



## Physical Infrastructure Remedy for Hull

MS3

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NON-CONFIDENTIAL

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## 1 Executive summary

- 1 Network competition in Hull cannot be expanded by building new stand-alone networks. This is due to a combination of public dislike of multiple sets of telegraph poles and the economics of the remaining parts of Hull where network competition has not yet arrived. Many of the remaining locations are in the city-centre, where network construction costs would be materially higher than outside the centre and it may not even be physically possible to accommodate duplicate network furniture.
- 2 For all consumers in Hull to have access to the benefits of network competition, it is therefore necessary to enable access to KCOM's physical infrastructure (PI). Through active encouragement from Ofcom and the government KCOM has agreed to develop a physical infrastructure access (PIA) product – known as KPIA. MS3 has worked alongside KCOM in that process for more than 18 months and remains committed to completing the trials and negotiations with KCOM to ensure that there is a fit-for-purpose KPIA product.
- 3 MS3 asks Ofcom to continue supporting the voluntary KPIA product development by KCOM and to use the Hull TAR to establish a regulatory framework where the KPIA product can exist and evolve. This includes setting out criteria that the KPIA product must satisfy and functionality it must deliver. A Hull TAR consultation that establishes such a framework is likely to contribute substantially to the successful completion of the trials and negotiations KCOM and MS3 are currently engaged in.
  - MS3 asks that the KPIA product be designed to be appropriate to meet MS3's needs but also proportionate to reflect the size of the Hull market and the fact that significant parts of Hull already have network competition.
  - MS3 asks that KPIA pricing should be the same as or very close to the regulated Openreach PIA price.
  - MS3 asks that the KPIA product is supported by a robust no undue discrimination (NUD) framework and SLAs for activities where KCOM does not have corresponding internal processes, such as the Network Adjustment (NA) process.
  - MS3 asks that that the KPIA product will enable MS3 to compete equally with KCOM in downstream communications markets.

## 2 Introduction

- 4 In its pre-consultation submission on Hull TAR market definitions, MS3 has not identified a separate physical infrastructure (PI) market in Hull, opting instead for PI access being a remedy applied in the wholesale broadband and leased lines markets. The reason for this was that MS3 considers it critical that a PI access remedy is designed to meet the specific market failures in those downstream markets and that it is not over-specified to (for example) match the existing Openreach PIA remedy.
- 5 If Ofcom considers it more appropriate to define a separate PI market, then MS3 accepts that, but asks that Ofcom keeps a keen eye on proportionality when setting out its specifications for the PI access remedy.
- 6 Since spring 2024, MS3 has worked with KCOM to introduce a PI access product. This product has been named KPIA, and we will use that term for the remainder of this document. The KPIA trials have progressed well (although slowly) and MS3 is successfully extending its network using the trial KPIA product. MS3 hopes to reach more than 80 premises using the KPIA trial product,<sup>1</sup> although the 2<sup>nd</sup> trial phase is progressing very slowly and, so far, only 80 premises have actually reached RFS using the KPIA trial product.
- 7 It is MS3's hope that the KPIA product can be developed in a collaborative fashion and that Ofcom will not need to issue prescriptive regulatory requirements. Instead, regulation should set the framework within which the KPIA product can be agreed and implemented. Regulation will also be necessary to ensure continuity of supply and to create a framework for the ongoing management and evolution of the KPIA product.

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<sup>1</sup> It is important that the trial terms and conditions are extended to cover this deployment. Some of KCOM's processes are forcing MS3 to slow down its deployment and KCOM has stated that it is not sure whether the trial KPIA terms and conditions will remain applicable through the completion of the 2<sup>nd</sup> trial wave.

### 3 The PI market failure

- 8 MS3 (and others) have deployed new competitive full-fibre networks in and around Hull. These networks are new stand-alone networks and do not use the existing KCOM PI.
- 9 Although KCOM's network competitors have tried to gain access to the KCOM PI (MS3 made considerable efforts over a period of more than 18 months to access KCOM poles, using the ATI Regulations in the absence of regulated PI access in Hull), those efforts have been unsuccessful. Only since early 2024 have PI access discussions progressed, largely driven by residents voicing opposition to multiple sets of telegraph poles in their streets.
- 10 Given the opposition to deploying more stand-alone networks in Hull and the cost to deploy to some of the remaining parts of Hull, access to KCOM's PI becomes a critical enabler of further network deployment across all of Hull. The number of premises in Hull currently not benefiting from network competition is around 50,000. Those residents and businesses are at risk of not accessing the reduced prices and improved service levels delivered through competition and a fit-for-purpose KPIA product is therefore essential. However, relatively limited scale of KPIA deployment likely (relative to the levels of use of the Openreach PIA product). It is important that the KPIA product is designed to meet the need of that limited remaining amount of competitive network deployment.

