Virgin Media's response to Ofcom's Consultation on the Fixed Access Market Review

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(Non Confidential Version – redactions indicated by [✂])

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Introduction

Virgin Media welcomes the opportunity to comment on the important proposals put forward by Ofcom in this consultation. The development and deployment of broadband services in the UK, and the networks and infrastructure that are required to support them, are critical to enabling the competitiveness, productivity and continued prosperity of the UK's economy. Broadband is currently evolving to provide consumers with superfast speeds, resulting from continued investment and innovation by Communication Providers (CPs), in order to deliver a significantly enhanced consumer experience. It is vital therefore that the regulatory framework applying to such services is fit for purpose and achieves the right balance between promoting competition and investment, whilst still ensuring that the necessary safeguards for both retail consumers and purchasers of wholesale services from dominant providers are in place.

Sustainable, commercially driven competition between infrastructures delivers the best outcomes for end users – and this is demonstrated very well in the UK. Virgin Media is therefore encouraged that Ofcom continues to recognise the importance of promoting competition and investment in 'super-fast' broadband (SFBB) networks whilst adopting a consistent approach to the policy developed in the last review. It is essential, especially following considerable investment by CPs in the period since the last review, that the objectives extend not only to new investments but also reflect the need to avoid undermining investments that have already been made. This, combined with Ofcom's general policy of intervention only as a matter of last resort, should result in Ofcom ensuring that it equips itself with all relevant information and then taking a cautious approach with regards to imposing regulation on SFBB.

In the period since 2010, Virgin Media has made considerable investments in its network to ensure that its customers receive cutting edge SFBB services. It has undertaken a speed doubling exercise whereby it has doubled the majority of its customers' broadband speeds with the top SFBB tier of 120Mbit/s available across the entire network footprint. This has not only helped to drive up broadband performance nationally (being significantly responsible for the increase in average UK broadband speed) but also stimulated investment by other CPs thereby ensuring that SFBB is now seen as a staple element of commercial offerings alongside ADSL based services.

Virgin Media continues to invest in its network in order to continually develop its cutting-edge propositions. [✂]. It is vital, therefore, that such innovations and investment are not stifled or restricted by regulation, which would ultimately lead to end users losing out from the resultant missed opportunity. Additionally, the investment that is currently driving the industry forward is playing a key part in ensuring that the UK continues to develop its digital economy

Ofcom has approached this review sensibly by proposing to build on the existing regulation imposed in 2010 whilst retaining the majority of regulation and its underlying structure (e.g. market definitions etc). This is an entirely appropriate approach to provide a stable basis for continued growth in this sector. The need for stability ties into the need to encourage and sustain investment.

There remains considerable need for regulation in this area, given the reliance by most CPs on BT's infrastructure. The continuation of existing remedies enabling the unbundling of exchanges, and the provision of VULA for wholesale FTTC services, are part of an essential package of regulatory measures. However, whilst customers of such products will invariably have an interest in wholesale prices being driven down, Ofcom needs to ensure that it takes account of the wider picture when considering any additional regulation – in particular the effect on the type of infrastructure based competition that is delivering such positive outcomes for consumers and the UK as a whole. Virgin Media sets out its concerns with regards to the specific proposals on VULA in Section 1 below and provides its responses to the consultation questions in Section 2.

Section 1: VULA PRICING

Virgin Media supports the aim of promoting competition and fostering investments in NGA networks as set out in the EC Recommendation on non-discrimination and costing methodologies (2013 EC Recommendation). In particular, Virgin Media agrees with Recommendation 1 which seeks to increase "*legal certainty and predictability in light of the long term horizons in NGA networks*".

Virgin Media therefore welcomes Ofcom's provisional decision not to impose ex ante price regulation on VULA but instead adopt a light touch approach by imposing an obligation on BT to offer VULA products on the basis of fair and reasonable terms, conditions and charges, no undue discrimination and EOI.

Whilst Virgin Media accepts that BT should also be subject to the same SMP condition with regards to its VULA margin i.e. that it should be set on a fair and reasonable basis, it is concerned that Ofcom has decided to extend its reach and impose additional ex ante regulation on VULA margins based on insufficient information and without due regard to all of the possible competition concerns or the consequences of such an imposition. Ofcom's guidance focuses its concerns on the narrow premise that BT has the potential to set excessive wholesale prices, rather than widening its scope and considering the risks and possible effects of BT setting wholesale prices below cost – a concern previously highlighted by Virgin Media in its response to the Call for Inputs in December 2012.

Virgin Media's concerns are not without reason. Not only does Ofcom refer to the potential for BT to set prices below cost on a number of occasions in its Consultation but it is also referred to in the NGA and 2013 EC Recommendations. Furthermore, as set out further below in response to Question 11.5, Virgin Media believes that there is also evidence to suggest that BT is pricing below cost.

Accordingly, on the one hand, Virgin Media supports Ofcom's decision to remove the risk of (i) regulatory failure; and (ii) stifling future investment by not regulating the wholesale price for VULA. On the other hand, given that Ofcom's guidance only assesses the effects of intervention in the event of a low VULA margin (omitting any assessment of high margins or below cost pricing) and the fact that there is effective competition at the retail level (and, specifically, no identified dominant provider), any ex ante intervention by Ofcom is likely to result in Openreach implementing a decrease in the wholesale price for VULA products. As such, despite the intention of Ofcom not to intervene in the regulation of wholesale pricing, the introduction of the proposed guidance risks introducing ex ante wholesale price regulation via the back door.

Ofcom has failed to assess the potential for low wholesale pricing in its guidance, despite available evidence, or to consider the detrimental knock-on effect a reduction in wholesale pricing could have on curbing potential future investment; an outcome which Ofcom was otherwise seeking to avoid. In the 2013 EC Recommendation, one of the Commission's main aims is "*to promote efficient investment and innovation in new and enhanced infrastructures*". Ofcom suggests that, for the purposes of this consultation, national circumstances indicate that greater weight should be placed on competition rather than investment with the result that a different approach should be taken to that suggested in the 2013 EC Recommendation. Whilst Virgin Media accepts that there are times when it is clearly warranted for Ofcom to adopt a different approach in the UK or place greater emphasis on certain features in UK markets, Virgin Media does not agree that deviation from the 2013 EC Recommendation is justified in this instance.

In particular, Ofcom has significantly underestimated the ongoing level of investment which is needed in respect of the deployment and continual upgrade of NGA networks across the UK[1]. Ofcom must not only consider the impact on incentives for BT to invest in its network but must also consider the wider sectoral implications. Any indication to the market that wholesale pricing may be reduced by virtue of regulation is likely to have a chilling effect on investor confidence in NGA advancement, and therefore, not only would BT be placed at a disadvantage from a lack of investor confidence, but also other network owning CPs such as Virgin Media.

Virgin Media accepts that Ofcom needs to consider the broad issue of VULA margin given the concerns set out in both the NGA and 2013 EC Recommendations. However, it considers that the proposed application of explicit guidance is inappropriate both in terms of timing and scope.

The VULA margin is currently the subject of an ongoing competition complaint raised by Talk Talk. Therefore, for Ofcom to issue guidance now would be premature and has to the potential to give rise to confusion should there be no competition concerns found as part of an ex-post competition investigation. Ofcom should delay issuing any guidance until such time as it has had an opportunity to take into account the ex post decision and any further information in relation to BT's costs and revenues it may receive in the process, which in and of itself would satisfy the 2013 EC Recommendation's EEO test. Ofcom is not precluded from issuing its guidance at a later time since guidance, issued under the proposed access condition mandating "fair and reasonable" charges, can be consulted upon at any time during the market review period.

Furthermore, the current form of the guidance fails to take account of potential adverse effects on wholesale pricing levels from either a competition or investment perspective. Any guidance issued should be based on a complete understanding of GEA pricing issues and should be sufficiently broad enough in scope to provide for predatory as well as excessive wholesale pricing behaviour on the part of BT. Whilst widening the scope of the guidance is not explicitly considered in the NGA and 2013 EC Recommendations, it is not precluded in any way.

