SKY'S RESPONSE TO OFCOM'S FIXED ACCESS MARKET REVIEW CONSULTATION

1. Summary

1.1 This submission constitutes the response of British Sky Broadcasting Limited ("Sky") to Ofcom's consultation on the fixed access market review dated 3 July 2013[1] (the "FAMR Consultation").

1.2 Sky recognises the continuing need for LLU/WLR regulation to support competition and innovation in the provision of broadband and talk services to consumers in the UK. However, Sky is concerned about Ofcom's proposal to remove all cost orientation obligations from charge controlled services. Sky shares Ofcom's concerns that there is limited competitive constraint in LLU Time Related Charges ("TRCs") and Special Fault Investigations ("SFIs"), but considers that it would be preferable for Ofcom to set charge controls for TRCs and SFIs to incentivise BT to improve its processes and systems and in order to restrict its ability to impose excessive prices on its customers.

1.3 Over and above the regulation of LLU which supports current generation broadband services, Sky also considers that it is essential for Ofcom to create the right framework for communications providers ("CPs") to invest in superfast broadband ("SFBB")/next generation access ("NGA") services. This is important to deliver greater competition in the provision of SFBB services which will benefit consumers through better products and lower prices. Sky needs certainty of costs as well as product developments in order to promote fully SFBB, and greater regulatory certainty to enable investment in competing fibre products deeper in the network (for example, via Sub-Loop Unbundling or unbundled fibre to the cabinet ("UFTTC")).

1.4 Unfortunately, Sky's incentives to invest in SFBB are currently constrained by limitations in BT's wholesale product – Generic Ethernet Access ("GEA") - and uncertainty in the future level of BT's wholesale GEA pricing. These issues, together with limited consumer demand, have to date held back the take-up of SFBB services by Sky. Ofcom has an important role to play in creating the right environment to promote further investment.

1.5 To date, and as signalled in the FAMR Consultation, Ofcom proposes to maintain light touch fibre regulation allowing BT pricing flexibility. However, as take up of SFBB increases in the UK (as anticipated by Ofcom over the three year market review period) it will likely become appropriate for Ofcom to re-assess the suite of NGA regulatory remedies as the constraint on SFBB by current generation access ("CGA") broadband may diminish.

1.6 In relation to GEA pricing, Sky is concerned with the risk that BT may attempt to introduce 'extra' charges that are not reflective of an increase in BT's underlying costs, in particular "throughput charging" and the impact this will have on Sky's incentive to invest. Ofcom should consider this issue as part of the FAMR. Sky also notes Ofcom's proposal to introduce ex ante margin squeeze guidance for GEA and has some concerns regarding the approach proposed by Ofcom, in particular its proposed departure from standard

[1] 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: http://stakeholders.ofcom.org.uk/binaries/consultations/fixed-access-market-reviews/summary/fixed-access-markets.pdf

competition law principles, which will not provide the necessary degree of certainty that is required to ensure that GEA pricing is at the right level.

1.7 Sky considers it positive that Ofcom has sought to address the issue of Openreach's service performance and is seeking to regulate BT to incentivise improved performance through the introduction of the minimum service performance SMP condition. However, Sky does have significant concerns regarding Ofcom's failure to assess whether Openreach's current service level commitments and associated compensation are fair and reasonable; reluctance to set service level targets; and presumption that enhanced performance is likely to come at additional cost to Openreach's customers. We address this further in a separate paper.

1.8 The remainder of this response is structured as follows:

- **Section 2**: The continued regulation of LLU/WLR with additional pricing safeguards is necessary.

- **Section 3**: Greater certainty of costs and product enhancements will create a better investment environment for fibre:

  A. Certainty of GEA charges;
  B. The need to ensure an excellent customer experience; and
  C. Strengthened intervention is required to promote investment in developing alternatives to GEA.

- **Section 4**: Other remedies.

2. The continued regulation of LLU/WLR with additional pricing safeguards is necessary

2.1 As noted by Ofcom, the regulation of LLU has been a success story.[2] There are now over 9 million unbundled lines in the UK with LLU coverage extending to over 93% of UK premises. This has enabled competition to thrive, offering consumers greater choice and more affordable packages of broadband and telephony services. In particular, LLU provides CPs with greater control of their own communications services, which enables differentiation in terms of the products and services offered as well as pricing. This has allowed Sky to invest and grow its broadband and telephony operations and provide innovative and competitive broadband and telephony services to over 4 million customers.

A continuing need for the regulation of LLU

2.2 This success is underpinned by the regulation of BT pursuant to both ex ante SMP regulation as well as the BT Undertakings.[3] The level of investment required to replicate BT's copper network is a significant barrier to entry and without regulated wholesale access to BT's network the development of competing communications services would have been hindered. Furthermore, the removal of LLU regulation, as noted by Ofcom, could result in BT withdrawing the product or otherwise changing it to the detriment of Sky, other LLU CPs and ultimately consumers.[4]

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2 FAMR Consultation, paragraphs 12.10-12.16.

3 Undertakings given to Ofcom by BT pursuant to the Enterprise Act 2002 dated 22 September 2005. See further section 2 of the FAMR Consultation which outlines the regulatory framework where Ofcom sets out its preference to intervene upstream and provide wholesale access to certain elements of the value chain to allow competing services downstream (e.g., the requirement on BT to provide LLU to allow competing copper based voice and broadband services at the retail level and the requirement on BT to provide VULA to allow competing SFBB services at the retail level).

4 FAMR Consultation, paragraph 12.21.

2.3 Sky considers therefore that the requirement for BT to provide LLU services (including ancillary services)[5] remains justified and appropriate.[6] This continued regulation will provide Sky with greater certainty in terms of maintaining its current investment in LLU[7], any future exchange unbundling as well as its fibre development plans.[8]

The need for cost orientation

2.4 The charge control is an important part of the overall regulatory regime in order to remove the risk of excessive pricing. Sky agrees with Ofcom's proposal to continue to impose an LLU charge control in order to address this risk.[9]

2.5 However, Sky has concerns regarding Ofcom's proposed removal of the safeguard cost orientation remedy[10] in relation to charge controlled services. Ofcom's provisional view is that the imposition of an additional cost orientation obligation would be unnecessary and disproportionate because an appropriately designed charge control would be sufficient by itself to constrain prices whilst at the same time allowing the recovery of efficiently incurred costs, thereby addressing Ofcom's competition concerns without the need for the imposition of any additional obligations on BT. Sky has the following comments:

2.5.1 The imposition of a charge control alone may not prevent BT from setting excessive pricing for certain products within a charge control basket. As Sky has previously pointed out to Ofcom, the proposal to remove cost orientation obligations has no regard to the fact that Ofcom previously ruled that a broadly specified charge control is <u>not</u> sufficient to protect customers from overcharging by BT;[11]

2.5.2 Sky considers that the use of sub-caps in the charge control will not provide the necessary protection that Ofcom envisages. Sub caps are designed to ensure prices do not rise in nominal terms, but they will not prevent the prices of individual products becoming disorientated from cost in cases where there is a broad charge control basket. BT has flexibility to set high prices for services principally used by its downstream rivals and low prices for those used by BT Retail, while complying with the overall charge cap (e.g. within the co-mingling basket, which includes a

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5 FAMR Consultation, paragraph 12.22.

6 Sky considers that the market conditions for current generation broadband have not changed sufficiently to warrant a significant change to the existing set of LLU remedies. There is no evidence of competition developing upstream and the availability of LLU continues to provide the basis for the development of substantial downstream competition.

