

Ms Lindsey Fussell

Group Director for Networks and Communications  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

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By email to: [Lindsey.Fussell@ofcom.org.uk](mailto:Lindsey.Fussell@ofcom.org.uk)

Cc: [David.Clarkson@ofcom.org.uk](mailto:David.Clarkson@ofcom.org.uk)

Dear Lindsey

## Openreach surcharges on backhaul circuits used for FTTP

### 1. Executive summary

- 1.1 UKCTA and INCA together comprise all the major fixed network competitors to Openreach.<sup>1</sup> We deliver broadband services to tens of millions of households. Our networks support myriad industries and sectors in the wider economy.
- 1.2 We are writing jointly to alert Ofcom to an immediate threat from Openreach to competition in the provision of FTTP networks. Left unaddressed, it could also trigger a wider destabilisation in relation to the services underpinning competition in the provision of broadband and data services in the UK. Central to this threat is a regulatory issue that only Ofcom can resolve. This letter is a preliminary explanation of the issue, with a more detailed briefing to follow shortly.
- 1.3 We are looking to Ofcom to resolve the issue urgently, clarifying that Openreach's obligation extends to the supply of circuits used to support aggregated traffic in the access network on fair and reasonable terms. If Ofcom does not act, we expect this issue will escalate.

### 2. Openreach's new surcharges harm competition and limit choice for consumers

- 2.1 **The problem: unfair surcharges access network circuits.** Openreach has introduced new surcharges on key Ethernet and optical services, that only apply when those services are used to aggregate FTTP traffic from one of Openreach's competitors.<sup>2</sup> Those changes threaten competition and directly harm the interests of consumers.<sup>3</sup> They materially compromise Ofcom's strategic objective of promoting competitive network deployment and threaten to derail Ofcom's imminent Wholesale Fixed Telecoms Market Review (**WFTMR**). We appreciate that time is of the essence, given Ofcom's plan to conclude its market review in time for new rules to take effect from the start of April 2021 (i.e. in the next eight weeks).

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<sup>1</sup> UKCTA is the UK Competitive Telecommunications Association. UKCTA's members are listed [here](#). INCA is the Independent Networks Cooperative Association. INCA's members are listed [here](#).

<sup>2</sup> Openreach update GEN102/20 issued 30 November 2020. The surcharges became payable with effect from 1 January 2021.

<sup>3</sup> The services covered are EAD 1000 (all variants), EAD 10000 (all variants), OSA and OSEA (all bearer variants) and Street Access 1Gb. We use the term 'EAD' to refer to the affected services for simplicity hereafter, except where otherwise stated.

- 2.2 **The root cause of the problem: ambiguous language in the 2019 BCMR.** In its update and in its explanations to CPs, Openreach adopts the position that EAD services used to connect FTTP cabinets to the local exchange (or to/between equivalent CP sites), rather than to connect a customer site directly to a point of aggregation in a network, fall outside the scope of the 2019 SMP conditions. It argues that because Ofcom make certain statements in the 2019 BCMR that ‘backhaul’ is de-regulated, then the access market (and hence the scope of the regulated access services provided by Openreach) is limited to the individual lead-in to each premises, and that everything beyond the street cabinet or other point of aggregation, in any form, is competitive and therefore unregulated.
- 2.3 On that basis, Openreach’s case is that it is free to increase the price of these circuits in any way it chooses, but only when they are used to aggregate FTTP traffic. To enforce those price increases, it requires competitors to provide information about the use of individual circuits.
- 2.4 **Wider strategic threat of further disruption.** Although the current ‘surcharges’ are wholly unacceptable to us as they stand, they are not the end of the risk we face if Openreach’s conduct is not constrained. It has also been at pains to emphasise the wider implication of its stance: that *any* circuits used to support any form of aggregation in the network that support fixed services can be the subject of additional charges or withdrawn by Openreach at any point in the future.<sup>4</sup> For example, Openreach has been open that it will next consider whether to withdraw ‘trunk’ ethernet from the market altogether.<sup>5</sup> Openreach’s briefing also makes it clear that it intends to prohibit the use of dark fibre access (DFA) for FTTP aggregation in ‘area 3’ described in the WFTMR. This will adversely affect in a significant way the network deployment plans of CPs where DFA was the anticipated solution of choice to connect to small and remote locations.
- 2.5 **No rationale beyond raising rival’s costs.** There is no objective justification advanced by Openreach for its surcharges, which are openly acknowledged to be a move to exploit a regulatory gap.<sup>6</sup> The surcharges nearly double the price of many circuits that are vital to competitors. There is no service, value or benefit being provided to CPs by Openreach, nor additional cost incurred that needs to be recovered, in relation to this surcharge. It is simply an opportunity being taken to disincentivise competing networks. By itself, the fact that Openreach sees commercial value and no risk in imposing these surcharges illustrates that it faces no threat of competition or cannibalisation in relation to these circuits, from any source.