### 4 The KPIA product requirements

- 11 The KPIA product is currently under development. MS3 has undertaken one small KPIA trial and is currently at the early stages of a second larger trial. MS3 has made substantial contributions to the overall product development process. In order to be efficient, KCOM has used the existing Openreach PIA product documentation as the starting point and has modified those documents to reflect its proposals for the KPIA product. There have also been commercial negotiations about key aspects of the KPIA product.
- 12 KCOM has recently presented its final KPIA Reference Offer (RO) to MS3. This was presented before the conclusion of ongoing negotiations of critical components of the RO. MS3 will write to Ofcom separately setting out its core areas of concern. MS3's focus for the KPIA product can be summarised as follows:

- KPIA must enable KPIA users to compete equally with KCOM in downstream markets. This, for example includes access to long-term minimum contract periods to support proposals for large long-term contracts.
  - KPIA needs to be standardised and predictable in terms of processes with standard documentation, templates and timeframes;
  - KPIA must be economically efficient to use for competitive network operators;
  - KPIA must allow competitive network operators to plan and implement new network construction in a predictable manner;
  - KPIA does not need to offer automated interfaces, but manual processes must be designed to operate as seamlessly as possible;
  - KPIA should offer competitive network operators the necessary information to efficiently design and build new full-fibre networks.
  - KPIA should include an efficient mechanism for KPIA customers to request new or amended functionality to the KPIA product.
  - The KPIA product should allow for novation's in the case of M&A activity in the sector.
- 13 MS3 has identified several areas where the KPIA RO either differs from what MS3 believes has been agreed during the trial processes or where the KPIA RO differs from the Openreach PIA RO for no valid reason. MS3 had previously submitted queries to KCOM to understand the rationale for these departures from what has been previously agreed or the established good practice from the Openreach PIA RO, but KCOM has nevertheless proceeded to issue the 30-notice of the RO and has indicated that it is unwilling to make any further changes of the document. Despite this, MS3 is committed to investing the time necessary to ensure the KPIA RO is fit-for-purpose.
- 14 One example of where the KPIA RO differs from the Openreach PIA RO in a manner that is not justified, is that the KPIA RO provides no standard and predictable conditions for access to sensitive sites. MS3 considers that this would be discriminatory and has asked KCOM to adjust the KPIA RO accordingly, KCOM has declined to do so.
- 15 MS3 considers that Ofcom should impose an obligation in the Hull TAR on KCOM to produce a KPIA RO. This will be both appropriate and proportionate as the document is essential to the

consumption of the PI by third parties and because KCOM has already produced a KPIA RO on its own initiative. The reason MS3 thinks it necessary to impose the KPIA RO remedy is that such a remedy will establish the criteria that must be satisfied by the KPIA RO, and it will enable MS3 and other CPs to hold KCOM accountable against those criteria in the future, if necessary.

## 4.1 KPIA pricing

### 4.1.1 Relative and absolute price levels

- 16 It is essential that the KPIA product is priced in a manner and at a level that makes it an economically attractive alternative to the deployment of stand-alone networks. By keeping the product largely manual (with little or no investment required in automation), MS3 believes the cost for KCOM should be limited and, therefore, the KPIA prices should be comparable to the regulated prices for the Openreach PIA product (which has more scale but substantially higher development, automation and management costs). KCOM has not incurred the costs of designing and developing the KPIA product but has instead benefitted from the existence of the Openreach PIA product and based its product description, term and conditions on that.
- 17 Very shortly before this submission, KCOM has published its KPIA price list (this had not been shared with MS3 in advance). The published KPIA price list is largely the same as the current Openreach price list and MS3 welcomes this. There are some exceptions, though, including pricing for network adjustments and the assessment of network adjustment requests. MS3 does not agree with KCOM's proposed approach to network adjustment charges and pricing and will present its detailed position in a separate submission to Ofcom. MS3 asks that Ofcom include in the Hull TAR clear criteria for how KCOM can set prices for the KPIA product and how those prices can evolve over time.
- 18 MS3 has made a significant investment in the KPIA product in the reasonable expectation that the finalised product will be priced at or very close to the regulated prices set for the Openreach PIA product..<sup>2</sup>

