Response to the Ofcom Consultation on Wholesale Local Access

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Summary

Vtesse Networks believes that the proposals indicate that Ofcom has taken a major step forward in recognising the enduring bottleneck of BT's physical assets, ducts, poles, fibre and copper, and that ex-ante remedies are therefore required.

However, we do not believe that the WLA proposals sufficiently recognise the differences in availability of service in the Final Third – those areas of the UK that currently get poor broadband and are unlikely, according to the Digital Britain report, to get super-fast broadband without intervention¹ - and the rest of the market.

Put bluntly, for customers in the Final Third, the issue is not primarily about super-fast broadband, it is about even achieving the bare minimum of 2 Mbps service.

BT has announced plans to roll-out super-fast broadband to over 60% of the UK by 2015. This is targeted mainly at those areas already covered by cable TV leaving a substantial part of the country with limited access to even basic broadband.

Unless a more radical regulatory approach is taken to attract investment from parties other than BT into the Final Third, the Digital Divide will increase, to the detriment of the economy, and which will reduce the potential benefits of e-government².

We therefore ask Ofcom to look again at the measures being proposed, and to think again. We make more detailed proposals below.

¹ See http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_06_09digitalbritain.pdf

² See <u>http://microsites.oii.ox.ac.uk/digital-exclusion/content/welcome</u> for the impact of Digital Exclusion

Introduction

Vtesse Networks is a leading supplier of very high performance networking solutions to large organisations, including IBM, Atos Origin, hp, Lloyds Banking Group, Vodafone, Deutsche Bank, the NHS, the Land Registry, the Home Office and others.

Through its detailed knowledge of fibre infrastructure from multiple operators, Vtesse Networks has a unique perspective on solutions for poorly served areas in the UK, where fibre route pass through, but where the owners of these assets do not provide local services.

Using this knowledge, Vtesse Networks has started a series of trials of Fibre to the Cabinet (FTTC) and Fibre to the Home (FTTP) in Cornwall, Hertfordshire, Buckinghamshire, Wiltshire and Warwickshire. It is now the largest independent implementer of Fibre to the Cabinet in the UK.

The detail

We welcome the opportunity to comment on what is a very important stage in the further development of the UK Telecommunications market, where access by the citizen to high quality broadband has taken on a new imperative.

Whilst we agree with the general analysis as it applies to those areas where there is facilities based competition, we believe a major opportunity has been missed in properly addressing the issues of the Final Third.

The consultation covers the next 4 years. In this period, Ofcom anticipates a choice between cable and FTTC or FTTP in around 50% of the UK, but does not, in our view, propose sufficient steps to overcome the barriers to provision in the Final Third.

In our surveys of our trial locations we have found a nearly universal complaint that, far from wanting greater than 8 Mbps broadband, existing customers are distraught that they cannot even get 2 Mbps. The reason for this poor service is that these customers are either too far from the BT exchange, or are in rural locations which make it uneconomic at current Openreach charges for a competitive service, or (most often) both.

In practice, Openreach appears to be taking little interest in serving locations that are not already served by CATV (for a number of reasons no doubt) and we strongly believe that Ofcom should take the opportunity of this review to introduce reforms that will make competitive activity more likely in these Not Spots.

If this is not addressed properly, it will lead to a substantial widening of the Digital Divide between citizens that can, if they choose, purchase super-fast broadband, and those that continue to have no choice, and will have to make do with the bare minimum.

We believe Ofcom's aim should be to maximise persistent contestability in the Final Third areas. In broad terms these consist of all Market 1 exchange areas, and those areas served by PCPs on E-side loops of more than 2.5km, where LLU bandwidth is substantially below the national average.

Whilst we applaud the Ofcom initiative in PIA we believe that these alone will not reduce barriers sufficiently to substantially raise the level of contestability.

