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Gigaclear response to Ofcom Consultation:

Promoting Competition and Investment in Fibre Networks - Wholesale Fixed Telecoms Market Review 2021 – 2026

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Gigaclear®

Contents

Executive Summary

1. Gigaclear welcomes the opportunity to respond to Ofcom's Wholesale Fixed Telecoms Market Review. As the UK's largest exclusively rural fibre to the premises (FTTP) network operator, our business model focuses on delivering full fibre connectivity to geographic areas that are unlikely to sustain multiple Very High Capacity Networks (VHCN). Our submission then focuses on Ofcom's proposed regulatory remedies within the market segments it defines as 'Area 3' for WLA and LL markets and 'BT only' for the IEC market. In doing so, our comments support three core considerations, as set out below;

2. Gigaclear's network currently passes 130,000 premises and has recently secured funding to expand that footprint to over 500,000 premises within the timeframe of this market review.[1] The entirety of this (current and planned) network build falls within Area 3, which Ofcom defines as 'where there is unlikely to be material commercial deployment by rival networks to Openreach' and within which Ofcom intends to 'encourage [the] BT investment case over that of alternative operators'. We then argue that Gigaclear's current network footprint evidences 'material commercial deployment' and so propose that Area 3 should not then capture the Gigaclear network footprint. In making this argument, we also propose that if the 'variable k'[2] RAB model is applied to potentially competitive geographies (such as the Gigaclear network footprint), it will deter, rather encourage investment in VHCNs in the parts of Area 3 that BT elects to not deliver full fibre. [✂]. We then recommend that Ofcom abandon the 'variable k' RAB model and instead adopt an amended form of the 'forecast' model.

3. Much of Gigaclear's network build is delivered as part of its BDUK contractual commitments; state aid contracts it has secured through competitive tender. After BT Openreach, Gigaclear is the most successful network operator is securing BDUK contracts and currently operates 15 BDUK lots. Given our experience of competing against the incumbent in securing state aid contracts to deliver VHCN connectivity, we consider how Ofcom's proposals for Area 3 would interact with both current and planned future state aid supply side interventions, specifically the 'Outside In' programme established in the FTIR.[3] In doing so, we propose that, as the Outside In programme will commit £5bn to support multiple hundreds of lots which are open to competitive tender and are designed to enable regional ubiquity, it is plausible that competition may develop in these areas should a non-incumbent network operator secure the contract. We then propose that these locations, along with pre-existing state aid intervention areas, be excluded from BT's capital allocation under the 'forecast model'.

4. Given our focus on delivering connectivity in hard to reach, rural areas, Gigaclear has explored utilising the IEC Dark Fibre remedy as established in the 2019 BCMR and considered within this consultation. Given the relative absence of pre-existing fibre infrastructure in these areas, access to interexchange dark fibre has the potential to significantly reduce build costs when extending the network into new areas. In reflecting on our experience of the product so far, we propose that the current DFX product is

[1] https://www.ispreview.co.uk/index.php/2020/04/rural-isp-gigaclear-signs-525m-long-term-funding-strategy.html
[2] For clarity, this is what Ofcom labels as 'post-build'.
[3]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732496/Future_Telecoms_Infrastructure_Review.pdf - page 5

not fit for purpose and provide evidence to support Ofcom's proposals regarding the obligation upon BT Openreach to provide ancillary services.

About Gigaclear

5. Based in rural Oxfordshire, Gigaclear was established in 2012 to address demand from rural homes and businesses for access to fast, reliable internet connectivity. These issues originated from the very long lengths of copper cable being used to deliver broadband in rural areas and other network operators prioritising network investment in cities and towns with higher population densities.

6. This environment created the opportunity to use new FTTP network technology, where distance has effectively no impact on performance, to deliver a multi-gigabit capable, future proofed service to customers who were willing to pay for superior connectivity. Whilst our initial network builds were purely commercial, Gigaclear subsequently secured and delivered BDUK contracts in Essex, Berkshire and Gloucestershire; the first wholly full-fibre contracts secured under the BDUK programme.

7. Gigaclear currently operates 15 BDUK contracts delivering full fibre connectivity across the South of England. The most of any operator after BT Openreach.

8. Gigaclear's network currently passes 130,000 premises and has recently secured access to £525m funding mechanism to expand that footprint to over 500,000 premises by 2025/2026.