7 FAMR Consultation, paragraph 12.19.

8 Today's wholesale fibre products are for the most part based on fibre-to the-cabinet ("FTTC") technology and require a copper line to the home which can be provided using LLU or WLR.

9 FAMR Consultation, paragraph 12.42. Sky provides detailed comments in relation to the proposed LLU/WLR Charge Control in a separate response.

10 Please note that where Sky refers to "cost orientation" it is referring to the remedy that Ofcom refers to as "Basis of Charges" obligation in the FAMR Consultation.

11 See Sky's response to Ofcom's Business Connectivity Market Review and Leased Line Charge Control Consultations of October 2012 (the "BCMR and LLCC response"). See also the Alix Partners report, commissioned by the UK Competitive Telecommunications Association (*Economic Analysis of Ofcom's Leased Line Charge Control* – Final Report, Alix Partners, August 30th 2012), which indicated that even with sub-caps and sub-baskets in place there is the scope for over-charging to take place (paragraph 27 of the BCMR and LLCC response). Sky also refers to Ofcom's determination in relation to the disputes between each of Sky (& Ors) and BT regarding BT's charges for ethernet services dated 20 December 2012 where Ofcom determined that BT's pricing was not cost orientated despite the existence of a charge control.

variety of services purchased by downstream BT divisions as well as competing /rival CPs).

2.5.3 Cost orientation can also provide a safeguard to cover any interim period between the end of one charge control and the beginning of the next charge control.[12] In previous instances, BT has provided voluntary commitments to cover the period where no charge control was in operation.[13] These commitments maintained a level of pricing which was significantly above the prices that would have been in effect had the new charge controls been imposed on time.[14] Whilst a cost orientation obligation is not perfect, an appropriately defined cost orientation condition could provide some protection against the risk of excessive prices for the core rental services.

2.6 For these reasons, Ofcom should retain the cost orientation obligation in addition to the charge control.

Time Related Charges ("TRCs") and Special Fault Investigations ("SFIs")

2.7 In relation to other ancillary services outside the scope of the proposed LLU charge control, Sky has concerns in relation to Ofcom's proposal to impose a cost orientation obligation on the provision of LLU TRCs and SFIs.[15]

2.8 Sky considers that it has very little option other than to request that an Openreach engineer carry out initial fault investigations as it may be uneconomic to use non-Openreach engineers if the fault is found to be on Openreach's network.[16] It is therefore more efficient to request that Openreach carry out the necessary line checks and associated engineering activity. Consequently, there is almost no competitive constraint placed on BT in terms of the provision of TRCs or SFIs.

2.9 Accordingly, given this lack of competition, BT has the incentive and ability to price the services above the competitive level, which could result in excessive pricing. Whilst we agree with Ofcom's proposal to impose some form of pricing protection for these services, we consider that Ofcom should go further than simply proposing to impose a cost

12 There was a 12 month period between the expiry of the previous LLU/WLR charge control on 31 March 2011 and the beginning of the current LLU/WLR charge control on 1 April 2012 following the previous Wholesale Local Access Market Review ("WLAMR" - see Ofcom statement on the review of the wholesale local access market dated 7 October 2010).

13 See, for example, BT's voluntary commitments in relation to LLU and WLR charges dated 1 December 2010 http://stakeholders.ofcom.org.uk/binaries/consultations/llcc/statement/charges

14 The MPF rental price under the 1 December 2010 voluntary commitment covering the period 1 April 2011 to 31 March 2012 was £91.50 whereas the MPF rental at the start of the new charge control on 1 April 2012 was £87.41. In the LLU Charge Control consultation, Ofcom noted that the charge controlled price would have been £90 for the period covered by the voluntary commitment thereby resulting in a £1.50 price differential per MPF line in favour of BT. Based on the 2012 Regulated Financial Statements this would amount to £7.5m in extra revenue for BT based on 5m MPF lines over that period. It should also be noted that the current charge control did not commence in April 2012 and therefore the overcharging continued for an even longer period resulting in further benefit to BT.

15 FAMR Consultation, paragraph 12.79.

16 It would be more efficient to allow non-Openreach engineers access to the Openreach Network but presently, non-Openreach engineers are not permitted to carry out any work on Openreach's network.

orientation obligation and instead should impose a price control as CPs have little choice but to purchase these services from BT.[17]

2.10 Sky considers that the imposition of the cost orientation obligation, as proposed by Ofcom, which is based on BT's direct and indirect costs (including costs such as travelling time, service centre costs and training, etc) supports the reimbursement of BT's current costs without any assessment as to whether or not such costs are justified and therefore does nothing to incentivise BT to improve its efficiency in resourcing. Were Ofcom to set a charge control for TRCs and SFIs, BT would be incentivised to improve its processes and systems as well as restrict its ability to impose excessive prices on its customers.[18]

WLR pricing

2.11 Separately, Ofcom proposes, to the extent other calling and network features provided by BT are reasonably necessary in order to provide WLR services, to remove the current cost orientation obligation and require BT to provide them on fair and reasonable terms including charges.[19] Ofcom considers that this is a more appropriate way of ensuring prices for calling and network features are not excessive and sets out guidance as to how it might assess whether or not charges were fair and reasonable.

2.12 Sky continues to require voicemail, caller ID and other call features from BT to serve its customers and there is no alternative source of supply.[20] These features form an important part of Sky's telephony service offering and are valued by Sky's customers. Granting BT additional pricing flexibility in relation to these services risks exposing Sky to increased costs which will be detrimental to competition. Given the lack of alternative supply in the provision of these services, Sky does not consider that Ofcom's proposed fair and reasonable charging obligation will provide Sky with sufficient protection. Accordingly, Sky considers that Ofcom should maintain the current cost orientation obligation.

3. Greater certainty of costs and product enhancements will create a better investment environment for fibre

3.1 In the FAMR Consultation, Ofcom recognises the growing importance of SFBB services and considers that the number of SFBB subscribers is likely to grow significantly over the market review period.[21] Indeed, BT claims to be signing up 250,000 SFBB subscribers every quarter.[22]

3.2 The UK Government has also identified SFBB as a *"key plank for our digital infrastructure"* and sets as the first of the DCMS' strategic priorities to *"establish world-class connectivity*

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17 Sky notes that in the event that Ofcom decides to impose a cost orientation obligation on BT in relation to TRCs and SFIs it has proposed to use a FAC approach rather than a FAC+ approach. Sky considers that this is positive but that Ofcom could go further and move towards a LRIC approach in line with its proposals in relation to key migration services outlined in the LLU/WLR charge control consultation. Sky considers that TRCs and SFIs involve engineering activity and should be treated in the same way as the closely related migration services which also involve engineer activity and therefore Ofcom should adopt a consistent approach and apply the LRIC cost standard.

18 Sky considers that the arguments set out above apply equally for WLR, because, as Ofcom rightly points out, TRCs do not differ depending on whether they are purchased for LLU or WLR. Accordingly, Sky requests that Ofcom imposes a charge control for WLR TRCs.

19 FAMR Consultation, paragraph 14.73.

20 [CONFIDENTIAL]

21 FAMR Consultation, paragraph 11.10-11.19.

22 http://www.btplc.com/news/articles/showarticle.cfm?ArticleID=5e7e4f67-e594-44e2-986a-bfcc825889f2.

throughout the UK".[23] In order to achieve this, Ofcom will need to monitor developments in SFBB carefully over the market review period to balance BT's investment incentives against regulatory intervention in order to ensure that BT and CPs are all incentivised to invest in NGA services, thereby affording consumers more choice, better quality products/service and lower prices.