We propose the following:-

- That sub-loop prices and associated component prices be set by Ofcom to positively encourage investment in FTTC, as we believe this provides the best early opportunity to both solve the problems of long copper loops, and provide a stepping stone to higher bandwidths and FTTH. We fail to see why there should be any preference given to LLU over SLU, as Ofcom proposes, as both consist of the same or similar cost inputs. In particular, the SLU connection charges are excessive, have not moved since 2003, and are out of line with European countries where the connection charges are around Euro 35, rather than BT's £127.61 which it applies, not to itself, but to other CPs. There is no basis for LLU rentals being lower than SLU as is currently the case, as SLU loops are shorter, and consume less cost on any rational basis.
- The associated service charges are also excessive. For example, the £600 charge for supervising core drilling into the BT chamber in FTTC is superfluous. In one case recently, the BT local staff allowed our approved BT contractors to undertake the work unsupervised, demonstrating that the supervision is not necessary. Tie cable charges also appear to be excessive.
- Furthermore, the concession granted by Ofcom in dis-applying the requirement in the Undertakings of Equality of Inputs raises the concern that we have two prices for the same components the one used by BT in GEA FTTC and another set of prices for other CPs. This breaches the fundamental EU principles of non-discrimination and transparency, because BT discriminates between prices for Sub-loops supplied to itself and those supplied to other CPs; furthermore the BT internal pricing within GEA-FTTC is not visible.

In particular, BT supplies to itself a "Direct multiple - GigE" connection³ between its cabinets and the exchange based Ethernet switches that is not available as a separate product to other CPs, which have to rely either on their own remedies, or use a variety of the BT lit WES family. This is both wasteful – additional and unnecessary electronics⁴ – and costly in both implementation time and hardware that is entirely superfluous, as most VDSL DSLAMs and Ethernet switches have in-built optics⁵, making a "lit" WES backhaul redundant.

BT does not use WESs or derivatives for its own GEA FTTC product, and therefore discriminates between its own supply and other CPs, in breach of European and English competition law.

Vtesse Networks applied for Network Access, in conformance with the procedures agreed with Ofcom and derived from the European Access and Framework Directives, 2002/19 EC and 2002/22 EC respectively, as SOR 8088. This "naked WES" consisted of the same inputs as the BT "Direct multiple – GigE" used in the GEA FTTC product. BT accepted the SOR which had industry support, but then rejected it for reasons which are not compatible with the existing or modified Access Directive.

3

http://www.openreach.co.uk/orpg/products/nga/fttc/downloads/FTTC%20Product%20Proposal%20Issue%201%204%20-%2022-10-08.pdf

⁴ The WES includes two optical boxes and an ISDN interface; all unnecessary and not used by BT in its GEA FTTC product.

⁵ See for example <u>http://www.keymile.com/en/products/milegate/milegate_interfaces/Interfaces.html</u>

Directive 2009/140/EC⁶ which must take effect before May 2011 mandates the provision to CPs of passive elements for backhaul, *in addition to duct access*. It is regrettable that Ofcom has not grasped the importance of a passive fibre remedy where appropriate. Where fibre already exists, or can be easily provided, such as Hatt in Cornwall, it is more effective that duct access, the procedures for which are likely to take at least a year to become "industrialised" and available to other CPs.

There is a natural evolution from FTTC to FTTP by the gradual replacement, line by line of copper with fibre. The cabinet then forms the natural concentration point, and issues of relative merits of GPON versus Point to Point fibre disappear, as the major cost differences (power, cabinets) are at that point sunk. However, if BT later chooses to deploy fibre to the premises, without a passive remedy to OCPs, it potentially renders the FTTC investment by the OCP "stranded" and thereby reduces contestability. We propose that BT is required to provide a passive optical remedy for the D side, irrespective of the architecture BT proposes for the service over that fibre.

The PIA timetable for duct and pole access is too long. In order to shorten the timescale for the introduction of effective remedies, we suggest that in the first instance access is provided to other CPs by BT to its microtubes used with, for example, the Emtelle blown fibre system deployed almost universally in the BT Access network⁷. We believe that there are sufficient spare tubes for this to be an effective near term remedy in a number of areas. It also represents the lowest possible intrusion into the BT network as it is compatible with BT processes, and also, at some 4 or 5 square millimetres, occupies the least space in existing ducts. As outlined in the practice in European Countries, we propose that BT is required to reserve at least 3 spare microtubes in each existing and new installation for other CPs.