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<sup>2</sup> MS3 agrees with the PIA costing and pricing issues identified in INCA's RoUK TAR response.

#### 4.1.2 Network adjustment cost recovery

- 19 In addition to pricing of the main product components (effectively rental charges for ducts, poles, manholes and chambers), MS3 will incur other costs and pay other charges to KCOM in the course of consuming the KPIA product. Such costs and charges include the repair of KCOM PI where required in order for it to be useable by MS3.
- 20 In the Openreach PIA framework, Ofcom has identified the concept of a Network Adjustment (NA). Ofcom has identified that it is important that the PI is repaired where it is unusable, but has also identified limitations to the NA obligation, Ofcom has determined that the following criteria must be satisfied for a network upgrade to be classified as a NA within the Openreach PIA remedy:
- ***“Is the requested adjustment necessary?”*** This criterion considers whether an alternative option exists which would render the requested adjustment unnecessary, provided this alternative allows for a reasonably equivalent outcome for the telecoms provider compared to making an adjustment.
  - ***Is the requested adjustment feasible?*** This criterion considers whether there are barriers that prevent Openreach from being able to make the required adjustment.
  - ***Does the requested adjustment improve efficiency?*** This criterion considers whether the requested adjustment promotes efficiency and is therefore consistent with the rationale for requiring Openreach to provide PIA (i.e. to unlock the efficiencies from sharing existing infrastructure).”<sup>3</sup>
- 21 MS3 acknowledges that only repairs that fall within the Ofcom NA definition for the Openreach PIA remedy, should be covered in the NA concept for the KPIA OR. Other work, such as the removal of silt, for example, should be at MS3’s own expense as it is not a permanent and necessary improvement to the KCOM PI assets.
- 22 MS3 would expect that costs for carrying out qualifying NAs should be covered by KCOM. This could be subject to a cap per kilometre or other unit, as is the case for the Openreach PIA product. KCOM’s initial position was that, as it has already completed its FTTP network, KCOM would not benefit from the adjustments and, therefore, should not contribute towards the costs of the NAs.

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<sup>3</sup> RoUK Tar V3 paragraph 5.32.

MS3, wrote to KCOM setting out the reasons why that rationale is not valid<sup>4</sup> and KCOM has now accepted that it should make some level of contribution towards NA costs.

23 KCOM's position on how much it should contribute and what cap should be applied to that contribution is, however, very far from the levels determined by Ofcom in the WFTMR and proposed for the TAR and from MS3's expectation.

24 KCOM has now issued its KPIA RO with network adjustment provisions. These were previously summarised to MS3 in the slide below.

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25 MS3 does not consider KCOM's position on network adjustments to be equitable.

26 MS3 is concerned that KCOM considers the above approach to be equitable. Beyond the monetary aspects of the proposal (which MS3 do not accept as being reasonable), KCOM is proposing that MS3 would always be responsible for carrying out NAs. It is, however, entirely feasible that some NAs cannot be practicably undertaken by MS3. For example, if an NA is required for accessing a sensitive site, then KCOM may need or want to undertake that NA itself in order to adhere to any additional safety and security requirements applicable in that location.

## 4.2 PIA non-discrimination

27 Although KCOM has completed its FTTP deployment programme and is therefore not deploying alongside the competing network operators, non-discrimination remains an important part of the KPIA product. However, despite the importance of non-discrimination in the KPIA product, MS3 does not consider that it would be proportionate to apply an Equality of Inputs (EOI) obligation on KCOM. MS3 considers that No Undue Discrimination (NUD) is the appropriate standard for the KPIA product.

### 4.2.1 Scope of NUD remedy

28 Determining specifically how the NUD condition should be imposed and how compliance should be monitored will be important and MS3 has the following proposals:

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<sup>4</sup> Letter to KCOM available on request.