3.3 Specifically, Sky considers that in order to deliver increased investment in SFBB, Ofcom needs to create an environment that promotes certainty of cost, excellent service quality from Openreach and, ultimately, the ability to make a reasonable return on investment through customer growth.[24] As with LLU, this will enable Sky to provide a competitive and compelling SFBB proposition and more choice to its customers. To achieve this, Sky considers that Ofcom must address Sky's concerns regarding: (a) elements of BT's GEA charges; (b) deficiencies in the GEA product which adversely impact the Sky customer experience, as well as the switching process; and (c) investment incentives to deliver alternative competing products to GEA, and these are addressed in more detail below.

3 (A) Certainty of GEA charges

3.4 To date, Sky has purchased GEA in limited volume[25] from BT and this is, in part, caused by the unattractive commercial terms on which GEA is offered to Sky and uncertainty regarding BT's charges. Sky is concerned with the risk of a proliferation of 'extra' charges that are not reflective of an increase in BT's underlying costs and are being imposed simply because there is an opportunity to do so. The result of such additional charges will be higher costs to Sky, which will harm investment and growth in SFBB. Examples include throughput charging, the high cost of GEA CP to CP migrations, and minimum contract lengths (which require Sky to pay early termination charges to BT if the consumer wishes to terminate before the end of the initial 12 month term). These, along with Ofcom's proposal to regulate VULA margins, are discussed in more detail below.

Throughput charging

3.5 We have explained above that in order to create a better investment environment for SFBB services, a certain level of predictability of costs is required. Ofcom has not addressed the possible introduction by BT of throughput charging in the FAMR Consultation. These charges could have a detrimental impact on Sky's investment in SFBB over the next three year market review period.

3.6 A 'throughput charge' is a usage fee imposed on a communications provider by its service provider, which is based on the amount of data usage the communications provider's customer base has used (usually, on a monthly basis). Throughput charging is currently implemented by BT Wholesale in relation to its ADSL IPStream service, which Sky uses as the basis for its off-net broadband product (called "Connect").

3.7 Whilst throughput charging is not currently in place for GEA, Openreach has previously said that it is a concept that it may implement at some stage.[26] Sky is concerned if these

23 See the DCMS paper, "Connectivity, Content and Consumers: Britain's digital platform for growth", July 2013.

24 In relation to LLU, at paragraph 3.135 of the FAMR Consultation, Ofcom comments that *"[a]n LLU operator has to invest in electronic equipment to be installed at BT's exchange. Since the investment required to support LLU is not negligible, a CP undertakes it only if there are expectations of acquiring a minimum number of customers."* The same applies in relation to fibre.

25 Sky has only recently launched a significant advertising campaign regarding the roll-out of fibre. See the Sky Fibre Unlimited advertising campaign, which began in September 2013.

26 See, for example, the NGA Update slides presented by Openreach at the NGA Trialist Workshop Group in November 2009. Openreach indicates that throughput charges would start *"no earlier than April 2011"* and Sky notes that these have not been introduced for GEA to date.

charges are introduced it will not be able to avoid them. This therefore gives rise to considerable cost uncertainty.[27] As Openreach is not price controlled on GEA, it would be able to introduce new charges with relative freedom.[28] The impact of such charges would be greater costs to Sky which could impact Sky's SFBB product offering (in terms of quality and choice of product) as well as Sky's retail packaging and offers.

3.8 Ofcom states in the FAMR Consultation that Virtual Unbundled Local Access ("VULA") was introduced in the WLAMR as the remedy by which BT would provide access to its NGA network (via Fibre to the Cabinet ("FTTC") or Fibre to the premises ("FTTP")) with the intention "*that it would, as far as possible, replicate many of the features of a physical access remedy, such as LLU*".[29] Sky considers that the introduction of a charge based on traffic volumes would not be consistent with Ofcom's intention as a data usage charge would clearly not be consistent with physical access remedies where CPs rent access to the line and do not pay any additional usage charges.

3.9 Separately, Sky also notes that BT will be required to provide GEA on fair, reasonable terms, conditions and **charges** and that this may assist in providing Sky with greater certainty and provide some protection against throughput charges, especially when combined with the proposed VULA margin regulation guidance.

3.10 However, in order to provide greater certainty, Sky considers that Ofcom should address the issue of throughput charging in its FAMR statement by: (i) stating whether or not, in the event that throughput charging was introduced by BT, GEA would be consistent with the VULA characteristics; and (ii) providing a clear indication that it would carefully assess any throughput charges against BT's SMP obligation to provide GEA on fair and reasonable charges.

3.11 A failure to address this issue will expose Sky to significant uncertainty in GEA costs given the expected growth in data usage by our customers. The latest figures indicate that end-user data usage has already increased significantly[30] and is expected to continue to do so.[31]

The high cost of GEA CP to CP migrations

3.12 Ofcom recognises in the FAMR Consultation that there is a *"clear case"* for setting a charge control on the GEA to GEA migration charge and highlights that low switching costs are in the consumers' interests as they *"help strengthen retail competition which tends to drive down prices and drive up quality."*[32] Ofcom also highlighted that *"there is some tension"*

[27] We note that BT may, in a number of years' time, need to invest to provide additional capacity due to increased data usage by consumers. This cost should be shared across all GEA customers rather than via throughput charges to the extent that cost recovery is required at all, given that BT already receives a high margin on GEA.

[28] Sky notes that BT has a regulatory obligation to provide VULA on the basis of fair and reasonable terms, conditions and charges, no undue discrimination and EOI and so, in theory, Ofcom could take enforcement action if this obligation is not met.

[29] FAMR Consultation, paragraph 11.24.

[30] Sky notes that in the Business Connectivity Market Review ("BCMR"), Ofcom comments that the demand for leased lines bandwidth has increased steadily in the last few years and cites as key drivers the *"[a]doption of remotely hosted computing applications (often known as 'cloud computing'), growing consumption of video content, and the rapid growth of e-commerce and of internet applications"*. See, for example, paragraph 1.5 of Ofcom's final statement on the BCMR: http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/final-statement/.

[31] As an alternative, Ofcom could also explore whether BT might be willing to give a voluntary commitment not to introduce throughput charging over the next market review period in order to create an environment that will encourage the take up of SFBB services by its customers.

[32] FAMR Consultation, paragraphs 11.149 and 11.158.

between giving BT pricing flexibility on VULA, which has led to prices which are too high (in the context of migration charges), and low switching costs.[33]

3.13 This issue was raised by Sky in its response to Ofcom's call for inputs in relation to the FAMR[34] where we stated that installation and migration charges should be regulated by Ofcom. It is positive that Ofcom proposes to regulate the GEA to GEA migration charge and adopt an incremental costs approach in setting the price. Sky also agrees with Ofcom's proposal not to rely only upon BT's GEA to GEA costs data, using other comparators instead, and Ofcom's decision to ignore systems development and sales costs.

3.14 Sky notes that Ofcom is proposing to control the level of the GEA migration charge by setting a charge in the range of £10 - £15 and that this will take the form of a one-off reduction at the start of the charge control period. Whilst Sky supports Ofcom's proposal to impose a charge control, we consider the proposed £10-15 range to be too high. Ofcom says that it considers the charge control should reflect the incremental cost of this service but does not provide sufficient justification for the range it has proposed.

3.15 The migration process requires no physical intervention, is straightforward, completely automated and is undertaken within seconds. In order to complete the migration of an existing GEA end-user to an alternative GEA provider, Openreach simply changes a configuration setting on its exchange equipment. The change has the effect of routing the data traffic for the specific consumer onto the new provider's network. There is no physical network intervention required for Openreach to undertake and therefore the associated cost should reflect this.