Virgin Media also disagrees with Ofcom's justification of the use of an adjusted EEO test. To the extent that any test should be adopted, which is discussed in more detail in response to Question 11.5 below, this should be the 'pure' EEO test as adopted by the Commission in Recital 64 of the 2013 EC Recommendation.

Virgin Media therefore considers Ofcom's guidance to be incomplete, not fit for purpose and not able to withstand scrutiny. Given the potential risk that Ofcom's guidance could have negative implications and potentially introduce inappropriate ex ante regulation on VULA pricing, Ofcom should not issue its guidance in its current form. Indeed, if Ofcom publishes its guidance prior to the ex-post decision, it risks creating confusion and the potential for challenge.

[1] Contrary to paragraph 11.139 of the consultation, Virgin Media considers that infrastructure investment in SFBB will continue during the review period [✂].

Section 2: Responses to Questions

Market definition and SMP analysis: WFAEL

3.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the WFAEL markets we define above? Please provide reasons in support of your views.

Virgin Media agrees with the provisional view.

Market definition and SMP analysis: ISDN30

4.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the wholesale ISDN30 markets we define above? Please provide reasons in support of your views.

Virgin Media agrees with the provisional view.

Market definition and SMP analysis: ISDN2

5.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the wholesale ISDN2 markets we define above? Please provide reasons in support of your views.

Virgin Media agrees with the provisional view.

5.2 Do you agree with our provisional view that, during the period covered by this market review, BT does not possess SMP in the retail ISDN2 market we define above? Please provide reasons in support of your views.

Virgin Media agrees with the provisional view, based upon Ofcom's assessment that appropriate wholesale remedies provide a competitive retail environment.

Market definition and SMP analysis: Retail markets in the Hull Area

6.1 Do you agree with our provisional view that, during the period covered by this market review, it is not appropriate to impose retail regulation in the RFAEL markets in the Hull Area that we define above? Please provide reasons in support of your views.

6.2 Do you agree with our provisional view that, during the period covered by this market review, it is not appropriate to impose retail regulation in the retail ISDN30 market in the Hull Area that we define above? Please provide reasons in support of your views.

6.3 Do you agree with our provisional view that, during the period covered by this market review, it is not appropriate to impose retail regulation in the retail ISDN2 market in the Hull Area that we define above? Please provide reasons in support of your views.

Virgin Media has no comment to make in relation to the Hull Area.

Market definition and SMP analysis: WLA

7.1 Do you agree with our provisional view that, during the period covered by this market review, BT and KCOM will have SMP in the WLA markets we define above? Please provide reasons in support of your views.

Virgin Media agrees with Ofcom's proposed definition of the WLA market. It considers that Ofcom's use of a focal access product is appropriate and agrees that the relevance of whether that access is used to provide specific downstream services (for example, superfast or current generation broadband) lies outside of this market analysis.

Virgin Media makes no comment on the submissions made by Talk Talk in relation to the relative constraint exerted by Virgin Media's network on BT's network at the wholesale level, but broadly agrees with Ofcom's criticisms in relation to the suitability of critical loss analysis in this market given that there is insufficient data to undertake any robust analysis. The approach to market definition taken in previous reviews, and followed in the provisional conclusions in this consultation, provides valuable and necessary continuity and consistency of approach.

Virgin Media disagrees with BT's comments on the potential for different geographic markets within the UK (excluding the Hull Area) based upon Virgin Media's own network footprint. Instead, Virgin Media agrees with Ofcom's analysis that national pricing policies are relevant in determining the scope of geographic markets and supports the rationale set out in the 2010 WLA statement, as reiterated in paragraph 7.64 of this consultation. In support, Virgin Media notes that national pricing is adopted by most of BT's competitors, save for situations where pricing differs only as a result of differences in input characteristics (for example unbundled operators offering on-net and off-net pricing). Ofcom must also not lose sight of the fact that there are risks in defining sub-national markets on the basis of incomplete or inconclusive evidence risking an increased potential for inappropriate findings of SMP and in turn, the imposition of unnecessary remedies to address the perceived "SMP". This in turn, risks consumer harm and potential harm to operators by virtue of costly and unwarranted regulation. For this reason, it is appropriate that the evidential threshold should be set at a high level when considering sub-national markets.

Virgin Media also strongly agrees with Ofcom's assessment that in this market, and in the downstream WBA market, there is a single product market not differentiated by broadband speed. SFBB is still very much constrained by current generation broadband both from a demand and supply side substitutability perspective with Virgin Media's price points competing directly against other providers' ADSL and VDSL packages e.g. Virgin Media's 30Mb dual package (broadband and voice) is priced less than the comparable BT 16Mb product[2]. In addition to general products, Virgin Media heavily competes with ADSL in respect of it targeted propositions, for example to the student market.

Remedies: General Remedies for wholesale fixed access markets

10.1 Do you agree with our proposals regarding requirements on BT and KCOM to provide network access on reasonable request? Please provide reasons in support of your views.

[2] BT up to 16Mb unlimited BB plus line rental £31.45; VM 30Mb BB plus line rental £29.49; prices from publically available websites at 16 September 2013.

Virgin Media broadly agrees with the proposal to impose a network access obligation as set out in the consultation.

However, Ofcom's proposal continues a recent trend which sees it moving away from cost orientation measures (which provide protection from excessively high or low pricing, either as a stand alone obligation or in conjunction with a charge control) towards Ofcom placing an increased reliance on the fact that SMP providers must access charges on a fair and reasonable basis.

Virgin Media understands that this provides an additional level of flexibility for Ofcom since a "fair and reasonable charges" obligation can, where it is transparently applied, extend beyond the traditional "floors and ceiling" protection offered by cost orientation. However, there are two concerns with this approach.

Firstly, there is little guidance as to what is meant by "fair and reasonable" in the context of a price control condition. Previous incarnations of this condition have not been tested against s87(9) and s88 of the Communications Act 2003 (the Act), perhaps due to the fact that the price control "safety net role" was undertaken by a cost orientation condition. Interpretive guidance from the CAT on what is meant by "fair and reasonable" is provided in the context of dispute resolution and does not necessarily provide a read across to an SMP condition set under s87 of the Act.

Whilst Virgin Media considers guidance which imposes an excessive level of constraint to be inappropriate (see Section 1 above and the response to Question 11.5 below with regards to Ofcom's proposed guidance on VULA margins), it nevertheless considers the absence of any guidance to be insufficient as it brings about a lack of transparency which prevents market participants from being able to assess whether Ofcom's remedies are fit for purpose and an effective means of regulatory intervention. Virgin Media raised this issue in its response to the recent consultation on Cost Orientation, indicating that the abandonment of cost orientation as a market wide remedy in favour of a "fair and reasonable" obligation, when there is now a good understanding of what is meant by the "basis of charges" obligation,, unnecessarily creates regulatory uncertainty. Virgin Media considers that there is considerable value in Ofcom addressing this issue both in the context of the cost orientation review, but also in the context of this specific market review.

Second, Virgin Media is concerned that Ofcom appears to be concerned only with excessive pricing concerns when there are potentially broader issues relating to fair pricing, involving, for example, low pricing of wholesale inputs, which need to be considered. See Section 1 in relation to Virgin Media's concerns regarding Openreach's GEA pricing. The pricing of new technologies is complex taking into account the level of investment that needs to be recouped and the need to incentivise consumer take up at the retail level (the bandwagon effect referred to by Ofcom in relation to GEA). Virgin Media is concerned that, as a competing infrastructure provider, BT may have an incentive to price certain products below cost so as to generate such a bandwagon effect, that could impact on efficient investment incentives more broadly. Given the lack of clarity surrounding the fair and reasonable obligation, it would be wrong for Ofcom to limit its application to control excessive pricing, when there has been little consideration of the potential for low pricing. Virgin Media is concerned that this could give rise to an argument that the imposed condition was only required to address the identified competition concern of excessive pricing, and therefore would not have jurisdiction to protect against low pricing. Clearly, if there is no objective need to regulate to protect against low pricing, then this would be an irrelevant concern, but as we have suggested in the case of

GEA (see below in response to Question 11.5 together with the evidence provided in Confidential Annex 1), there are concerns that have not been analysed by Ofcom, and in that sense, the potential concern remains.

