligation meantime.

While the reinstatement of cost accounting obligations would go some way towards restoring market confidence, we see difficulties with the proposal to alter the present requirement to publish DSAC and DLRIC figures and henceforth to confidentially retain these calculations between BT and Ofcom. One purpose of publication, which has been highlighted in the consultation document, has been to ensure that stakeholders have access to the information required to undertake a first order test of BT's compliance with its cost orientation obligations.

As Ofcom will be aware, it was primarily as a consequence of OCPs' access to the 'floor and ceiling' information that BT's apparently significant overcharging for both TISBO and AISBO services has been brought to light in recent years. Removal of a publication obligation for DSAC and DLRIC would seriously hinder any prospect that OCPs could argue for reinstatement of the cost orientation obligation in the event that Ofcom proceeds with removal of this remedy in the final Statement.

Additionally, a second important purpose of publication is to ensure that the effectiveness of Ofcom's decisions on charge controls can be observed in a transparent manner during the period of a charge control. A cessation of DSAC/DLRIC publication would remove one of the safeguards that has helped to ensure the high regard in which Ofcom is held, both domestically and internationally.

In relation to KCom ✕

Question 4: Do you have any comments about the proposed TAN definition or the proposed circuit routing rules?

We acknowledge and support Ofcom's proposals for simplifying and clarifying the rules relating to TANs and circuit routing. This is an important and essential step and we are

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optimistic that Ofcom has dealt satisfactorily with the most significant problems of interpretation that arose in this area following BCMR 2008. In particular, it is helpful to have unequivocal guidance that a CP should be able to reach national coverage in the AISBO market by interconnecting its core network with BT at 56 different points rather than all 106 BT OHPs.

In reviewing the text of the proposed SMP condition, which will require provision of end-to-end circuits up to 25km, we see scope for confusion as to the treatment of extended reach circuits where technically possible. Accordingly, we would welcome Ofcom's clarification.

In relation to the definition of 'backhaul segment', we would welcome confirmation that an affiliate company within a corporate group structure is not intended to be caught by the concept of 'third party'.

In order that the TAN concept can now succeed, a number of supporting product developments are required to ensure a fit-for-purpose AISBO interconnection regime. Despite having raised SoRs, OCPs' requirements have not yet been met. The most immediate requirement would be for handover products at rates of 1Gb and 10Gb/s and our assessment is that work that has already been carried out regarding High Density VLAN Handover could be utilized for this purpose.

Experience suggests that in the absence of clear direction on product development timescales, significant unexpected delays are frequently observed. We would therefore encourage Ofcom to introduce a specific requirement on BT to develop suitable interconnection products in a timely manner.

There remains a number of points on which we are still unclear and which may therefore give rise to unintended confusion. For the avoidance of such doubt, we would welcome a clear direction from Ofcom on the following:

- In our view, there should be no restriction on the number of adjacent boundaries that a service should be permitted to cross. However this is not expressly stated currently and Ofcom's confirmation would be of help.
- We would contend that when services cross TAN boundaries, there should be no material increase in BT's costs and hence the charging regime should be standardized. However, BT may have a different perspective and we anticipate that there is scope for confusion. We would welcome Ofcom's guidance as to how the question of pricing such services should be approached. Clarity surrounding the commercial flexibility that BT will be permitted when introducing services which cross TAN boundaries. CPs would be disappointed if this initiative increased the cost of delivering services today.
- We would expect BT to apply the new TAN rules to the embedded estate which is still a mix of WES/WEES/BES & EAD based AISBO services as this would enable viable migration options. However, if this is not specified by Ofcom in the final Review, we are not confident that such an outcome would prevail. We therefore urge Ofcom to give a clear direction on this point.

Question 5: Do you have further evidence on competition in the MISBO market outside the WECLA, including the use and impact of dark fibre?

Ofcom has sought comments regarding the ‘self-supply’ of dark fibre which we understand to relate to the purchase by enterprise customers of unequipped fibre.

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may be of assistance to Ofcom to be aware that CPs are required to file annual returns of dark fibre leases to the Valuation Office Agency in order that they can track the underlying market rents on which to base their tax assessment methodology.

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Yours sincerely,

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Level 3