### 3. Openreach’s interpretation of the regulatory regime cannot stand

- 3.1 **Openreach’s literal reading is not sustainable.** Contrary to Openreach’s extreme reading, there is little evidence that Ofcom intended in 2019 that literally any point of aggregation was excluded from the regulated access network. The SMP conditions do not define what constitutes ‘access’, leaving it to be construed from the 2019 Statement. In the Statement and its Annexes, a range of statements are made, and it appears that Ofcom did not really consider the question of what, precisely, ‘backhaul’ meant. That is understandable given that, in 2019, all parties would have understood that the role played by EAD for backhaul was a given, and formed part of the pre-existing regulatory landscape.

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<sup>4</sup> For example, Openreach’s announced surcharges do not apply to all forms of aggregation – for example, they do not apply to MDUs. But Openreach is clear that it is free to change its mind on this front at any point.

<sup>5</sup> Openreach’s product sponsor made this point on an industry call in December 2020.

<sup>6</sup> GEN102/20 states that the surcharges are ‘*in order to better align with what we are required to do under regulation*’.

- 3.2 **In any event, Openreach does not face competition in these circuits.** Regardless of the reason why Openreach feels that the 2019 BCMR gives them licence to disrupt their competitors in this way, it is a serious threat to our plans, and to Ofcom’s policy. And there is absolutely no doubt that, as a matter of fact, there is no competitive constraint on Openreach in relation to the circuits that it now claims are ‘unregulated’. Openreach makes the suggestion that PIA is available as an alternative, but as Ofcom knows from the work of the OTA in this area, the truth is that PIA is not yet at the stage of providing a suitable substitute for many use cases of EAD/OSA. While there is work underway to improve the PIA product and associated processes — particularly to make it more efficient and suitable for use at scale — it is clear that PIA has not yet reached the point where it could be used by CPs in the place of EAD/OSA in a way that would serve to constrain Openreach.<sup>7</sup> In addition, for the reasons documented in the accompanying impact report from GOS, it is clear that PIA is not an economically viable alternative to EAD/OSA in many situations.
- 3.3 We do not believe that Ofcom intended the access network between the aggregation point and the local exchange or equivalent CP site to be de-regulated and thereby to provide Openreach with an unregulated monopoly on that segment of activity. That would have the perverse effect that in some areas, Openreach would be determined to have SMP from the customer site to the aggregation point, and between the nearest local exchange and other local exchanges, but not between the aggregation point and the exchange. Clearly, such an outcome could not (and does not) reflect Ofcom’s market assessment.
- 3.4 It appears that in 2019, all parties may have approached this issue without an appreciation of the need to be precise about the boundary of the access service. We also appreciate that as Ofcom has widened its focus and shifted its analysis away from a focus on Openreach’s network, it has moved from using terms like ‘local exchange’ to ‘point of aggregation’, in order to accommodate a wider range of network architectures. The unintended consequence — which Openreach appears to be exploiting — has been that those terms are capable of several meanings.
- 3.5 This is a serious threat in a range of settings, including but not limited to:
- (a) Rural and regional networks;
  - (b) New and innovative models of network deployment, such as MDUs or new builds; and
  - (c) Competitive investment in FTTP in urban areas.

#### **4. Ofcom has existing powers that can resolve this issue**

- 4.1 **Ofcom must clarify that access circuits are regulated.** Regardless of the underlying source of any ambiguity, we look to Ofcom to sort out any confusion about the scope and intended meaning of the regulatory regime as it applies today as a matter of urgency. There can be no room for any doubt that network connectivity from a CP’s network termination point to the Openreach exchange/CP site is part of the access network, and not competitive across the

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<sup>7</sup> For example, the average time to complete Network Adjustments is consistently over 50 working days. Whilst PIA plays an increasing role in *some* use cases, it is clearly not a credible alternative in its current form in all circumstances, being unable to be used at scale in a way that is quick, reliable and straightforward for CPs.