10.2 Do you agree with our conclusion not to seek to modify SLAs or SLGs as a mechanism for quality of service improvement? If not, how would you modify the SLAs and or SLGs and on what basis and how would you ensure that such changes did not have unintended incentive consequences? Specifically do you consider that the existing SLA for provisioning appointments (12 days from next year) is adequate? Please provide reasons in support of your views.

Virgin Media agrees with the general concern expressed by stakeholders with regards to Openreach's performance in delivering an acceptable level of service and refers to its earlier comments made in response to the CFI which set out examples of how Openreach's performance has negatively impacted on the delivery of its wholesale input service.

The main issue is a failure in Openreach's forecasting which results in an inherent inflexibility to deliver increased performance when the need arises (e.g. through a period of adverse weather). When combined with an apparent lack of ability to react to such events as and when they arise, this has caused the overall poor level of performance delivered to date.

Virgin Media therefore agrees with Ofcom's decision to undertake a review of this area and broadly considers the proposed approach to be a sensible first step given that further regulatory intervention (such as a direct modification of the SLAs and SLGs) may be overly intrusive at this stage and could undermine the necessary relationship between industry and Openreach.

Ofcom cites the industry agreement of 12 days for provisioning as an example of an agreed standard not necessarily reflecting customer requirements. This agreement needs to be viewed in the overall context of how negotiations are undertaken, and should not necessarily be taken to be an acceptance, by industry of an ideal standard. Virgin Media comments below on Ofcom proposed improvements to the negotiation process facilitated by OTA2 below.

10.3 Do you agree with our proposals regarding requirements on BT and KCOM in relation to handling requests for new network access? Please provide reasons in support of your views.

Virgin Media agrees with the proposal to maintain this obligation in the current review, with the additional requirement for BT to provide transparency in the event that it rejects a SoR.

10.4 Do you agree with our proposals regarding requirements on BT and KCOM in relation to remedying discriminatory conduct? Please provide reasons in support of your views.

Virgin Media agrees with the proposals to impose specific non discrimination remedies (draft conditions 4 and 5) on BT. Ofcom has sought to provide additional clarification as to the "level" of obligation applied to BT in order to comply with the 2013 EC Recommendation, and has therefore proposed two distinct conditions;

Condition 4 (based on the current obligation and compliant with an EEO approach) and Condition 5 (based on an obligation to provide services on an EOI basis).

Virgin Media considers that this increases the level of transparency and consolidates obligations that previously have existed as part of separate regimes (i.e. the SMP framework and the Undertakings) into the SMP conditions.

Ofcom's proposed approach to the additional "overlay[3]" EOI obligation under Condition 5 is to impose it only in situations where the obligation already exists for BT (either through existing SMP regulation or Undertakings). Virgin Media understands and agrees with this approach in the context of this consultation, but notes that this should not necessarily be the default position adopted in all markets. Instead, Ofcom must consider the level of non-discrimination remedy going forward on a case-by-case basis.

10.5 Do you agree with our proposals regarding requirements on BT and KCOM in relation to accounting separation? Please provide reasons in support of your views.

Virgin Media notes that no changes are proposed in relation to BT and we consider that a continuation of the current accounting separation obligations remains appropriate. Virgin Media has no comment on the proposed requirement with regards to KCOM.

10.6 Do you agree with our proposals regarding requirements on BT and KCOM to publish a reference offer? Please provide reasons in support of your views.

Virgin Media agrees with the proposal to re-impose the obligation on BT to publish a reference offer and with the change to remove usage factors, as this aligns with the position taken (and confirmed in the recent draft statement submitted to the EC) in the Narrowband Review.

10.7 Do you agree with the proposal to specify the services for which BT is to provide SLA/SLGs? Also do you consider that we have identified all appropriate services that should be subject to an SLA/SLG requirement at this time? If not, please set out what services should be included and provide reasons in support of your views.

Ofcom's proposal to clarify which services are subject to SLA/SLGs will provide clarity to both BT and purchasing CPs and avoid confusion as to whether individual services (e.g. MPF provide) are included within the SMP obligation. It will also aid Openreach in its forecasting which, as noted above in response to Question 10.2, contributes to Openreach's overall failure to perform.

10.8 What are your views on whether you consider a need for Ofcom to require BT to offer an SLA in relation to GEA appointment availability? Please provide reasons in support of your views.

[3] Condition 5 is expressed to apply in addition to the obligations imposed under Condition 4, notwithstanding that compliance with Condition 5 will imply that Condition 4 is also met.

Virgin Media agrees that there should be a consistent approach across WLR / MPF and GEA services to ensure that there is a level playing field between CGA and NGA services.

10.9 What are your views on the principles for negotiations on SLA/SLGs? Please provide reasons in support of your views.

SLA/SLG negotiations should not be micro-managed by Ofcom. Accordingly, Virgin Media supports Ofcom's proposed approach to not to directly regulate the basis for those negotiations. However, Virgin Media believes there are issues which need to be addressed and as such supports Ofcom's proposal for a statement of principles on the basis that this provides greater transparency as to how any subsequent dispute would be resolved, thus providing an indirect constraint on that manner in which the original negotiations are undertaken. This is a pragmatic first step to improving matters.

10.10 Do you agree with our proposals regarding requirements on BT and KCOM to notify changes to charges? Please provide reasons in support of your views.

Virgin Media welcomes Ofcom's proposal to retain the 90-day notice period for the majority of pricing changes, which provides necessary certainty to industry as a whole. However, Virgin Media is concerned by the proposal to reduce the notice period for WLA price reductions to 28 days. Whilst there is an interest in ensuring that price reductions can be passed through to end users as soon as possible, the significant reduction of the notice period could have disruptive effects on industry; a fact which does not appear to have been considered in detail by Ofcom. Ofcom simply suggests, in paragraph 10.210 of the consultation, that industry may benefit from shorter notice periods; this is not further explained, and whilst there is a reference to stakeholder responses, there is little objective reasoning for the proposed change. Some stakeholders were clear in their support for retention of the 90-day provision, some argued for longer periods and those that did mention shorter periods generally spoke in the context of facilitating special offers. The current framework already allows for charges to be amended on application (i.e. by consent from Ofcom) so that consumers can benefit from shortened "pass through" times, whilst industry has a valuable opportunity to comment on the consent.

10.11 Do you agree with our proposals regarding requirements on BT and KCOM to notify technical information? Please provide reasons in support of your views

Virgin Media agrees with the re-imposition of the requirement to notify technical information in largely the same form as the current regulation. Virgin Media understands the proposed amendment to take account of changes agreed under the NICC process.

10.12 Do you agree with our proposal to impose conditions on BT for the provision of information for quality of service purposes in each of the WLA, WFAEL, ISDN30 and ISDN2 markets excluding the Hull Area? Please provide reasons in support of your views.

Virgin Media broadly agrees with the proposals to align the WLA and WLR KPIs under a new direction. Virgin Media also supports Ofcom's proposal for an additional publication requirement, but does not agree that the Ofcom website is an inappropriate place for the publication of information required as part of an SMP condition. In addition, Virgin Media disagrees with Ofcom's concern that, simply by virtue of information being published on its website, Ofcom would be implicitly taken to have endorsed or approved such information. It would be simple to display a clear message on the relevant webpage to ensure that no visitor would remain under such a misapprehension. However, in saying that, Virgin Media does not consider that there is an overriding need to publish the information on Ofcom's site and provided the information is published in an accessible manner, then the purpose of the condition will be fulfilled, and the alternative suggestion of the OTA2 site may be entirely appropriate.

10.13 Do you agree with our proposal to extend the direction for specific KPIs to LLU and GEA services? Please provide reasons in support of your views.

Virgin Media agrees with this proposal.