WFTMR Structure

9. The WFTMR marks a considerable step change from Ofcom's previous approaches to addressing BT Openreach's SMP. Where previous market reviews have focused on driving down BT Openreach wholesale charges whilst protecting downstream competition, this review explicitly aims to 'encourage investment in new fibre networks'. It also brings together both WLA and LL market review cycles, where previously these markets have been served by with remedies running at different review cycles.

10. Gigaclear welcomes this shift in approach. As recent announcements from Gigaclear, CityFibre[4], Hyperoptic[5], Jurassic Fibre[6], WightFibre[7] and Fibrus[8] attest to, the market review period will see major investment in non-incumbent full-fibre networks that can serve both residential and business markets. This indicates that the pre-existing market structure of high entry barriers (that historically warranted

[4] https://www.cityfibre.com/news/cityfibre-puts-place-debt-package-1-12-billion-underpin-capital-investment-full-fibre-across-uk-towns-cities/
[5] https://www.hyperoptic.com/press/posts/hyperoptic-raises-record-250m/
[6] https://www.ispreview.co.uk/index.php/2019/10/jurassic-fibre-to-start-fttp-broadband-rollout-in-south-west.html
[7] https://www.ispreview.co.uk/index.php/2020/05/wightfibre-get-50m-to-boost-ftth-broadband-on-isle-of-wight.html
[8] https://www.irishnews.com/business/2020/05/07/news/infracapital-agrees-to-acquire-northern-ireland-fibre-broadband-provider-fibrus-1928740/

a policy focus on promoting greater downstream competition within the current market structure) appear to be more readily overcome.

11. This shift from an ex-post to an ex-ante regulatory approach is further warranted by the FTIR's and SSP's commitment[9] to facilitating network competition as a means to accelerating network rollout, as well as the EECC's requirement that NRAs support the rollout of VHCNs.[10]

12. It is then appropriate for Ofcom to assess competition in light of enabling entry from a network operator viewpoint, rather than focusing on specific downstream services.

Market Review – Volume 2

Question 2.1: Do you agree with our description of retail markets? Please set out your reasons and supporting evidence for your response.

13. Gigaclear supports Ofcom's assessment of retail markets, although would ask that Ofcom give further consideration to part of the analysis Ofcom presents in this section, as it is useful in understanding our concerns regarding the 'variable k' RAB model.

14. In Figure 2.10, Ofcom tracks advertised dual play retail prices and headline broadband speeds by ISP. Whilst Ofcom is right to stress that this shows that there is not a clear relationship between price and broadband speed provided, Ofcom do not reflect on the pricing disparity between urban and rural that this data highlights.

15. Across all speeds, Community Fibre and Hyperoptic (exclusively high-density urban operators) are at the lower range of the price spectrum. This contrasts to Gigaclear, an exclusively rural operator that consistently reflects the upper range of pricing. This likely reflects variation in the cost of build and perhaps an end-user's higher propensity to pay when the service offered is a significant improvement over what is currently available.

16. This then evidences that a business model supporting network build in predominantly rural areas will likely require comparatively higher wholesale network charges than would be seen with purely urban ISPs or national ISPs that can cross subsidise to provide a single national price point(or indeed ISPs purchasing from a national incumbent that already cross subsidies in order to offer a single charge across the its national footprint). This is relevant to understanding the impact of the 'variable k' RAB model reducing 40/10 FTTC product pricing in parts of Area 3. We discuss this in more detail in our response to Q2.1v4.

[9] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP_-_as_designated_by_S_of_S_.pdf - paragraph 10

[10] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=comnat:COM_2016_0590_FIN – Article 74

Question 3.1: Do you agree with our provisional conclusion on physical infrastructure product market definition? Please set out your reasons and supporting evidence for your response.

17. Yes, we agree that the product market should be defined as the supply of wholesale access to telecoms physical infrastructure for the purpose of deploying a telecoms network.

18. For this to not be the case, we would expect to see little demand for PIA, as network operators would be utilising alternative non-telecommunications infrastructure for deploying networks. Yet the alternative is true, Ofcom evidence increasing demand for PIA and extremely limited utilisation of alternative physical infrastructure. Where use of alternative physical infrastructure does occur, it is certainly not to the point of scale where it could be deemed to have a competitive restraint on incumbent pricing and terms of access physical infrastructure supporting telecoms networks.

19. This outcome supports Gigaclear's own experience of exploring where pre-existing physical infrastructure could be used to reduce the cost of delivering networks. In response to the 2019 PIMR, Gigaclear highlighted that it continued to explore utilising non-telco solutions where available. However, such alternatives remain limited; isolated scenarios such a traversing bottlenecks or unique terrain (e.g. Gigaclear utilising the Clifton Suspension Bridge[11]). We then support Ofcom's assessment that the PIMR's assessment is still relevant; that market conditions remain unchanged.