3.16 Ofcom explains the difficulties it has faced as a result of lack of data and suggests using benchmark services which they consider to be similar to GEA migrations, such as the WLR transfer cost and IPstream migration charges, but then suggests a range above these levels.[35]

3.17 Sky considers that the GEA migration fee should be lower than these benchmark services. Ofcom observes in the FAMR Consultation that the WLR-WLR migration costs are approximately £8-9 but comments that a *"WLR transfer does not involve network re-configuration/re-routing, so it does not provide an indication of the costs of such activity on Openreach systems"*.[36] Sky does not believe that physical network re-configuration/re-routing work is required in the GEA case and therefore this is not likely to result in greater costs for BT.[37]

3.18 Sky also notes that Ofcom's estimate of WLR transfer costs is based on distributed long run incremental costs ("DLRIC") which includes an allocation of common costs. Moreover, given that this process is largely automated, we would anticipate that the majority of its

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33 FAMR Consultation, paragraph 11.159.

34 Ofcom Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN 30 – Call for inputs – 9 November 2012 and Sky's response dated 21 December 2012.

35 In relation to the IPStream migration charge Sky notes that this charge has been maintained at £11 since 2004 and that it has been subject to a charge control since 2011. Despite this, Sky would have expected the costs of providing this service to reduce over time given anticipated efficiency savings over the 9 year period. Sky therefore considers that Ofcom should exercise caution in relying on the IPStream migration charge as a benchmark.

36 FAMR Consultation, paragraph 11.168.

37 Unfortunately, Sky does not have access to BT's cost figures and the relevant sections have been redacted from the FAMR Consultation. However, Sky notes that some cost data used by Ofcom for comparison includes BT's common costs, which will lead to an overstated price.

costs are not incremental. Therefore, if Ofcom is to adopt an incremental cost only approach it can be expected that the GEA migration charge would be significantly lower than this estimate of WLR transfer costs. Accordingly, Sky considers that, given the WLR transfer process is a reasonable proxy for the GEA migration process, it is appropriate for Ofcom to use the estimate of the WLR transfer cost as a benchmark. However, as this cost includes an element of common costs, we consider that it should represent the maximum GEA migration charge and therefore Ofcom should set the GEA migration charge below the WLR transfer cost.

Minimum contract duration

3.19 Ofcom has proposed to intervene to reduce the minimum GEA rental contract period for fibre to fibre switches from twelve months to one month. Sky welcomes this but also considers that the one month limit should apply to new fibre connections.[38]

3.20 Currently, when a Sky customer signs up to obtain SFBB, Sky must purchase GEA rental for that customer for a minimum of twelve months irrespective of the time that the customer chooses to maintain its SFBB service with Sky and Sky must absorb this cost (subject to any early termination fees). Despite requests to BT for the minimum GEA rental term to be brought into line with LLU, the minimum term remains at 12 months and Ofcom has not proposed to intervene to address this.

3.21 Sky disagrees with Ofcom's suggestion that *"[h]aving a longer minimum term may have a large impact on allowing BT to have lower connection or rental charges than it otherwise would, particularly if it allows BT to recover any wholesale connection costs over a longer period (rather than in an upfront charge)"*.[39] There are no upfront costs, which are not already paid for separately, that justify this approach. CPs pay a separate installation charge of £92 (and £47 for wires-only) which should cover BT's connection costs.

3.22 Sky considers that the 12 month minimum term increases its wholesale costs and therefore negatively impacts the economics of offering SFBB services to its customers. Whilst Ofcom notes in the FAMR Consultation that the 12 month minimum term for fibre to fibre migrations acts as a barrier to switching,[40] Sky considers the same barrier applies to the 12 month minimum term for new fibre connections. Ofcom should intervene to limit BT's flexibility to have a 12 month initial minimum contract term for new connections and limit this to one month.

Regulation of the VULA margin

3.23 BT is required to provide VULA services on fair and reasonable terms, conditions and charges.[41] In the FAMR Consultation, Ofcom proposes to publish guidance on *"the margin between the wholesale price of VULA and downstream prices that is consistent with the proposed obligation for BT to offer fair and reasonable terms, conditions and charges"*.[42] Ofcom is proposing that charges for VULA services will not be considered fair and reasonable unless the VULA margin conforms to Ofcom's proposed guidance.

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38 FAMR Consultation, paragraph 11.208.

39 FAMR Consultation, paragraph 11.203.

40 FAMR Consultation, paragraph 11.207.

41 SMP Condition FAA11.2. Sky notes that Ofcom proposes to maintain this requirement as the new SMP Condition 1.2.

42 FAMR Consultation, paragraph 11.404.

The test should be based on an EEO approach

3.24 Ofcom considers that the appropriate approach to measuring a *"suitable"*[43] or *"appropriate"* [44]VULA margin for this purpose should be to use an 'adjusted Equally Efficient Operator ("EEO")' standard. This would be implemented by Ofcom issuing guidance describing (among other things) the characteristics of a hypothetical *"benchmark operator" that has "slightly higher costs or some other slight commercial disadvantage relative to BT"*[45] , a draft of which is included in the Consultation. The guidance would cover matters such as the benchmark operator's scope of activities, its costs and revenues, and the resulting adjustments to margins determined using an EEO standard that would be required.

3.25 The EEO standard is the normal approach used for assessing margin squeezes under competition law. The fundamental economic underpinning of this standard is that it facilitates competition from retailers that are as efficient as a vertically integrated operator's downstream business, thereby supporting efficient downstream competition.

3.26 The normal reason for preferring a "Reasonably Efficient Operator" ("REO") or adjusted EEO approach to the measurement of margins is where the policy objective is to introduce competition into markets dominated by incumbent firms with substantial economies of scale or scope which cannot be matched or compensated for by potential entrants, even over a considerable period of time. In such circumstances setting margins based on an EEO approach would be unlikely to achieve the policy objective, as entry is unlikely to be profitable (and therefore unlikely to occur).

3.27 As Ofcom recognises, this is unlikely to be the case in relation to the provision of VULA-based SFBB services. In particular, as recognised by Ofcom, the cost disadvantages against BT, or other commercial disadvantages, of the most likely significant competitors to BT who would rely on VULA services to compete, such as Sky and TalkTalk, are likely to be *"slight"*[46]. Concomitantly, such firms may have their own advantages which can be deployed to market their SFBB services. In this regard, Sky notes the views of the Competition Appeal Tribunal, which stated:

> *"Competition between operators with … inherent differences is never going to be symmetrical, and each is obliged to play to its own particular advantages. Effective competition does not require such symmetry."*[47]

3.28 Accordingly, there is no compelling reason for departing from the normal, competition law based EEO standard for measuring the appropriate VULA margin. On the contrary, there are good reasons for preferring this approach.

3.29 Ofcom's proposed approach to the regulation of VULA margins relies on BT having an incentive to price appropriately in order to avoid complaints by other CPs that those margins do not comply with its SMP obligations. For this approach to work effectively, (a) both BT and other CPs must have a good understanding of how Ofcom would determine a complaint, if such a complaint was made, and (b) BT should be able to monitor the relevant costs and revenues.

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43 FAMR Consultation, footnote 428.

44 FAMR Consultation, paragraph 11.254.

45 FAMR Consultation, paragraph 11.290.

46 FAMR Consultation, paragraph 11.424.

47 Paragraph 810, British Sky Broadcasting Limited & ors v Ofcom – Cases No: 1156 – 1159/8/3/10 [2012] CAT 20.

3.30 Sky considers that the most appropriate and effective approach to this issue would be for Ofcom to:

(a) issue a statement that sets out its view that VULA margins would not be considered fair and reasonable unless they meet an EEO-based test; and

(b) publish guidance for the purpose of applying Ofcom's ex ante test of how it would approach the estimation of VULA margins under that approach.