10.14 Do you agree that it is appropriate to include a common core set of KPIs across WLR analogue, LLU and GEA given the competition between these services? Please provide reasons in support of your views.

Virgin Media agrees with this proposal.

10.15 Do you agree with our proposals to include a record of the number of services affected by MBORC in the KPIs? Please provide reasons in support of your views.

Virgin Media agrees with this proposal and the reasoning that a failure to include MBORC could result in increased citing of MBORC events in order to "game" the KPIs, but if MBORC events are included, it would provide additional transparency to know the level of performance for non-MBORC affected services, which this metric would help to provide.

10.16 Do you agree that it is appropriate to require Openreach to prepare some of these KPIs for presentation in the public domain? Do you consider that there are any issues with this publication that we should be aware of? Do you agree that the OTA2 website is the best location for such publication? Please provide reasons in support of your views.

Virgin Media agrees with this proposal, subject to the comments made above in response to Question 10.12.

10.17 Do you agree that it is appropriate to set minimum standards for Openreach services? Please provide reasons in support of your views.

An improvement in the current regime is required given the current level of performance by Openreach and the imposition of additional regulation is an appropriate response by Ofcom. Virgin Media welcomes the opportunity to respond to a further autumn consultation, as discussed in paragraph 10.321 of this consultation, in relation to the detail of any such obligation.

10.18 Do you agree that the minimum standards should only be applied to WLR and MPF provisioning appointment and fault repair? If not what else should be included and why? Please provide reasons in support of your views.

Virgin Media agrees that it is generally appropriate to adopt a cautious approach when introducing new regulation and, on this basis, supports Ofcom's proposed approach with regards to the application of minimum standards. It is important, however, that Ofcom ensures that competitive neutrality continues to exist between CGA and NGA technologies.

10.19 Do you agree that we should incorporate force majeure affected services in the standards? Please provide reasons in support of your views.

Virgin Media agrees that the new standard should incorporate force majeure affected services to avoid the incentive to game the definition of force majeure, as discussed in relation to MBORC events above.

10.20 How should we determine the appropriate standard? How would you assess the trade off of service level and charge increase?

To the extent that additional service provision means that there is an objectively justifiable increase in Openreach's costs, then Virgin Media agrees that it would be legitimate for Openreach to pass through this additional cost as part of the regulated charge. The balance between acceptable costs and acceptable service level is a matter that Ofcom must carefully consider, given the disparate views of stakeholders and their relative self interests. In particular, Ofcom's use of event simulation data, as supplied by Openreach, to form a basis for the determination of the relationship between resource and performance is only appropriate if the model is independently verified and if stakeholders are able understand the basis upon which any assumptions were reached.

10.21 Do you agree with the structure of the standard – yearly, forecast region targets? Please provide reasons in support of your views.

Virgin Media considers that the approach proposed is sensible and considers that variation within regions supports the need for forecast region targets.

10.22 Do you agree with our proposals regarding requirements on BT in relation to cost accounting and not to impose cost accounting requirements on KCOM? Please provide reasons in support of your views.

Cost accounting remains an important remedy to ensure that there is sufficient transparency of BT's costs in markets where there is an identified competition concern relating to pricing. Virgin Media notes that the proposal is to re-impose the obligation on BT, although Ofcom is proposing to change the nature of the pricing remedies in relation to certain services. Virgin Media sets out its comment on the suitability of those proposals elsewhere in this response.

Remedies: WLA next generation access

11.1 Do you agree with our proposal to require BT to offer VULA and with the five key characteristics identified? Please provide reasons in support of your views, *including, if you think alternative or additional characteristics are required, evidence of how you would use them to offer services to your customers.*

Virgin Media agrees with the proposal to require BT to offer VULA and considers that the five key characteristics are appropriate.

11.2 Do you agree that BT should continue to be allowed general pricing flexibility on VULA, subject to a fair and reasonable charges obligation? Please provide reasons in support of your views.

Virgin Media supports the 2013 EC Recommendation's aim of promoting competition and fostering investments in NGA networks. In particular, Virgin Media agrees with Recommendation 1 which seeks to "*foster investments in next-generation access (NGA) networks*" and increase "*legal certainty and predictability in light of the long term horizons in NGA networks*".

Virgin Media therefore welcomes Ofcom's provisional decision not to impose ex ante price regulation on VULA but instead adopt a light touch approach by imposing an obligation on BT to offer VULA products on the basis of fair and reasonable terms, conditions and charges, no undue discrimination and EOI.

Virgin Media continues to share the view that the next three to four years will be critical in the development of VULA and SFBB take-up more generally[4]. As such, it is important that innovation and investment is not stifled by an overly-restrictive or cautious regulatory regime. Whilst Virgin Media believes that there is more information available now with regards to the costs and revenues associated with VULA compared when Ofcom published its last WLA Statement in 2010, Virgin Media acknowledges that there remains some degree of uncertainty. If there remains uncertainty regarding the level of costs, inherently there are risks associated in setting a cost-orientated charge. This reflects the position adopted by the Commission in Recital 49 of the 2013 EC Recommendation – "*Due to current demand uncertainty regarding the provision of very-high speed broadband services it is important to promote efficient investment and innovation, in accordance with Article 8(5)(d) of Directive 2002/21/EC, to allow those operators investing in NGA networks a certain degree of pricing flexibility to test price points and conduct appropriate penetration pricing*". Accordingly, Virgin Media supports Ofcom's provisional decision to retain general flexibility on VULA at this time, whilst imposing a fair and reasonable charges condition on BT.

However, as set out below in response to Question 11.5, Virgin Media is concerned regarding Ofcom's provisional decision with respect to VULA margins. Whilst it acknowledges that the imposition of ex ante regulation with respect to VULA margins is provided for in the 2013 EC and NGA Recommendations, together with BEREC Guidance, Virgin Media considers that Ofcom has based its provisional decision in this regard on insufficient information and without due regard to all of the possible UK competition concerns. Ofcom's guidance focuses its concerns on the narrow premise that BT has the potential to set excessive wholesale prices, rather than widening its scope and considering the risks and possible effects of BT setting wholesale prices below cost – a concern previously highlighted by Virgin Media in its response to the Call for Inputs in December 2012. Accordingly, as set out below in more detail, Virgin Media believes that it would be premature to issue its guidance in its current form. Instead it should reassess the narrow construct of its guidance in light of additional

[4] *See paragraph 11.35 of the Consultation*

evidence provided as a result of this consultation together with the detailed cost analysis that will form a part of the ex post margin squeeze case brought by TalkTalk.

11.3 Do you agree that the charge for a GEA migration should be subject to a charge control at some point in the range of £10 to £15? If so, please indicate where in that range the charge should be, supported by evidence. If not, please state the reasons why.

There is a need to be cautious in imposing more intrusive regulation on GEA when the costs of provision of the service as a whole have not been examined in detail by Ofcom. To concentrate on a particular service and impose intrusive pricing regulation such as a charge control may have unintended consequences in relation to overall cost recovery. In particular, Virgin Media is concerned that consequence of Ofcom's proposed approach may be to undermine the investment and innovation in SFBB technologies, which would impede not only BT, as the regulated entity, but also other infrastructure providers.

11.4 Do you agree with our proposal that BT offer a minimum contract term of no more than one month following a GEA migration? Please provide reasons in support of your views.

Virgin Media emphasises the appropriateness of considering the effect of regulation in the round, as discussed in our response to Question 11.3.

11.5 Do you agree with our proposed approach to regulating the margin between the VULA price and BT's downstream prices? In particular:

(a) Do you agree that our objective should be to ensure that BT sets a VULA margin that allows an operator with slightly higher costs than BT (or some other slight commercial drawback relative to BT) to profitably match BT's retail superfast broadband prices?

(b) Do you agree that we should achieve this objective by requiring BT to set fair and reasonable terms, conditions and charges and setting out guidance on how we would interpret this requirement?

(c) Do you agree with our draft guidance? In particular, do you agree with our benchmark operator and the ways in which such an operator differs from BT?