20. We also propose that scale network build still presents a significant barrier to entry; to our knowledge there are only 5 fixed non-incumbent access network operators with over 100,000 premises past[12] - [✂].

21. Given these points, it is then likely that if access regulation was not in place; incumbent network operators would be incentivised to (and capable of) prohibit access, which would restrain competition in wholesale markets and consequently retail markets, culminating in a deterioration of consumer choice.

22. We also support Ofcom's assessment of FWA. FWA is dependent upon fixed infrastructure to be operational, so will often be of a limited use as a scalable alternative physical infrastructure. Given our experience of considering FWA in our initial development of R100 build plans, we would also support Ofcom's assessment that FWA solutions are of limited capacity and distance; lending themselves to connecting across short distances of complex terrain, rather than a viable scale alternative to fixed infrastructure.

Question 4.1: Do you agree with our provisional conclusion on physical infrastructure geographic market definition? Please set out your reasons and supporting evidence for your response.

[11] https://www.bristolpost.co.uk/news/business/bristol-areas-poor-internet-speeds-1521812
[12] Virgin Media, Hyperoptic, CityFibre, Gigaclear and Community Fibre

23. We support Ofcom's approach to geographic market definitions, principally because we support Ofcom's assessment of the importance of ubiquitous coverage of physical infrastructure as a critical characteristic when assessing competitive conditions.

24. Gigaclear's experience as a physical network operator would support this position. [✂].

25. [✂].

26. We then agree that ubiquity delivers a substantial material advantage to access seekers of physical infrastructure, although stress that this should not be understood as national ubiquity. Rather, ubiquity is valuable where communities and regions are effectively 'blanket covered'.

27. Given this and the points expressed in response to question 3.1v2 above, we agree that BT's ubiquitous telecoms infrastructure has a substantial competitive advantage to other telecoms specific physical infrastructure. Even where there is the potential for alternative physical infrastructures to be built during the period of the market review, Ofcom rightly point to many of these having some dependency on PIA in both rural and urban areas (admittedly to a variable extent). We then support the conclusion that without ex ante regulation, there are sufficiently similar conditions across all parts of the UK (outside the Hull area).

Question 4.2: Do you agree with our provisional conclusion on the application of the three criteria test to the physical infrastructure market? Please set out your reasons and supporting evidence for your response.

28. Yes, we do. The points discussed in response to question 4.1v2 address the requirements within the first two tests. As for third test, we are conscious that some may argue that recourse to competition law would be a viable means of redress and so ex-ante regulation may not be necessary. In response, we would stress that ex-ante regulation can be remedy specific, targeting specific circumstances, such as how products function or services are prioritised. Whereas competition law is more wide reaching, concerning itself primarily with whether a dominant provider is abusing its position of dominance. Application of competition law to a specific product and/or market is then less predictable than circumstance specific ex-ante remedies; leaving network operators unclear as to whether competition law can be a viable means of recourse.

29. We would also add that the timeframe for recourse through competition law is often prohibitive if the perceived abuse of dominance is already having a material effect, due to the length of time the process requires to substantiate breach, as well as the legal cost and resource. For these reasons we believe that competition law would not be a viable alternative means of recourse, so then propose that Ofcom's provisional conclusion passes the three criteria test.

Question 5.1: Do you agree with our provisional finding on SMP and resultant competition concerns in the physical infrastructure market? Please set out your reasons and supporting evidence for your response.

30. BT is the owner of the only ubiquitous telecoms physical infrastructure in the UK (excluding the Hull area) and given the previous consideration of ubiquity offering considerable competitive advantage, it is appropriate to assess whether BT has SMP in respect of the supply of wholesale access to said telecoms physical infrastructure.

31. We support Ofcom's provisional finding of SMP. Entry into the market for constructing physical infrastructure to support largescale roll-out would require very high levels of investment, a large proportion of which are likely to be sunk costs, and which would take a considerable period of time to deploy. Gigaclear's own history is testament to this; whilst Gigaclear recently secured financing of £525 million, it has taken several years and multiple rounds of funding to grow to the scale where such an arrangement was possible.

32. Whilst multiple alternative networks are also emerging, it takes considerable time and resource to develop a scale footprint.

33. Further, many new (often urban based) networks delivering new physical infrastructure are enabled through heavy utilisation of PIA.