3.31 The key benefit of aligning Ofcom's approach with that taken in competition law is that it would obviate the need for Ofcom to produce its proposed additional guidance explaining the adjustments to the competition law test that Ofcom would make in the event of a complaint about BT's VULA margins.

3.32 Instead, BT and other CPs could rely on a combination of Ofcom's guidance and a substantial, well understood body of guidance on issues related to the application of the test, derived from many years of competition law jurisprudence in relation to margin squeezes. Indeed, Sky notes that, even at this stage, Ofcom finds it useful to refer CPs to competition case-law on margin squeeze. At footnote 576 of the FAMR Consultation, Ofcom states:

> *"Both BT and TalkTalk raised the issue of the relevance of margins on individual products and of margins on portfolios of products. Competition law provides guidance on these matters."*

3.33 By contrast, Ofcom's proposed approach requires it to: (i) develop a model of a hypothetical "benchmark operator"; and (ii) set out an explanation of its approach in meaningful guidance. In particular:

- it would require Ofcom to make numerous, difficult judgements on a wide range of complex issues - such as the scope of the hypothetical operator's business, subscriber breakdowns, customer lifetimes etc.;
- it would introduce a significant, unnecessary cost into regulation at a time when Ofcom's resources could be better deployed elsewhere; and
- unless Ofcom's guidance on a significant range of issues is detailed and specific, it will generate uncertainty for both BT and other CPs, with the only way of resolving that uncertainty being via a complaint.

3.34 In relation to the last of these issues, this point is exemplified by the draft guidance included in the FAMR Consultation. Whilst Sky recognises that this is work in progress, it would require substantial further elaboration before it could provide a reasonable level of understanding of how Ofcom would implement its proposed approach in the event of a subsequent complaint.

3.35 The approach proposed above would have the further benefit that it would rely entirely on information (for example on costs, revenues and charges) that is available to BT, obviating the need for BT to make estimates of the impact of the adjustments proposed by Ofcom.

Key issues for Ofcom's assessment

3.36 Whichever approach is adopted by Ofcom, its analysis of VULA margins will need to address two important issues: (a) the treatment of BT's sports channels, and (b) discounts on wholesale services.

The treatment of BT's sports channels

3.37 A key element of BT's strategy in relation to its SFBB services is to bundle premium sports content with those services for no additional charge. Accordingly, the cost of BT's sports channels must be included in any assessment of VULA margins. To do otherwise would risk facilitating the types of distortions to competition in the provision of SFBB services that Ofcom's proposal seeks to address.

3.38 The treatment of the cost to BT Retail of BT's sports channels will, therefore, be a key issue in both the assessment of TalkTalk's margin squeeze complaint, and Ofcom's proposed approach to assessment of the reasonableness of VULA margins.

3.39 The normal approach to this issue is that BT Retail should be assumed to pay the same wholesale charges for BT Sport channels that are paid by other operators.

3.40 Currently, BT has reached only one wholesale agreement for supply of its sports channels, with Virgin Media. It would not, however, be appropriate to rely only on the terms of supply offered to Virgin Media for BT's sports channels. This deal facilitates Virgin Media including the BT Sport channels in its basic pay TV packages. This is not how BT retails the BT Sport channels on Sky's DTH satellite platform, where the channels are retailed as premium channels, [CONFIDENTIAL].

3.41 Given the current absence of an observable wholesale price for BT Sport channels when supplied on an à la carte basis (i.e. not sold as part of a broader package of basic channels with guaranteed distribution), the question therefore arises as to what charge might be considered appropriate to include in the VULA margin test. Such a situation was (in principle[48]) addressed in the OFT's decision concluding its investigation into margin squeeze complaints against Sky in 2002. In that case, the OFT considered the appropriate charge to impute for a number of Sky basic channels that were not retailed by third parties. The approach adopted by the OFT was to use the charges that *"an independent distributor could expect to pay"*[49]. The OFT indicated that there were two potential bases for such an expectation: rate card charges, or charges proposed for particular channels. The OFT stated:

> *"Where no price can be observed, the price as per the extant ratecard has been adopted, until such time that an alternative price was offered for the given channel."*[50]

3.42 Accordingly, in the absence of a rate card for BT's sports channels, Sky considers that it would be appropriate and reasonable to base imputed charges for BT Sport on the per-subscriber rates offered to third parties such as Sky and TalkTalk.

3.43 A further benchmark that could be used is the implicit wholesale charge for BT's sports channels in relation to provision of those channels on a standalone basis by BT to subscribers on Sky's DTH satellite platform, where the channels are retailed by BT for £10 per month (in standard definition, excluding VAT), and £12.50 per month (in high definition,

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48 While the situation is not directly analogous, Sky considers that the principle embodied in the test, of basing charges what an independent distributor could expect to pay, is applicable.

49 Paragraph 446, Decision of the Director General of Fair Trading, BSkyB investigation: alleged infringement of the Chapter II prohibition, 17 December 2002.

50 Paragraph 443. *Ibid*. See also paragraph 448, which addressed imputed charges for two Sky channels that were not retailed by third parties. This stated:

"*During the period investigated, no distributor purchased either channel, and as such no price could be observed with regard to these channels. Absent an observed price, DisCo is charged according to the ratecard until 1 January 2001. After this date, [less than 10p is charged] with respect to these channels,* ***consistent with the terms offered to Telewest***." *(Emphasis added.)*

excluding VAT). This could be estimated by deducting a reasonable attribution of retail costs from such charges.

Discounts

3.44 An issue that may potentially arise in relation to VULA margins is whether BT Retail, as a significant purchaser of inputs from other parts of BT (such as BT Wholesale and BT Openreach), should be entitled to receive volume-related discounts.

3.45 The approach adopted by the OFT in 2002 was to base imputed charges for the focal products of the test on charges actually paid by third parties[51]. The OFT stated:

> *"the Director has assessed DisCo's profitability when it 'pays' the prices paid by each of its principal third party distributors, namely ITV Digital, NTL and Telewest for the relevant period".*[52]

3.46 Accordingly, the OFT undertook separate margin squeeze tests for each of the third parties to whom Sky supplied its premium channels, using the wholesale charges actually paid by each of them.

3.47 This approach means that the supplier is permitted to benefit from any discounts received by third party retailers.[53] It is consistent with the approach taken by Ofcom in the Wholesale Calls margin squeeze decision, taken under the Competition Act, where BT Retail was permitted to benefit from discounts principally because discounts were available to, and in practice achieved by, competing downstream operators.[54]

3 (B) The need to ensure an excellent customer experience

3.48 Sky places its customers at the core of its business operations and we seek to ensure that we do all that we can to maximise service delivery. A fundamental aspect of this is the need to ensure an excellent customer experience for our existing customers upgrading to SFBB and for new customers choosing SFBB when switching to or joining Sky. In order to ensure the growth of SFBB and the development of competing SFBB services, it is essential for Ofcom to address the current deficiencies in the supply of GEA which are negatively impacting the user experience of Sky's SFBB customers. In particular, Sky has concerns regarding BT's development of the GEA wires-only product and access to network termination equipment ("NTE").