Please provide reasons in support of your views.

As set out above, Virgin Media supports Ofcom's provisional decision not to impose ex ante price regulation on VULA but instead adopt a light touch approach by imposing an obligation on BT to offer VULA products on the basis of fair and reasonable terms, conditions and charges, no undue discrimination and EOI.

However, Virgin Media is concerned about Ofcom's provisional decision to impose ex ante regulation on VULA margins. Virgin Media considers that there remains a high degree of uncertainty associated with determining the "right" level of margin and that ex ante regulation that could mandate margins that are above or below a competitive level would likely risk distorting the market to the detriment of consumers. This raises the following key concerns which are discussed in more detail below:

- Ofcom has failed to take a holistic view of costs when reaching its provisional decisions;

- Ofcom has underestimated the impact on future investment incentives and in doing so has wrongly deviated from the position set forth in the 2013 EC Recommendation;
- Ofcom has not considered the potential implications of BT Openreach setting wholesale prices below cost; and
- Ofcom's guidance is both premature and incomplete focusing only on margin squeeze rather than taking account of the potential for predatory pricing

Whilst Virgin Media accepts that BT should continue to be subject to the same SMP condition with regards to its VULA margin i.e. that it should be set on a fair and reasonable basis, it is concerned that Ofcom has decided to extend its reach and impose ex ante regulation on VULA margins based on insufficient information and without due regard to the effect on the market as a whole. Virgin Media accepts that Ofcom needs to consider the broad issue of VULA margin given the concerns set out in both the NGA and 2013 EC Recommendations. However, Virgin Media considers that the proposed application of explicit guidance is inappropriate both in terms of timing and scope.

In this regard, Virgin Media is concerned that Ofcom has failed to take a holistic view of the costs associated with VULA products and in doing so has underestimated the potentially detrimental impact that setting a larger VULA margin than required by competition law could have on future investment incentives – not just for BT but for other competing investors in infrastructure. Ofcom's statement in paragraph 11.360 is indicative of the concerns which Virgin Media has as it is clear that Ofcom has not had regard to sufficient cost data to understand the potential implications on the market and is only able to speculate that "*addressing Potential Concern 2 is only likely to involve a* ***relatively modest*** *increase in the VULA margin (over and above that required under competition law). As a result the negative effects* ***are likely to be*** *limited*" (emphasis added).

The potential to impact future NGA investment is a key concern for the Commission. In the 2013 EC Recommendation, one of the Commission's main aims is "*to promote efficient investment and innovation in new and enhanced infrastructures*". Whilst Virgin Media accepts that there are times when it is clearly warranted for Ofcom to adopt a different approach in the UK or place greater emphasis on certain features in UK markets, Virgin Media does not agree that deviation from the 2013 EC Recommendation so as to place a greater weight on promoting competition as compared to fostering NGA investment is justified in this instance – paragraph 11.466 of the Consultation. In particular, Virgin Media believes that Ofcom has significantly underestimated the ongoing level of investment which is needed in respect of the deployment and continual upgrade of NGA networks across the UK.

As noted above, Virgin Media continues to invest in its network in order to continually develop its cutting edge propositions. [✂] It is vital, therefore, that such innovations and investment are not stifled or restricted by regulation, which would ultimately lead to end users losing out from the resultant missed opportunity and the UK would potentially struggle to meet the targets as set by the Government as part of the Digital Agenda.

Virgin Media therefore disagrees with Ofcom's conclusion drawn in paragraph 11.349 that imposing a stricter than competition law test will be "*unlikely to have a material impact on investment incentives*". Instead, we re-emphasise Ofcom's own statement at paragraph 11.350 that "*unanticipated regulatory changes that materially affect the profitability of that investment would introduce perceived regulatory uncertainty. This* *in turn is likely to harm future investment incentives...*" Ofcom must not only consider the impact on incentives for BT to invest in its network but must also consider the wider sectoral implications. An indication to the market that wholesale pricing was being decreased by regulation may have a chilling effect on investor confidence in NGA advancement, and therefore, not only would BT be placed at a disadvantage from a lack of investor confidence, but also other network owning CPs such as Virgin Media. Virgin Media therefore does not support Ofcom's provision decision to adopt the adjusted EEO test in its guidance and instead advocates the use of the 'pure' EEO test as adopted by the Commission in Recital 64 of the 2013 EC Recommendation.

Furthermore, Virgin Media notes that the light-touch approach to date has delivered significant benefit for consumers (and UK plc) by allowing providers to compete on the merits. In the period since 2010, Virgin Media has made considerable investments in its network to ensure that its customers receive cutting edge SFBB services including a speed doubling exercise whereby we have doubled the majority of our customers' broadband speeds and our top SFBB tier of 120Mbit/s is available across the entire network footprint. As noted by Ofcom, *"[t]he move to higher speeds is partly down to Virgin Media's network upgrade to double the speeds of most of its cable broadband customers. As a result, the average speed on cable has nearly doubled over the last year from 18.0Mbit/s to 34.9Mbit/s*."[5] Overall, by May 2013, 19% of residential broadband connections were superfast, up from 14% in November 2012 and more than doubling from 8% over the course of the last year. In May 2013, the average fibre-based connection speed was 43.6Mbit/s, up by over a third (38%) over the year. Virgin Media therefore shares BT's view that "*A more intrusive regulatory regime carries a high risk of distorting investment incentives and damaging the development of a vibrant and competitive market*"[6] which will ultimately be to the detriment to the end consumer.

Whilst other responses to the CFI suggested that GEA pricing may be high, Ofcom, in addressing the issue of potential excessive pricing, has not investigated pricing in any detail[7].

Ofcom notes, at paragraph 11.299 of the consultation, that the complaints made by stakeholders in response to the CFI that a margin squeeze was likely could be a result of a misinterpretation of SFBB take up, and that the current market position reflects the different commercial strategies that CPs have adopted, rather than some form of margin squeeze. Whilst it is suggested that this is a matter that does not need to be investigated before any guidance should be implemented, the position, coupled with the additional evidence provided in this response, appears to be untenable. Additionally, it is noted that the current retail strategies and pricing levels have moved on since the response to the CFI and are not in any way suggestive of a margin squeeze, with fibre being actively pushed by major CPs[8]. Current pricing suggests that Sky, TalkTalk and EE are all able to price their retail offerings substantially beneath BT Retail's equivalent Infinity offering (see Table 1, below). Indeed, the level of monthly price differential (from £9.77 to £7.68, after offers) that exists between BT Retail's offering and all of the other listed GEA consuming providers, suggests that there is a clear ability to price significantly below BT Retail absent any

[5] See: http://media.ofcom.org.uk/2013/08/07/average-uk-broadband-speed-continues-to-rise/

[6] BT"s response to Ofcom"s Call for Inputs on the Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30 – 8 January 2013

[7] See for example paragraph 11.134 of the Consultation where Ofcom confirms that it has not examined the modelling in the WIK report submitted by TalkTalk

[8] See for example Sky's recent "Toy Story" advertising campaign.

specific margin squeeze guidance. Given this indicative trend in the retail market, there is a clear need for Ofcom to give additional and careful consideration to whether additional, specific regulation is needed or appropriate at this time in the context of all the available evidence.