Duct access should not be restricted to E side routes alone. Our experience is that around 30% of PCPs at the edges of larger settlements or serving isolated settlements are or could be connected by inter-exchange rather than E side ducting. This raises organisational issues within BT as the local network is managed by Openreach, and the inter-exchange duct network is managed by BT Wholesale, we understand. These internal organisational boundaries should not be used as an obstacle to consistent provision of access to other CPS.

The exclusive focus on E side ducting is overly restrictive. Likewise, there are areas at the edge of exchange areas where simple linking of pole based infrastructure for backhaul is simpler than long routes back to other serving exchanges.

We have benchmarked costs for duct access against our experiences in Hatt in Cornwall, and found up to 18,000 areas similar to Hatt. Taking the international charges for duct access, we have calculated that the Portuguese pricing model makes Hatt contestable, but the French sewer pricing, more appropriate to dense cities, is too high and would prevent Hatt from being contestable.

There is no justification for fully loaded costs for duct access, as the revenues and costs are incremental.

As Ofcom is aware, there is little point in constructing a passive remedy if the treatment of other CPs use of fibre under the Business Rates system is not the same as BT. Ofcom should

⁶ <u>http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF</u>

⁷ http://www.emtelle.com/?id=119

take full account of the business rates burden in the setting of any prices for duct access and ancillary facilities.

We have had a substantial variation in the Excess Construction Costs quoted for cabinet backhaul by BT. We understand that costs are subject to a 200% loading on direct costs, which we consider to be excessive. This substantially raises the bar for FTTC in rural areas, and therefore reduces contestability. There seems to us no justification for fully loading these costs, as the overheads associated with the operation are already fully recovered. Where these are applicable to the Final Third, we would like to see the loading capped at, say, no more than 20%.

Finally, it is apparent that the ANFP⁸ which seeks to manage the use of copper loops does not properly take into account the requirements of the Final Third and large scale FTTC deployment on long E-side loops.

It makes no sense on an E Side loop of some 5 kilometres, as we have experienced in Cornwall and Hertfordshire, to penalise users on long D side loops for the apparent benefit of users of exchange based services which themselves do not meet the Digital Britain minima.

We propose that the ANFP is set aside for cabinets with Cabinet Assigned Loss⁹ ("CAL") values of greater than, say, 40, and would ask Ofcom to give consideration to this proposal.

Finally, we have discovered cases where BT has removed flexibility points (SCPs) near customer locations in adherence to a general requirement to improve access network reliability. The result of this is that the provision of FTTC to consumers already on long loops is made difficult, as the D side loop lengths are artificially extended by removal of these flexibility points. We would like Ofcom to release BT from the overall obligations in these cases, and to require BT to reinstate the flexibility points when requested to do so by other CPs.

Vtesse Networks 31st May 2010

⁸ <u>http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/llu/2003/anfp0103.htm</u>

⁹ http://www.niccstandards.org.uk/files/current/ND1602_2007_03.pdf?type=pdf

RESPONSE TO SPECIFIC CONSULTATION QUESTIONS

Question 1: Do you agree with our proposed product market definition? If not, please explain why.

Yes.

Question 2: Do you agree with our proposed geographic market definition? If not, please explain why.

No, we believe for the reasons given above that the Final Third constitutes a separate geographic market.

In addition, the Hull geographic area should include the market consisting of Leeds and Hull, as KCOM's bottleneck applies not only to the geographic market of greater Hull, but also all services originating within Hull, but terminating outside that geographic area. We term this the "Hull Transit" market. This is one of the reasons that the regulatory system historically imposed on KCOM only within Hull has had no effect on KCOM's market share. Any access remedy within the Hull area is rendered ineffective because KCOM controls the market connecting Hull to the rest of the UK – which we coin the "Hull Transit" market.

Question 3: Do you agree with our proposals that BT and KCOM have SMP in their respective geographic markets? If not, please explain why.

Yes, but KCOM also has SMP in services sinking or sourcing in Hull but terminating outside Hull (the "Hull Transit" market) for reasons given above.

Question 4: Do you agree with our proposals for the general access requirements that should apply to BT and KCOM respectively? If not, please explain why.

Yes, but note our experiences in relation to general Network Access requests. BT has, in the case of SOR 8088, decided unilaterally to decline access. Where is our remedy?