Inadequacy of the GEA wires-only product

3.49 In the FAMR Consultation, Ofcom notes that wires-only (and alternative installation arrangements) have taken some time to implement but that some progress has been made. However, Ofcom also states that it would be concerned if commercial implementation was extended beyond the end of 2013.[55] As well as addressing issues regarding the timing of the launch of BT's wires-only GEA product, Ofcom must also examine issues regarding the quality of delivery of the wires-only product.

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51 This approach should be applied to all products included in the test supplied to third parties in which BT has significant market power.

52 Paragraph 442, *Ibid*. See also the results of the test set out at paragraph 539, which are specified for each of ITV Digital, NTL and Telewest. *Ibid*.

53 The OFT rejected Sky's position that Sky's notional retail business should be permitted to benefit from discounts that a scale retailer might be expected to receive, but were not achieved by other retailers. See Section 5.1.3 of the OFT's decision, op. cit.

54 See paragraph 6.317 of 'Complaint from Thus Plc and Gamma Telecom Limited against BT about alleged margin squeeze in wholesale call pricing'. Ofcom case reference: CW/00988/06/08.

55 FAMR Consultation, paragraph 11.75.

3.50 On the basis of the current wires-only trial, the lead time for a wires-only install (which simply involves a wiring change in the cabinet) is a minimum[56] of 9 working days, whereas by comparison an Openreach full install (requiring both a visit to the cabinet and the customer's premises) is a minimum of 5 working days. The lead times for these services should, at the very least, be identical (if not shorter for the wires-only install as no home visit is required). Despite raising this with BT there has been no justification for the differential in lead times.

3.51 An essential aspect of the wires-only install is that it obviates the need for an Openreach engineer to visit the customer's home, thereby providing the customer with a more flexible and better SFBB installation experience. However, if the customer needs to wait a significant period of time before the SFBB service can be switched on then this benefit will be lost. It is perverse for an engineer install, which requires a home visit, to be quicker than a wires-only install. Sky notes that an Openreach engineer install costs more than a wires-only install but this should not be a reason for the time differential given the clear difference in tasks that the engineer needs to perform. Sky requests that Ofcom addresses this discrepancy as part of the FAMR and provides a clear steer to BT that it expects wires-only installations to have the same, if not better, service delivery timescales than engineer installs.

3.52 Furthermore, what is of most importance is not Openreach's "allowable lead-time" for a product but how long it actually takes to deliver the service. Allowing Openreach to deliver in longer than 2 weeks would cause delays in other services and could negatively impact CPs who do not choose to take Openreach's more expensive "engineer appointed" installation options. This will impact the customer installation experience as well as hindering the switching process.

Access to Network Termination Equipment version 5 ("NTE5")

3.53 Ofcom refers in the FAMR Consultation to the concerns raised by CPs, notably TalkTalk, regarding access to the NTE5, which is the copper network termination point within an end-user's premises. TalkTalk has submitted a SoR in relation to the NTE5, which Sky supports, but limited progress has been made to date. This is extremely disappointing, given that the SoR was raised by TalkTalk in April 2013.[57]

3.54 The concern is that there are likely to be instances when it is necessary for Sky engineers to identify and access the master socket in customers' homes to ensure that the customer is able to receive a suitable SFBB experience. Access to NTE5 would enable CPs to provide a more efficient "one visit" installation service, which is much sought after by consumers who are otherwise disrupted by multiple engineer visits. Furthermore, in the context of a wires-only install, any benefits are negated if it is necessary in any event for an Openreach engineer to attend the customer's home. Therefore, Sky urges Ofcom to require BT to give access to NTE5 to non-Openreach engineers.

56 The actual "time" that is being measured here is what is called the "Minimum Allowable Lead-time". If a CP requests an installation date that is sooner than the Minimum Allowable Lead-time, Openreach reject the request as being an invalid order.

57 This is an example of BT's failure to adhere to the timelines by which the SoR process is supposed to work (see further section 4 below).

3 (C) Strengthened intervention is required to promote investment in developing alternatives to GEA

3.55 Sky has a strong desire to invest in the provisioning of SFBB services, including the development of alternatives to BT's GEA product by investing deeper in the network. Sky considers that this has the potential to deliver even greater choice for consumers. Sky has demonstrated its commitment to the provision of broadband and talk services by investing significantly in its own network to provide LLU-based broadband and talk services to over 4 million customers. Sky considers that its investment in LLU-based broadband services, rather than relying on managed wholesale services, has allowed for greater product differentiation in terms of the product proposition and price. Sky is keen to replicate this approach, as far as possible, in relation to NGA services by investing deeper in the network in order to differentiate its products and increase choice for consumers.[58]

3.56 To this end, Sky has submitted a request to BT to provide an Unbundled FTTC product, as well as requesting regulatory improvements to remedies in relation to physical infrastructure access ("PIA"). Sky also considers that there may be further scope for it to explore the viability of sub-loop unbundling ("SLU"), but this will likely require Ofcom's support and possible intervention as the current SLU offering is not "fit for purpose".

Unbundled Fibre to the Cabinet ("UFTTC")

3.57 For some time now, Sky has been exploring an alternative to GEA, through unbundled fibre to the cabinet. GEA fibre to the cabinet ("FTTC") provides an end-to-end Ethernet connection between customer premises and a BT local exchange handover point (where the CP interconnects its network). UFTTC splits GEA-FTTC into two parts: (i) rental of a VDSL2 port provided by the Openreach cabinet-DSLAM, and (ii) separate per-CP backhaul from the cabinet. In both cases a MPF or WLR line is required to carry the VDSL2 signals and to provide voice service from the exchange. UFTTC is a natural extension of GEA, and is a complement rather than a substitute to FTTC GEA, and therefore merits full and proper consideration.

3.58 In January 2013, Sky submitted a request, via the SoR process, to Openreach for the development of UFTTC as a new product to offer the industry and we attended a meeting with Openreach to explain the technical details of the proposition. Sky also kept Ofcom updated as to Sky's request and the details of it.[59] Throughout this process, Sky has invested time and resources into developing its proposal and has undertaken detailed modelling.

3.59 Unfortunately, Sky's request has been met with some resistance by Openreach. Openreach has failed to engage constructively and instead has repeatedly extended its deadline for responding to the SoR[60] and on 1 August 2013 it determined that a key element of the proposal (backhaul using separate wavelengths) is *"not viable from either a technical or commercial perspective"*. Sky sees no merit in BT's claims as to viability of the UFTTC product – noting in particular that the equipment required to support multiple-wavelength backhaul is very compact and would be paid for by the CP consuming UFTTC..

58 Sky also notes Ofcom's preference for intervening upstream outlined in section 2 of the FAMR Consultation.

59 Sky wrote to Ofcom on 9 May 2013 and provided Ofcom with a copy of Sky's technical paper on UFTTC.

60 Following Sky's SOR on 29 January 2013, Openreach indicated it would review the proposal in 60 days. On 17 April, Openreach informed Sky that it would not be able to meet the 60 day deadline but it was looking into the matter in more detail. On 1 August, Openreach informed Sky that it did not consider the request to be viable and Sky has since engaged with Openreach to try to resolve Openreach's concerns.

3.60 Sky notes Ofcom's comments in relation to UFTTC where it states that it is *"generally supportive of products that offer increased dynamic benefits arising from a greater level of control, such as greater innovation and retail product differentiation"*.[61] Provision of UFTTC will allow Sky to invest in unbundling the cabinet as well as developing cabinet to exchange backhaul enabling Sky to pushing its network out closer to the customer, just as we have done with LLU. This will permit Sky to gain greater control and certainty of the associated costs and provide Sky with the opportunity to leverage scale advantages which will fuel greater investment and innovation in compelling SFBB product propositions and provide greater choice to consumers.[62]

3.61 Sky also considers that UFTTC would more completely satisfy the VULA characteristics as set out by Ofcom in the WLAMR and the FAMR Consultation, than BT's GEA product. Whereas GEA may be inconsistent with the VULA characteristics, for example by charging CPs extra for higher speeds and lack of control of the service,[63] Sky considers that UFTTC would address these concerns as a product and would conform more closely to the VULA characteristics.