Table 1:

	Virgin Media	Sky	BT	TalkTalk	EE	Plusnet
Broadband Package	Up to 30Mb	Fibre Unlimited	Unlimited Infinity 1	Essentials + Fibre Medium	Up to 38Mb/sec	Essentials Fibre Broadband
Download Speed	Up to 30Mb	Up to 38Mb	Up to 38Mb	Up to 38Mb	Up to 38Mb	Up to 38Mb
Monthly Usage	Unlimited	Unlimited	Unlimited	Unlimited	Unlimited	40GB
Broadband Cost	£14.50	£20.00	£23.00	£17.50	£15.00	£15.99
Phone Package	Free weekend calls to landlines, 0870 & Virgin Mobiles	Free weekend calls to landlines & 0870	Free weekend calls to landlines, 0845 & 0870	Free E&W calls to landlines, 0845 & 0870	Free weekend calls to landlines, 0845 & 0870	Free weekend calls to landlines, 0845 & 0870
Line Rental	£14.99	£14.50	£15.45	£15.40	£14.75	£14.50
Contract (months)	18	12	18	18	18	18
Standard Monthly Cost	**£29.49**	**£34.50**	**£38.45**	**£32.90**	**£29.75**	**£30.49**
Connection Fee	£49.95	£52.18	£36.95	£30.00	£56.00	£5.99
Offer(s)	6 months half price Fibre & free install	6 months half price Fibre and free activation	£3 off Fibre for 12 months	12 months half price Essentials, 6 months half price Fibre & free install	3 months half price Fibre & half price install	None
Offer value	(£93.45)	(£110.00)	(£36.00)	(£105.00)	(£47.50)	**£0.00**
Total Cost Over Contract[1]	£487.32	£356.18	£693.05	£517.20	£544.00	£554.81
Average Monthly Cost Over Contract[1]	**£27.07**	**£29.68**	**£38.50**	**£28.73**	**£30.22**	**£30.82**

[1] Includes any connection fees and offers

Source: Publicly available information from CPs' websites, correct as at 16 September 2013

Virgin Media is particularly concerned that Ofcom's guidance simply focuses its concerns on the narrow premise that BT has the potential to set excessive wholesale prices, rather than widening its scope and considering the risks and possible effects of BT setting wholesale prices below cost – a concern previously highlighted by Virgin Media in its response to the Call for Inputs in December 2012. Whilst in its CFI response Virgin Media stressed the need for a holistic approach to pricing regulation to be undertaken, this appears to have been ignored by Ofcom in the Consultation.

Virgin Media's concerns are not without merit. In paragraph 11.248 of the Consultation, Ofcom recognises the potential for BT to offer its wholesale VULA products below cost given the "bandwagon effects", a concept which is supported by BT's response to the 2012 Call for Inputs in which it noted that "*its business case for NGA investment requires "substantial" take-up across the industry and thus Openreach is "fully incentivised" to increase CP's take-up of GEA and to meet CPs' and end users' needs*".[9] In Recital 25 of the NGA Recommendation, the Commission accepts the premise that there is a risk that SMP operators may offer wholesale products below cost.

[9] See paragraph 11.259 of the Consultation.

Virgin Media has previously commissioned an independent third party report to assess whether Openreach's pricing of its GEA-FTTC products, based on certain assumptions and taking account of certain variables, could be considered predatory. A copy of this report is attached at Annex 1. Whilst Virgin Media acknowledges that the independent report is not necessarily conclusive evidence of predatory pricing behaviour, it does demonstrate that there are plausible scenarios in which the test for predation could be met by BT and in turn casts doubt on the inherent veracity of Ofcom's assessment as to the nature of potential concerns which may result in the market.

Ofcom acknowledges in paragraph 11.343 of the Consultation that "*requiring BT to set a VULA margin greater than required by competition law implies that it either must increase its retail prices (which harms consumers, at least in the short term) or reduce its wholesale VULA price (which affects its investment incentives).*.". Given the fact that there is effective competition at the retail level (and, specifically, no identified dominant provider), any ex ante intervention by Ofcom will, in reality, result in a decrease the wholesale price for VULA products. However, Ofcom has failed to assess in its draft guidance the potential that wholesale pricing is already too low, despite available evidence, or to consider the effect that a further reduction in wholesale pricing could well have a detrimental knock-on effect of curbing potential future investment – and not just by BT. Therefore, despite the intention of Ofcom not to intervene in the regulation of wholesale pricing, the introduction of the proposed guidance in its current form risks introducing ex ante wholesale price regulation via the back door.

Furthermore, VULA margin is currently the subject of an ongoing competition complaint raised by Talk Talk. For Ofcom to issue guidance now would be premature and has to the potential to give rise to confusion and distort the market should Ofcom determine that there are no competition concerns as a result of its ex-post competition investigation. Guidance, issued under the proposed access condition mandating "fair and reasonable" charges, can be proposed and consulted upon at any time during the market review period. Ofcom should therefore delay issuing any guidance until such time as it has had an opportunity to take into account any modelling and analysis carried out in relation to the ex post margin squeeze assessment which in and of itself would satisfy the 2013 EC Recommendation's EEO test. It should also seek to ensure that any guidance is sufficiently broad enough in scope to provide for predatory as well as excessive wholesale pricing behaviour on the part of BT. If Ofcom should publish guidance prior to the ex post ruling, it risks creating confusion and the potential for challenge.

Virgin Media therefore considers Ofcom's guidance to be incomplete, not fit for purpose and not able to withstand scrutiny. Given the potential risk that Ofcom's guidance could have negative implications and potentially introduce inappropriate ex ante regulation on VULA pricing, Ofcom should not issue its guidance in its current form. Virgin Media notes that neither the 2013 EC or NGA Recommendations, nor the BEREC Guidance, precludes Ofcom from widening its guidance to reflect such regulatory concerns particularly if there is evidence to suggest that there is justification for doing so in the UK.

11.6 Do you agree that we should continue to require SLU and that it should be offered subject to a Basis of Charges requirement? Please provide reasons in support of your views.

Virgin Media agrees that it is still appropriate for Openreach to be required to offer SLU. However, the Basis of Charges condition proposed is considerably different to the existing Basis of Charges condition which requires pricing to be on a LRIC+ basis. Ofcom's proposals require the obligation on SLU to be interpreted as set out in paragraph 11.513 of the consultation and under draft Conditions 6.3 and 6.4. Whilst it is essential that any conditions imposed are transparent, the different applications of the Basis of Charges condition create a number of separate conditions that vary within both the market as a whole and across the different services (as in the case of SLU), potentially creating confusion rather than dispelling it.

11.7 Do you agree with our proposed approach on the issue of SLU and vectoring? Please provide reasons in support of your views, including, if you disagree with our approach, evidence as to why an alternative approach is more appropriate (e.g. in the form of business plans).

Ofcom discusses the need for the use of shared or compatible DSLAMs within exchanges to allow vectoring[10]. This provides Openreach with the potential to inhibit further SLU roll out by requiring the prospective operator to ensure that its technology is compatible with BT's own. Whilst the network access obligation under proposed condition 10 requires BT to provide SLU on reasonable basis, BT retains a wide discretion as to how it complies with this condition therefore not necessarily preventing the potential competitive concern identified in relation to vectoring. Given Ofcom's provisional conclusions supporting the relevance and importance of continuing the obligation to offer SLU; it would be unfortunate for this to be undermined by inaction on the issue of vectoring. Virgin Media agrees with Ofcom's proposal not to accede to BT's suggestion that the SLU obligation should be removed in order to resolve any vectoring issues; this ignores the underlying competition concern identified by Ofcom. However, the proposed approach would appear to favour a BT roll out of vectoring that is likely to precede wider development of SLU. Assuming that BT wishes to use vectoring to achieve a higher headline speed offer for its SFBB product, it will want to roll this out on a national basis, and potentially Ofcom's guidance will result in BT being able to routine rely on the excuse set out at paragraph 11.499 that "*it was not possible for SLU to be deployed without significantly degrading the service of existing customers at that cabinet*". Virgin Media would urge a more industry led discussion on achieving a "vectoring neutral" solution that does not impede SLU take up yet further, to the extent that on the next review a lack of take up is seen by Ofcom as reason to remove the remedy, as suggested in paragraph 11.500.

11.8 Do you agree that we should continue to require PIA and that it should be offered subject to a Basis of charges requirement? Please provide reasons in support of your views.

As set out in its CFI response, Virgin Media considers that, although the current PIA option is not fit for purpose, it remains necessary for an obligation to be imposed.

11.9 Do you agree that PIA should continue on the same bases as it is currently applied? Please provide reasons in support of your views, including, if you disagree with our approach, evidence of specific business plans or intentions to invest in

[10] See paragraph 11.493 of the Consultation

deploying NGA networks that are currently unviable, but would become viable with your suggested changes.