34. Absent ex ante regulation then, the commercial market for the supply of wholesale access to telecoms physical infrastructure would be likely to remain small over the period of this review. It is then unlikely that alternative physical network operators will emerge to challenge BT's national incumbency within the period of the market review.

35. With that said, this does raise the question of regional variation. For example, alternative operator FTTP rollout may not bring competitive challenge to BT on a national scale, but within a defined geography or community they may be capable of providing near ubiquitous coverage. If that geography is one that can only sustain one fibre network (so likely a rural area), the 'first VHCN advantage' may mean that BT opts to not deliver its own full fibre in this area, as the return on investment would likely be higher elsewhere. We propose that this scenario could emerge during the period of the market review and consider the ramifications of this in response to question 1.1v4.

36. In regards to assessing what incentives this places upon BT; as BT is both the largest user of BT's physical infrastructure and is itself present downstream through the ownership and operational of multiple ISPs and the EE mobile network, it faces significant incentives to restrain access to its infrastructure absent regulation.

37. Even if BT chose to provide such access, we agree that for an access seeker purchasing significant volumes of access to infrastructure, it is unlikely that there would be a credible threat of it switching sufficient volumes away quickly, given the large switching costs and service disruption that would be involved in removing and re-deploying its network in alternative physical infrastructure. BT could then readily abuse this dominance through charging access fees that would hinder downstream competition and choice.

38. In light of the above, absent regulation, we agree that BT faces incentive and capability to restrain supply to its physical infrastructure, thereby restricting competition in downstream markets. For the same reasons we set out in response to question 4.2, competition law is not an adequate protection. Further, even where competition law may act to punish an incumbent for leveraging its dominance to the detriment of competition, the detriment is still realised and cannot be undone.

Question 6.1: Do you agree with our provisional conclusions on product market definition for wholesale networks? Please set out your reasons and supporting evidence for your response.

39. We support Ofcom's proposal of three product market segments for wholesale networks, although support Ofcom's caveat that the distinction between WLA and LL is blurring with the advent of full fibre alternative networks.

40. Gigaclear's network offers an example of the increasing crossover between WLA and LL, where resilience and (in the case of a P2P connection) the bandwidth capacity and upload speeds offered can mean WLA can present substitute products to that of a LL, particularly to SMB and SME. However, we believe that it is reasonable to maintain differentiation as traits of LL are not readily offered by business grade broadband, particularly those desired by larger businesses. We then believe that it is appropriate for Ofcom to conclude that these are different markets, whilst being conscious of how the presence of WLA networks may impact competition across both WLA and LL markets, given the potential for some substitution effect in connectivity supply.

41. In light of the above, we then welcome Ofcom's stated ambition of 'want[ing] to support investment and network competition, whether in networks that support only one service or in MSNs that provide a range of services for residential and business customers.'

42. As for the differentiation of product speed, we support the conclusion that supply-side considerations point to a single WLA market that is not materially differentiated by speed, even as the industry transitions from copper to full fibre infrastructure. Gigaclear's own experience is testament to this, as reflected in our annual F02 Connected Nations submission. This suggests that local access networks will need to continue to deliver a range of different broadband speeds for the foreseeable future.

Question 7.1: Do you agree with our provisional conclusions on geographic market definition for wholesale networks? Please set out your reasons and supporting evidence for your response.

43. No. We are concerned by Ofcom's consideration of broadband only networks present in what Ofcom defines as 'Area 3' postcode sectors. Ofcom does not consider that its market designation should be amended in light of broadband only networks presence in postcode sectors included in Area 3. We contest the reasoning behind this and propose that postcode sectors where a broadband only network is materially present should be moved to Area 2.

44. Ofcom identifies 33 Area 3 postcode sectors where a broadband only network (principally Gigaclear's and Hyperoptic's), is present where there is also no current or planned MSN presence beyond that of the incumbent.[13] For these postcode sectors and any Area 3 postcode sectors that broadband only networks become 'present' during the market review period, Ofcom does not propose to change the area designation. Instead, it intends to maintain these postcode sectors being designated under Area 3.

45. At face value, this seems counter intuitive. Ofcom defines Area 3 as 'where it is unlikely for there to be material commercial deployment by rival networks to Openreach'. Yet by its own admission, there are 33 Area 3 postcode sectors where a broadband only network is materially present.[14] Given that this is the case at the starting point of the market review period, it is likely that this number of Area 3 postcode sectors seeing broadband only network presence will increase over time. There are two critical reasons for this;

46. Even at a point of relative infancy for UK FTTP rollout, there are multiple broadband networks that are attracting significant investment, actively building network and specifically target Area 3 geographies. For example Gigaclear, TrueSpeed and Jurassic Fibre's business models target geographies that can sustain only one VHCN operator (rural communities). Combined, these three operators alone have secured over £1bn in funding and Gigaclear alone already has a footprint of over 130,000 premises past. It is then reasonable to conclude that these operators will continue to grow and that other such entrants following the same business model may enter this market during the period of the market review.