3.62 Furthermore, UFTTC reflects Ofcom's principle of seeking to allow access and promoting infrastructure investment at the deepest point in the network (as set out in section 2 of the FAMR Consultation), which offers the opportunity for greater downstream competition.

3.63 Sky considers that Openreach has failed to give proper consideration to an innovative and well thought through alternative to the only wholesale fibre product currently available to CPs – GEA. Given this lack of progress with Openreach, it is extremely disappointing that, despite Sky's persistent updates and requests to Ofcom to include an endorsement of Sky's request for UFTTC in the FAMR Consultation,[64] Ofcom has not proposed to require BT to provide UFTTC as a specific access remedy as part of the FAMR.

3.64 Whilst Ofcom requests to be kept up to date of the progress of the SoR, the reality is that, after the conclusion of the FAMR, Ofcom's next opportunity to mandate a specific access remedy for UFTTC will likely not be until the next market review. For UFTTC to be a viable option, Ofcom needs to intervene now.

Sub-loop Unbundling ("SLU")

3.65 Ofcom proposes to maintain an obligation on BT to offer an SLU product and ancillary services on fair and reasonable terms and conditions to all CPs who reasonably request such services in writing[65] and to continue to apply a cost orientation condition.[66]

3.66 SLU is an important input that could enable the development of competing SFBB services to GEA. As Ofcom correctly notes,[67] the SLU investment case will be stronger as demand

[61] FAMR Consultation, paragraph 11.598.

[62] [CONFIDENTIAL]

[63] As highlighted to Ofcom in its letter of 9 May 2013, Sky considers that GEA is inconsistent with the VULA characteristics in the following ways: characteristic (i) - there is no local interconnect available at the cabinet with GEA; characteristic (ii) - GEA is not fully service agnostic – CPs pay extra for different speeds; characteristic (iii) - there is contention on the backhaul from the cabinet to exchange and a threat by Openreach to charge for throughput; characteristic (iv) - there is a lack of control of the service (e.g., the ability of a CP to set the speed and QoS characteristics of GEA).

[64] For example, see the emails to Selina Chadha of Ofcom on 9 and 13 May 2013.

[65] FAMR Consultation, paragraph 11.486.

[66] FAMR Consultation, paragraph 11.511.

[67] FAMR Consultation, paragraph 11.485.

for SFBB increases (which Ofcom acknowledges it will do over the next three year market review period) and CPs' fibre customer bases grow as a result. However, Sky considers that currently SLU is not fit for purpose and has concerns over the way SLU is: (a) priced; and (b) made available by BT. Unless these concerns are addressed, further investment in SFBB will likely be stifled which, as Ofcom recognises,[68] could result in a missed opportunity for Sky and other CPs to deploy NGA in genuine competition with BT.

3.67 These concerns are addressed in turn below.

SLU - pricing

3.68 In relation to the pricing of SLU, Ofcom states in the FAMR Consultation that *"where parts of the SLU product or process are the same as products or processes within other products, then we would typically expect BT to take a consistent approach when assessing costs".[69]* Sky has concerns over the high pricing of SLU compared with LLU (which is subject to a charge control) and GEA prices which are considerably lower.

3.69 For example, the charge imposed by BT for SLU 'provide'[70] is £127, whereas the equivalent GEA 'PCP-only' provide (used for wires-only GEA) is £40-£50.[71] A further example is that an SLU 'cease'[72] is charged at £100.67 by BT, compared to £5.37 for a GEA cease. Therefore, the majority of migration scenarios involving SLU are very expensive compared to equivalent GEA migrations. SLU operators face high charges in all scenarios: GEA to SLU migration pays BT £132.98 (£5.37+£127.61), SLU to GEA pays BT £147.67 (£100.67+£47). The work required to provide SLU and wires-only GEA services is broadly the same and so it is unclear how the two sets of prices, which differ significantly, can be justified by BT.

3.70 The current SLU pricing makes it uneconomic for another operator to provide SLU services with a comparable cost-base, which would allow it to compete with BT.[73] Further, at these price levels there is a clear barrier to SLU deployment and it will be difficult for CPs to develop alternatives to GEA using SLU thereby reducing consumer choice through the development of competing products. Sky considers that Ofcom, as part of the FAMR, should review BT's SLU pricing in line with BT's cost orientation obligation and provide clear direction on its expectations, with the threat of enforcement action, in order to provide certainty to CPs who may wish to invest in SLU. A failure to do so risks undermining potential SLU NGA investment.

SLU - Issues with BT's ordering process

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68 FAMR Consultation, paragraph 11.488.

69 FAMR Consultation, paragraph 11.512.

70 This is the connection of a new customer to a Sub Loop broadband service and involves an Openreach engineer connecting the customer's copper line to the ISP's (cabinet-based) DSLAM. After the SLU Provide is completed the customer has a working VDSL broadband service.

71 See BT's GEA-FTTC PCP Only Pilot and Indicative Launch Pricing: http://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=vh9p3XJccrLw1RV956%2BxVCCgiEFdr%2Bt8ewMrSA%2B3orracmDiVufCBCyd2tYRbF0nKg1lahGwNjw5%0AU%2BWNjocSrw%3D%3D.

72 This is the disconnection of a customer from a Sub-loop broadband service and involves an Openreach engineer disconnecting the customer's copper line from the ISP's (cabinet-based) DSLAM. After the SLU cease is completed, the customer no longer has a working VDSL broadband service.

73 Sky notes in this regard the announcement in August 2013 that South Yorkshire Digital Region was unable to offer economically attractive SFBB to CPs with existing MPF deployments in the Yorkshire area.

3.71 As well as concerns regarding SLU pricing, Sky also considers that there are issues with BT's ordering process, which need to be addressed. The problem is that the SLU order/fault process is a manual process and is not supported on Openreach's equivalence management platform (EMP). The EMP platform is what CPs use to place orders and faults for GEA, LLU and WLR services.

3.72 Examples of the fundamental issues that exist with the SLU provisioning process include: (a) no 'real-time' Openreach facility for assessing service availability or likely SFBB speed; (b) no XML ordering interface, which means no real-time order updates for keeping end-users informed; and (c) no simultaneous ordering capability and lack of end-user migration support.

3.73 All of the above features are provided on WLR/LLU/GEA and if these are not made available for SLU it will not be possible to provide SLU in the volume that a large CP would need to in order to fully invest in and support this product. Openreach has argued that without a CP using the product in volume that there is no business case to invest in EMP development for the SLU portfolio. Therefore, without Ofcom's intervention, it is likely that the situation will not be resolved. Sky therefore requests that Ofcom addresses these concerns in the FAMR by setting a clear expectation that BT will use *"the same, or very similar, products, processes and systems for both SLU and its own FTTC deployments where this is practical"* and that it expects BT to develop an automated process to meet any future demand for SLU.[74]

SLU - Vectoring

3.74 Sky also notes that there are proposals in relation to vectoring (a technology used to increase SFBB speeds) in the FAMR Consultation[75]. Sky acknowledges the benefits of vectoring technology, and included these as part of the rationale for UFTTC.