As echoed by a number of stakeholder responses to the CFI, the current PIA product is not working, evidenced by the lack of take up. This strongly suggests that to continue the remedy on the same basis that it is currently applied will result in the continuation of a not fit for purpose product by BT.

However, Ofcom's invitation to supply business plans that would only be contemplated in the event that changes were made to the remedy is a classic example of Ofcom placing the cart before the horse. It is not appropriate to invest further time and money in drawing up specific business plans that would only be viable on the basis that speculative regulatory changes were enacted. Rather, a suitable framework needs to be in place before business plans are considered. Whilst Virgin Media realises that it may be equally difficult to determine an appropriate regulatory framework without any proven demand, it considers that if Ofcom wants to ensure that PIA is given a chance of being a meaningful remedy it needs to follow a development project that most likely sits outside of this review. Therefore, Virgin Media supports Ofcom's proposals to continue the broad obligation on BT but consider that there is further work, with the support and backing of industry, that needs to be undertaken by Ofcom.

11.10 Do you agree that we should not require BT to offer any other Please provide reasons in support of your views provide reasons to support your views, including, if you disagree with our approach, evidence of your likely demand (e.g. in the form of business cases or specific intention to invest) for any suggested alternative forms of network access.

Virgin Media agrees with Ofcom in that WLU, FTTC Unbundling or FTTDp should not, at this time, be the subject of separate remedies.

Remedies: WLA current generation access

12.1 Do you agree with our proposal to continue to require BT to provide LLU? Please provide reasons in support of your views.

Virgin Media agrees that BT should continue to provide LLU.

12.2 Do you agree with our proposal to continue to apply a charge control on LLU? Please provide reasons in support of your views. (Comments on the specifics of the charge control should be made in response to the forthcoming 2013 LLU WLR Charge Control Consultation.)

Virgin Media agrees that a charge control should continue to be applied to LLU services.

Ofcom's proposal to remove the market wide cost orientation remedy and to carve out the application of "fair and reasonable" charging in respect of products that are subject to a charge control is a fundamental change of position from the 2010 review; a position which is used by Ofcom in the context of determining markets and assessing market power. In 2010, Ofcom stated :

"*In the context of LLU there is a general requirement for BT's charges to be cost orientated, in particular on the basis of LRIC+. On many products we also intend to continue setting charge controls. There is also a requirement on BT to have fair and reasonable terms, conditions and charges. Finally, BT is required not to discriminate unduly between customers. We consider that these existing remedies are sufficient to enable us to adequately control BT's prices for LLU products and services, and where appropriate, to ensure consistency with other products or parts thereof. If stakeholders come forward with specific allegations of pricing behaviour which they consider may be in breach of these obligations, they will be considered in accordance with our established procedures*."[11]

Despite the explanation in relation to the use of sub-caps to increase protection against gaming of controls in relation to individual service pricing, Virgin Media remains concerned that there is substantially less protection afforded by the proposed control than previously existed in this market. The flexibility afforded by the combination of remedies previously imposed protected CPs against both high and low pricing. As set out above in response to Question 11.5, Virgin Media has identified shortcomings in Ofcom's analysis in relation to GEA pricing and consider that this should mean that Ofcom should take a more cautious approach to removing what are still considered to be proportionate remedies in an established market which has not fundamentally changed since the last review. In this regard, it is of particular note that Ofcom issued a "no material change" decision only last year (during the most recent charge control review), and stakeholders did not consider a change was necessary in their responses to the CFI in 2012[12]. Notably even BT, who as the SMP provider has a clear self interest to lessen regulation, accepted that there would not be major change.

As part of its most recent Cost Orientation market review, Ofcom issued a consultation which set out proposals highlighting a change in policy with regards to pricing remedies. However, stakeholders have had no sight of the responses to that consultation or any further sense of direction by Ofcom. To that end, Virgin Media re-iterates its view that it is essential for Ofcom to be more transparent as to its current thinking with regards to Cost Orientation and calls on Ofcom to publish a post-consultation position statement. Virgin Media stands behind its comments made in response to that consultation and remains concerned that the proposals in this consultation continue to show Ofcom moving away from the use of market-wide cost orientation (which performed a useful and necessary role) towards the use of price-caps which, at best, only guards against the risk of excessive pricing on an aggregate level depending on the breadth of the sub-cap and/or fair and reasonable which remains an untested and unknown remedy in the context of a specific price control remedy..

12.3 Do you agree with our proposed approach, including on pricing, to LLU TRCs and SFIs? Please provide reasons in support of your views.

This is the first time Ofcom published proposals which seek to implement its new approach to "targeted" cost orientation. Traditionally, Ofcom has reduced excessive pricing to FAC through the imposition of charge controls and has consistently referred and applied a policy of using glide paths so as to reduce pricing over the period of the control. The proposal to impose an immediate requirement to set prices

[11] *WLA Statement 2010 Paragraph 6.42*
[12] Question 4.2 Call For Inputs Fixed Access Market Review

at FAC (or even FAC+ where the + is small) would seem to impose a stricter requirement on Openreach and requires an immediate reduction of prices for FAC. This has the potential to be significantly disruptive across industry as a whole given that different stakeholders will inevitably have diverse interests in relation to pricing of such services.

As set out above, excessive use of “bespoke” cost orientation conditions could act to reduce transparency of this remedy contrary to Ofcom’s intention.

12.4 Do you agree with our proposed approach, including on pricing, for electricity? Please provide reasons in support of your views.

Virgin Media sets out its concerns with respect to the basis of charges on FAC in response to Question 12.3 above. However, Virgin Media accepts that where there is clear evidence of BT incurring input costs (e.g. electricity costs) and such costs can be passed through with minimal addition of network common costs, then such a charge is more suitable to stricter regulation such as an FAC type condition. Certainly, assuming there is, as stated, only minimal common costs added to the pure input cost of electricity, then any + would logically be set as a small factor.

12.5 Do you agree with our proposed approach to cost accounting for LLU? Please provide reasons in support of your views.

Virgin Media does not agree with the proposal to drop the requirement to publish LRIC data by BT in its RFS. Ofcom states that the absence of cost orientation as a remedy means that it is unnecessary for BT to publish LRIC data. Virgin Media disagrees with this broad brush statement both in general terms and in the specific context of this review.

General Concern

Virgin Media reiterates its previous submissions against Ofcom’s assertion that the publication of LRIC data is dependent upon the imposition of a cost orientation remedy[13]. As part of this consultation, Ofcom continues to rely on an obligation to provide access on “fair and reasonable” charges as a means to offset some of the protection lost by not imposing a cost orientation condition. Accordingly, LRIC data is potentially highly relevant for stakeholders to have confidence that charges are “fair and reasonable”.

Although Ofcom has failed to provide any general guidance on the meaning of fair and reasonable, it must follow that fair prices must bear some relationship to cost. Ofcom has, to date, refused to confirm this linkage, stating that fair and reasonable “*involves a large number of factors*” [14] but it remains entirely unclear as to what those factors may be. It would be surprising if the cost of supply was not a relevant factor, especially where “fair and reasonable” is used in the context of protection from low pricing (where DLRIC would appear to be especially relevant).

Concerns specific to this review

[13] See Virgin Media’s responses to Ofcom’s BCMR, Narrowband and Cost Orientation consultations

[14] See paragraph 4.24 Ofcom’s statement : Changes to BT and KCOM’s regulatory financial reporting 2012/3 update dated 25 April 2013

In this review, LRIC data continues to be of key importance beyond the imposition of cost orientation “floors and ceilings”. The differential between MPF and WLR+SMPF is specifically set at LRIC, with SMPF set at LRIC, which enables a level playing field for costs allocated to the MPF and WLR cost stacks. Given that this is a regulatory requirement imposed by Ofcom, it remains important to ensure that stakeholders have confidence in BT’s compliance with the obligation, and therefore sufficient data needs to be published to ensure the differential requirement is being complied with.