- Where KCOM performs the same or very similar activities, then the KPIA product terms and performance should be the same as those experienced by KCOM. As KCOM has completed its network deployment, MS3 expects this category to mostly exclude build-related parts of the KPIA product and to include activities such as response time to network problems, notification of planned and emergency network outages (such as replacement of poles), ability to influence planned network outages (including planned pole changes and works to the PI that could disrupt customer service or the MS3 network deployment activities).
- Access to sensitive sites. MS3 understands that some sites will require specifically qualified staff and potentially escorted access to KCOM facilities. What is important is that MS3 can access those sites in a manner that puts it in the equal position to KCOM for serving the customers based at those sites.
- Provision of and access to network information. MS3 does not ask that KCOM provide fully automated access to its PI network mapping, but it is important that the data accessible to MS3 is the same data available to KCOM. Although this may be considered most directly relevant to the build phase, it has a significant influence on MS3's ability to plan and implement efficiently designed networks and thus on its costs and ability to compete with KCOM once the network is built.

#### 4.2.2 Compliance monitoring and enforcement of NUD remedy

- 29 Ofcom's current preferred approach to monitoring Openreach's compliance with its PIA NUD obligations is to require Openreach to produce an internal reference offer (IRO). MS3 does not consider that this has been an effective enforcement approach for Openreach, and it is not clear that it would be so for KCOM either.
- 30 Given that MS3 proposes that the NUD criteria for Hull should focus on post-build aspects of the product, MS3 considers that Ofcom should, instead of imposing an IRO remedy on KCOM, (which would likely require considerable resources from KCOM and (MS3 anticipates) add limited value to Ofcom's ability to enforce the KPIA NUD remedy) require KCOM and its PIA customers to identify the most critical processes of the post-build KPIA product elements and characteristics and establish the closest possible comparison between the KPIA process and KCOM's internal consumption of the same activity (but likely through different processes and systems). Those

parameters should be monitored by the newly established KCOM monitoring unit (KMU) and the measures should be shared with KPIA customers.

#### 4.2.3 KPIA SLAs

31 In addition to the NUD monitoring set out above, there are some parts of the KPIA process which are not applicable to KCOM's internal consumption of the PI (regardless, whether KCOM is still building or has completed its network build). This includes the processing of NA requests and the settlement of payments from the NA fund. It is important that SLAs are set for those activities, and that KCOM's performance is closely monitored. It remains MS3's position that it would be in KCOM's interest to frustrate the deployment of competing full-fibre networks in Hull and the KPIA framework needs to be designed to prevent that from happening.

## 5 Proposed KPIA development path

- 32 As already explained, MS3 has already invested substantially in working with KCOM to develop and trial the KPIA product. This process was kick-started with the assistance of Ofcom and government pressure on KCOM to engage constructively with potential KPIA customers, and MS3 believes it has been a constructive engagement and there is scope for positive outcomes of the two trials MS3 has engaged with. Significant issues have been identified during the trials, including absence or uncertainty regarding wayleaves to access premises in the trial areas and the KCOM trial processes (many of which are carried forward into the RO) make any form of scale deployment extremely difficult.
- 33 Although KCOM has now published its KPIA RO prior to concluding negotiations with MS3, MS3 believes that (providing that KCOM is willing to continue constructive engagement with MS3), over the period of Hull TAR consultation, it is likely that an acceptable KPIA RO can be agreed and put into operation. As part of that process, MS3 asks that Ofcom sets out clearly its expectations for the KPIA RO together with the criteria the KPIA product must satisfy in order to prevent direct Ofcom intervention in the KPIA development process (through the inclusion of stricter rules and mandatory timeframes in the final Hull TAR Statement).
- 34 MS3 is concerned that KCOM has sought Ofcom approval for the current KPIA RO version. MS3 has only had a very limited time to review it and it is taking time to get the different parts of MS3 to

review what was agreed with KCOM during the trials and compare that to what KCOM has included in the KPIA RO. MS3 is happy to work under trial conditions for the period necessary to ensure that the KPIA RO is fit for purpose when it is implemented, and MS3 is not aware of any other CPs in Hull looking to use the KPIA in the short term.