3.75 However, Sky is concerned that the deployment (or promise of deployment) vectoring could be used to restrict the ability of CPs to invest in SLU due to possible concerns about incompatibility of equipment. Ofcom refers to the potential need for all copper lines in the cable to be controlled and vectored by the same system for it to work effectively. Sky's understanding of the technology is that – as Ofcom suggests – there are solutions to allow both vectoring and SLU to coexist.

3.76 As a result, Sky considers that if a SLU restriction were adopted today, there is a risk that BT could deploy vectoring in such a way that would prevent interoperability and foreclose potential competition in FTTC via SLU. Sky notes that Ofcom has suggested that this issue could be addressed by BT's SMP obligation to provide SLU on reasonable request and that CPs could bring a dispute to Ofcom in the event of a refusal by BT to provide access. Sky does not consider this to be a satisfactory outcome as it will result in considerable uncertainty and deter SLU investment.[76] Sky considers that Ofcom needs to reject any attempt by BT to circumvent its current regulatory obligation to provide SLU.

3.77 Furthermore, Sky considers that BT is in a position to identify the most beneficial SLU target cabinets for each rival CP, due to its knowledge of the cabinets serving competing CPs' lines, and there is a risk that BT could take the opportunity to try to 'lock out' SLU target cabinets by deploying vectoring tactically, in anticipation of competition. To prevent such potential foreclosure, Sky considers that Ofcom must promote the

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74 FAMR Consultation, paragraph 11.506.

75 FAMR Consultation, paragraphs 11.492-501.

76 FAMR Consultation, paragraph 11.499.

development of a mutually agreed technical solution through NICC standards and consider whether to require this standard to be adopted by CPs.[77]

Physical Infrastructure Access

3.78 Ofcom proposes to maintain the obligation on BT to *"offer a PIA product on the basis of fair and reasonable terms and conditions, to all CPs who reasonably request in writing such services for the deployment of access networks"*[78] and to continue to apply a cost orientation obligation. Ofcom considers that this proposal will provide CPs with the opportunity to invest in developing alternative products to VULA. However, currently the efficacy of the PIA remedy is poor due to a lack of information available to third parties about BT's ducts and poles network and capacity, and ancillary charges which greatly inflate the headline price to CPs.

3.79 This issue renders Ofcom's proposal to maintain the status quo rather impotent. Instead, as explained in its response to Ofcom's call for inputs, Sky considers that Ofcom should encourage BT to improve this product by:

3.79.1 requiring BT to provide an "as built" database of its access network, which would be accessible electronically to all CPs. Given that Openreach is engaged in a major upgrade of its access network as it rolls out NGA, this would appear to be a rich source of current information for this database and could be supplemented with surveys commissioned by CPs; and

3.79.2 relaxing the current narrow constraints on the use of PIA to take a technology-neutral approach to include the carriage of broadband traffic delivered to both residential and business consumers by both fixed and wireless means.

3.80 Sky also encourages Ofcom to follow the approach of the European Commission regarding State Aid for SFBB[79] by publishing (or requiring BT to publish) information regarding PIA projects, such as location, support being provided, implementation plans, etc. According to the European Commission, best practice examples suggest *"the creation of a central database of the available infrastructure at a national level"*"[80] will increase transparency and encourage investment.

4. Other remedies

The SoR process is deficient

4.1 Sky is concerned about BT's current failings in responding to customer requests for new products or product enhancements made via the SoR process. We note that Ofcom is proposing to *"impose a condition regarding the process by which BT … will address requests for new forms of network access"*.[81] Ofcom goes on to say that *"[t]he obligation requires BT …, for the explicit purposes of transparency, to publish reasonable guidelines which, inter alia,*

77 NICC is a technical forum for the UK communications sector that develops interoperability standards for public communications networks and services in the UK.

78 FAMR Consultation, paragraph 11.562.

79 See the EU Guidelines for the application of State Aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01).

80 Ibid, paragraph 78. BT is the major recipient of the Government's BDUK state aid funding for the deployment of SFBB. In compliance with state aid rules (as per the European Commission's revised state aid guidelines for broadband (section 3.4: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF) Sky considers that if BT is deploying a database of available infrastructure, the incremental cost of populating that database with data from non-BDUK SFBB build, will be small.

81 FAMR Consultation, paragraph 10.68.

detail timescales in which they will handle requests for new network access and that such timescales for each stage of the SoR process are required to be reasonable. Furthermore, on receipt of a request for new network access, BT [is] required to deal with the request in accordance with their guidelines including, therefore, such reasonable timescales which are mandated to be published in the guidelines."[82]

4.2 Currently, as has been highlighted above, BT is failing to adhere to the SoR process. In particular, BT is not: meeting its own self-imposed deadlines for responding to requests; providing reasonable explanations or justifications for its decisions (when they are finally made); and/or sharing outputs from key stages in the development process (even if there is no obvious confidentiality issue).[83]

4.3 Sky considers that, rather than leaving the SoR guidelines to BT, Ofcom should prescribe the SoR process which BT must follow. As well as introducing a condition relating to transparency, the process should include the following: (a) the provision of fixed timescales, which must not be missed or extended without valid justification; (b) where appropriate, industry review of proposed SoR rejections by BT; and (c) reference to the OTA for adjudication when there is widespread dissatisfaction with a BT SoR. Further, Sky supports EE's suggestion, as referred to in the FAMR Consultation,[84] that BT's adherence to this process should be actively monitored by Ofcom and failure to meet the process should be subject to sanction.

4.4 The inadequacy of the current SoR process is even more serious given that in a number of places in the FAMR Consultation, part of Ofcom's justification for not imposing more stringent remedies on BT is that CPs could *"raise a request with BT through the SoR process"*.[85] If the SoR process is not working properly, submitting requests via this process is hardly a suitable means of redress.

Non-discrimination and Equivalence of Inputs ("EoI")

4.5 Sky notes that Ofcom proposes to require BT to provide network access on an EoI basis where (i) BT is currently required to do so under a SMP service condition (e.g., in relation to the provision of VULA), and (ii) BT currently provides network access on an EoI basis in accordance with the Undertakings[86] as well as retaining the SMP condition on BT not to unduly discriminate in relation to the provision of network access.[87]

4.6 Whilst it is positive for Ofcom to seek to enshrine the application of the principle of EoI by BT into SMP regulation, Sky considers that this will have a minimal impact on CPs and consumers, given that BT is already required to provide most of its wholesale products and services to its customers on an EoI basis pursuant to the Undertakings. Separately, Sky

82 FAMR Consultation, paragraph 10.71.

83 By way of a further example, Sky and other CPs recently submitted a SoR submission regarding the sharing of test results with CPs. The request relates to access to results from the tests that Openreach run when performing a fault / SFI visit, which is paid for by the CP despite the CP not receiving any test data, which may assist with the analysis of the customer's issue. The initial SoR was submitted to Openreach after agreement from the Copper Products Commercial Group on 14 November 2012. Over 10 months later, we are no further forward in obtaining confirmation on whether Openreach will undertake the requested development or not.

84 FAMR Consultation, paragraph 10.61.

85 See, for example, paragraph 11.504 of the FAMR Consultation. Ofcom proposes not to specify any particular product characteristics for SLU and instead considers the most appropriate way for CPs to seek changes they consider necessary to fulfil SLU characteristics is to raise an SoR request with BT.

86 The "Undertakings" given to Ofcom by BT pursuant to the Enterprise Act 2002.

87 FAMR Consultation, paragraph 10.116 and 10.118.

does not consider that the introduction of such a SMP condition should in any way lead to a relaxation of the Undertakings.

Sky **September 2013**