UK.<sup>8</sup> Those links must be provided by Openreach on a regulated basis nationally (with possible exceptions in those areas where competition has been truly demonstrated to operate effectively – that is, areas Ofcom will in the future designate as Area 1 locations, as competition matures).

- 4.2 That said, providing that clarity should not be difficult and should not cause any difficulty for the wider WFTMR.
- 4.3 We ask Ofcom (1) to undertake urgent work to quantify the impact of Openreach’s surcharges on competition and on consumers, and (2) to act now to protect competition and Ofcom’s regulatory strategy. To assist Ofcom, we include an initial independent expert’s report with this letter, with more material to follow.
- 4.4 **Our objective: access network circuits on fair terms.** The outcome we seek is that Ofcom secure a withdrawal of the EAD surcharge and a commitment from Openreach not to introduce further restrictions on the use of Openreach services for service aggregation without Ofcom’s prior written consent.
- 4.5 That outcome could be secured by:
- (a) A sufficiently strong and public voluntary commitment from Openreach to Ofcom, backed by Ofcom’s firm willingness to take further action if needed;
  - (b) A Direction issued to Openreach under its SMP conditions<sup>9</sup>; or
  - (c) The terms of a determination made by Ofcom following a regulatory dispute referral.

## 5. The WFTMR is at risk if this issue is unaddressed

- 5.1 **WFTMR also needs to address this issue.** For the reasons set out in this letter, it is also vital that Ofcom clarifies in the WFTMR decision its view of the boundary between the ‘access’ market and any intended zone of de-regulation comprising ‘backhaul’. Openreach justifies its surcharges on the basis of an extreme and commercially unworkable approach to that question, applying a skewed reading of the 2019 BCMR Statement. Seized as it is of this issue and its impact, Ofcom’s proposed approach to adopt the same position in 2021 as previously adopted in 2019 cannot stand. It would be a recipe for disaster and, we fear, litigation.
- 5.2 We appreciate that Ofcom may need to consult on this issue before reaching a final view in the WFTMR. We would hope that a suitably narrow and focused consultation exercise could be undertaken without unduly delaying the WFTMR, if necessary.

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<sup>8</sup> This point appears to be well-understood by Openreach itself, who note in Guidance Note 1 to the new surcharges that: *Guidance note 1. The change is specific to leased line circuits that are being used to connect aggregation nodes for Fibre To The Premises (FTTP) deployments connecting multiple end-user site premises in street locations (e.g. residential streets of houses, business and industrial parks and mixed-use housing and business developments). Here the leased line circuit is being used to create an access network to serve FTTP to multiple end-user sites / premises which is what Physical Infrastructure Access (PIA) is intended for.* (Emphasis added). This ‘Guidance’ illustrates the illogicality of Openreach’s stance: if PIA is the alternative, surely that implies that Openreach does have SMP in relation to that connectivity?

<sup>9</sup> We note that Openreach’s position is likely to be that this avenue is not open to Ofcom, on the basis that any connectivity beyond any point of aggregation is outside the scope of any finding of SMP.

5.3 **If not via the WFTMR, then the issue needs to be dealt with promptly in early 2021.**

Otherwise, at a minimum, Ofcom should preserve its freedom to deal with this issue following the WFTMR. In that case, rather than consult now, Ofcom might simply make a statement that the boundary between 'access' and 'backhaul' is a matter of regulatory detail that Ofcom may address in subsequent decisions. If Openreach had not voluntarily withdrawn its surcharges at that point, then Ofcom could note in the WFTMR that the basis of those surcharges was disputed and may need to be unwound in subsequent decisions (although acknowledging this would be a separate decision). That would enable the WFTMR to proceed, de-coupled from this issue.

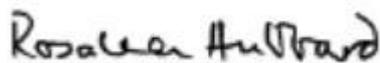
**6. Ofcom's early intervention can avoid further escalation**

6.1 As noted, only Ofcom can resolve this issue effectively, and quickly, and avoid harm to the process of competition and to the interests of consumers.

6.2 We/our members are available to meet with you and your team at any time.

6.3 We would appreciate a reply clarifying Ofcom's intended approach to dealing with this issue by no later than Monday 22 February 2021. All our members' rights are reserved.

Yours sincerely,



Rosaleen Hubbard (UKCTA)



Malcolm Corbett (INCA)