Ofcom needs to bring much needed transparency to this aspect of its proposed regulation. This can be through the current Cost Orientation review, to the extent that general cross market guidance can be provided, and also through this review given the proposed regulatory framework. Further, as previously submitted in other reviews, given that Ofcom is proposing to oblige BT to maintain the data and provide reports to Ofcom, there is minimal incremental effort required to publish the data and as such the proportionality test of imposing a publication requirement should have a low threshold.

Remedies: WFAEL

14.1 Do you agree with our proposal to continue to require BT to provide WLR? Please provide reasons in support of your views.

Virgin Media agrees with the proposal to continue to require BT to provide WLR.

14.2 Do you agree with our proposal to continue to apply a charge control on WLR? Please provide reasons in support of your views. (Comments on the specifics of the charge control should be made in response to the forthcoming 2013 LLU WLR Charge Control Consultation.)

Virgin Media agrees that a charge control should be imposed but repeat its earlier concerns over Ofcom’s proposed approach to price control remedies applied in the WLA market (for LLU services). Removal of a (near) market wide cost orientation remedy and reliance upon the fair and reasonable access condition substantially weakens the regulatory protection afforded in relation to these services despite there being no significant change in this market which may have justified a change of approach.

14.3 Do you agree with our proposed approach to pricing for WLR, including our proposals for a Basis of charges obligation on TRCs and for Caller ID? Please provide reasons in support of your views.

Virgin Media would repeat the comments made in relation to LLU in respect of TRCs.

14.4 Do you agree with our proposed approach to pricing for WLR calling and network features (including revenues for Caller ID)? Please provide reasons in support of your views.

Given the unusual circumstances that Ofcom describe in the consultation in relation to caller ID, Virgin Media chooses not to comment on the proposed approach (which allows for above cost recovery in order not to create additional demand), save for the fact that this approach should be regarded on its merits and should not form a default position for other price controls.

Virgin Media has already commented on Ofcom's application of the fair and reasonable obligation as a general pricing remedy, and the potential lack of transparency over how it would be interpreted.

14.5 Do you agree with our proposed approach to cost accounting for WLR? Please provide reasons in support of your views.

Virgin Media reiterates its comments made in relation to cost accounting proposed for LLU services above.

Remedies: ISDN30 and ISDN2

15.1 Do you agree with our proposal to continue to require BT to provide wholesale ISDN30? Please provide reasons in support of your views.

Virgin Media agrees with the proposal.

15.2 Do you agree with our charge control proposals for ISDN30? Please provide reasons in support of your views.

Virgin Media agrees with Ofcom taking a pragmatic approach to this market and not remodelling following the 2012 Charge Control review. However, it will be necessary for Ofcom to be alive to any significant upward cost trends within the market (driven, for example, by a significant shift to alternative IP based solutions) to ensure that the control does not become overly restrictive. Ofcom notes that the 2012 Charge Control review found an upwards trend in relation to underlying unit cost. The 2012 review only forecast volumes to 2013/4 and there is an absence of forecast data for the end period of the proposed control in 2017. Consequently, a significant drop in actual volumes could result in a cost increase that it not reflected in the proposed control, which imposes a year-on-year fall in average prices in real terms. This could result in the skewed migration incentives between ISDN30 and IP alternatives. In this regard, a more neutral approach, even to a limited extent, of flat real rather than flat nominal pricing combined with a commitment to continually monitor the market, would provide some security against prices being driven to an artificially low level and creating the sort of market distortions that Ofcom specifically sought to avoid in undertaking the detailed modelling prior to the imposition of the 2012 control.

15.3 Do you agree with our proposed approach for cost accounting for ISDN30? Please provide reasons in support of your views.

Virgin Media raised concerns with the approach taken to cost accounting and resultant reporting obligations in the recent annual review of financial reporting requirements. In particular, it considered the reporting of FAC would be a useful metric for stakeholders to have visibility over. Although Ofcom declined to accept its prevision submission, Virgin Media considers that the proposed control as part of thjs review requires Ofcom to reconsider its decision. As stated above, the proposed control is not based on detailed modelling, instead imposing a flat nominal safeguard cap. Whilst Virgin Media accepts that the FAC costs do not relate to the regulated price given the depreciated asset base, it is more important that cost trends are visible to ensure that the proposed remedy (if imposed) remains appropriate throughout the review period. For the reasons given above, there is a significant risk of increasing costs during the review period. As the majority of stakeholders, including BT, have indicated, low pricing of ISDN30 could have significantly disruptive effects on the market as a whole, which would concern both BT as the supplier of the regulated provider and competing providers. Therefore, Virgin Media considers, in light of the pragmatic approach to modelling, that publication of FAC would be appropriate and not unduly onerous to BT.

15.4 Do you agree with our proposal to continue to require BT to provide wholesale ISDN2? Please provide reasons in support of your views.

Virgin Media agrees with this proposal.

15.5 Do you agree with our charge control proposals for ISDN2? Please provide reasons in support of your views.

Ofcom is proposing to remove the current cost orientation obligation and replace it with a charge control, which, in effect is a static cap, based on current pricing for connections and rentals (in a single basket) and a £10 charge for transfers.

The current pricing is based on BT's LRIC data, where charges have been set a little under the published DSAC (no doubt, to comply with the current obligation).

Although Ofcom suggests that it is appropriate to base the proposed approach for ISDN2 pricing on the framework applied to ISDN30, this assumes that the LRIC data provided by BT is correct. Ofcom understandably do not want to undertake detailed charge control modelling for a low volume product, however, the introduction of a "hardwired" control which benchmarks prices against current levels and reduces transfer charging to LRIC, needs to have some degree of assurance that it is appropriately cost based.

The LRIC values for ISDN30 caused Ofcom particular concern when setting the ISDN30 control. In particular Ofcom felt unable to rely on updated LRIC data supplied by BT in the course of that review[15].

<u>Rental and Connections</u>

Virgin Media accepts that a safeguard cap based on current pricing levels is not inappropriate. However, it repeats it previous concerns set out above in the context of ISDN30, that Ofcom needs to ensure that they are alive to significant cost changes within the market that would render a fixed control inappropriate.

<u>Transfers</u>

In this context it is inappropriate to mandate a reduction of transfer costs to the LRIC value. Even if a reduction in a transfer cost is considered necessary, Virgin Media does not agree with the proposal that this should be by way of a one off adjustment. Ofcom have continually emphasised a strong policy preference for glide paths, and typically one-off adjustments have been made only where prices are considerably out of line with costs. To the extent that Ofcom is reliant on the historic LRIC data, the current pricing level is set well within its unaudited DSAC, and therefore there is no need to radically align pricing to within "cost oriented" bounds. Ofcom's suggestion that transfers should typically be set low to encourage switching is less relevant where switching from the product is likely to result in a move to new technology. Artificially depressing the transfer cost may skew incentives to migrate to IP based

[15] See paragraph 1.9 of ISDN30 Charge Control consultation December 2011.

alternative solutions. In the case of ISDN30, transfer costs were already low, and therefore there was no regulatory intervention to reduce prices at the introduction of the control in 2012. In short, the only valid reason for a one-off adjustment in this case is Ofcom's assertion at paragraph 15.119 of the consultation document that it is, in practice, easier to mandate a one-off adjustment rather than setting a glide path. Virgin Media does not consider that this is an appropriate way to approach pricing regulation.

15.6 Do you agree with our proposed approach for cost accounting for ISDN2? Please provide reasons in support of your views.

Virgin Media reiterates its concerns set out in relation to ISDN30 above that cost data can provide useful indicators of cost trends that may have greater significance for legacy products than products within their mid-life cycle. When setting a control that is not subject to detail cost modelling, this concern is increased and can be partially mitigated by increased transparency obligations in terms of financial reporting. It is also important to take account of the current regime imposed on BT, as a requirement to continue to produce information is significantly less intrusive than a requirement for new information, and as such the proportionality threshold for continuing what is already in place should be lower.

Virgin Media
30 September 2013

Annex 1 : [✂]