Question 5: Do you agree that Ofcom should impose a new network access obligation on KCOM, that would require it to follow a statement of requirements process to handle requests for new network access in this market? If not, please explain why.

Yes, but this should also include termination of those services outside Hull, as KCOM controls these. See above for additional comments.

Question 6: In relation to LLU, do you agree with the assessment and options set out?

Yes.

Question 7: In relation to fibre access, do you agree with the potential unbundling arrangements for the different fibre architectures and the positions/options set out given the current and expected future availability of fibre within BT's access network?

Partly. See comments above re fibre remedy for the D side where another CP has invested in FTTC, and also our comments on a lack of fibre backhaul remedy. We request that Ofcom

ensures BT accepts and implements SOR 8088 immediately, in compliance with the obligation on BT to provide Network Access.

There is little advantage (other than a regulatory one) for BT to move fibre flexibility points nearer the customer. The existing SCP/PCP cabinets are still the logical place to do this, at least for maintenance reasons. Under these circumstances, a point to point fibre remedy is entirely possible. Market foreclose by over-emphasising issues with PON technology should be resisted by Ofcom.

Question 8: In relation to SLU, do you agree with the assessment and options set out?

Only partly. See comments above in our main narrative. In the Final Third, we believe Ofcom should take positive steps to enforce low SLU component prices to stimulate investment in the Final Third to avoid further Digital Exclusion. In particular, the long-winded process of industry negotiation will chill investment in this area. We do not see why BT should charge the high levels in the SLU pricing for all the ancillary services, when it is not being seen to charge the same to itself. There is no justification for charges of £127.61 for SLU connection when European operators charge Euro 35.

In addition, there appears to be no automated process for SLU ordering, which has to be undertaken entirely manually, with the possible errors this introduced. BT clearly has automated process for the SLU components of GEA FTTC (or has it employed Santa's elves to undertake out of season manual work?), but denies other CPs access to these same automated systems. This increases the likelihood of CPs service disruption, and is clearly discriminatory.

Question 9: In relation to PIA, do you agree with the proposed PIA obligation structure and the proposed implementation arrangements?

Partly. We believe that an early remedy based around the use of blown fibre micro-duct should be introduced in a shorter timescale that the current proposal.

Question 10: In relation to VULA, do you agree that VULA may be a necessary access remedy in the WLA market and if so, do you agree with the key characteristics identified and how these currently relate to BT's GEA products?

VULA should be called "Actual re-bundling" or ARB so no-one under any illusions about its actual form. We believe it represents a long term threat to competition, and may reverse the benefits brought about by Local Loop Unbundling. Although the majority of CPs seem to accept this, we contend that the situation has been largely orchestrated by BT's high SLU prices, an industry reluctance to formulate services based on passive inputs, together with the concessions granted to BT for GEA FTTC, which has allowed it to radically subsidise the service to protect revenues within the cable TV footprint.

VULA offers no remedy in the Final Third.

Question 11: Do you agree with the framework for considering specific access remedies on BT?

Partly. We do not consider that Ofcom has taken proper account of the barriers to entry to the Final Third and the need to take stronger ex-ante remedies to increase the contestability of the Final Third, by, for example, ensuring that there is a passive (ie dark fibre) remedy for FTTC backhaul, as is mandated in Directive 2009/140/EC.

If, in its FTTC footprint, Ofcom argues that BT is entitled to protection by releasing it from EOI and price controls, the quid pro quo should be that BT accepts lower prices for SLU components in those areas in which others, and not it, may be willing to invest, in order to protect their investment.

Question 12: Do you agree that there is a need to have a complementary set of access remedies and if so, do you agree with the proposed set of remedies on BT?

Yes, subject to the comments above.

Question 13: Do you agree that no specific access remedies should be imposed on KCOM in the WLA market at this time? Could any remedies on KCOM at the WLA market level address the competition issues that we have identified?

See comments above. WLA remedies on KCOM will have no effect if the A and B ends of the connection are within the Hull area, as KCOM controls the "Hull Transit" market. Without a remedy for the "Hull Transit" market, no remedy within the Hull area will have any significant effect.

Question 14: Do you agree with our assessment against the legal tests for each specific remedy, as set out in Section 9?

Yes, subject to the specific comments above.