47. The second is that the BDUK 'Outside In' programme will allocate £5bn to state aid funded interventions for geographies that would otherwise not be commercially viable for gigabit capable connectivity; so likely to fall within area 3. Whilst the parameters of the programme are yet to be confirmed, it is likely that the aid will be allocated across hundreds of 'lots' – the majority of which will be opened to tender during the market review.[15] Whilst we cannot know which network operators will secure bids, it is reasonable to expect that the incumbent will not win every lot. It is then a reasonable assumption that this programme will also support expanding broadband only network operators into postcode areas currently designated within Area 3.

48. The material outcome from the above factors is that many hundreds of postcode sectors where a broadband only network operator is materially present are likely to be captured under Area 3 during the market review, which is defined as where 'it is unlikely for there to be material commercial deployment by rival networks to Openreach'.

49. Our concern with this outcome is that remedies that Ofcom propose for this area explicitly encourage BT investment in full fibre over that of alternative networks. This would then see Ofcom's remedy functioning to encourage BT full fibre investment in areas where BT Openreach likely has a smaller full

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[13] https://www.ofcom.org.uk/__data/assets/pdf_file/0029/188822/wftmr-volume-2-market-assessment.pdf - 7.61
[14] Using Ofcom's definition of 50% of premises passed within the postcode sector in question.
[15] [✂]

fibre footprint (if any at all) to that of alternative networks, and encourage BT full fibre investment where state aid has been used to fund the expansion of an alternative network.

50. Ofcom gives some consideration to this concern in section 7.63. It again notes that 33 of the postcode sectors that fall within Area 3 have material presence of broadband only networks and specifically refers to Gigaclear. Whilst it acknowledges that Gigaclear targets areas where it does not expect to see competition (to even that of BT), Ofcom notes that the network is deployed 'in small pockets over large areas'. This lack of regionally ubiquitous coverage is used to justify Ofcom's conclusion that 'the degree of competition, specifically competitive pressure to BT's pricing, is unlikely to be substantial'.

51. As such, Ofcom do not consider that Gigaclear's presence (existing or planned) in a postcode sector could potentially alter the competitive conditions it would expect based on Openreach's presence alone such that it should define a separate geographic market.

52. We strongly contest this argument. As already established in our response, alternative networks investing in Area 3 have secured significant sums of investment, are already rolling out their networks and are aware that ubiquity (even on a regional basis) is desirable to national ISPs that may seek to operate over their networks. It is then reasonable to expect these networks to 'in-fill' their current footprint throughout the period of the market review. Gigaclear's submission to Ofcom's initial information request regarding future rollout plans provides further evidence of this and we would welcome the opportunity to refresh this data following the securing of the £525m further investment.

53. Furthermore, under the BDUK superfast programme and the proposed 'Outside In' initiative, the state aid intervention area is defined by where network operators declare that they have no current nor future (within 3 years) plan to rollout and/or upgrade network infrastructure in that area. The state aid 'gap funding' model then deliberately encourages build in an area where there is no commercial plan to do so. The funding provided then 'fills the gap' to make what was previously non-commercial, commercial. The intended effect is to not only deliver infrastructure to the specific 'white' premises within the intervention area, but to also facilitate further expansion of the network. This is possible because the sunk cost of presence in the area will already be absorbed through the intervention; the marginal cost of further network rollout is then reduced. The model then encourages the operator fulfilling the 'lot' to develop regional ubiquitous coverage. The new 'Outside In' programme even has this as a defined goal of the programme.[16]

54. Ofcom's reservations regarding ubiquity also contradict its logic regarding how it deems if a network is 'present'. Ofcom proposes 50% of premises passed within a postcode sector warrants presence. It uses this metric to assess whether an alternative network can be deemed to be present, in order to assess the <u>potential for competition</u>, not competition itself. This is the approach that Ofcom takes to establishing Area 2. To then require ubiquity for broadband only networks in order to deem a postcode sector 'potentially competitive' appears to place an unjustified criterion upon them as opposed to MSN networks.

[16] [✂]

55. Given these points, we propose that during the period of the market review, it is likely that alternative network operators within Area 3 will seek to 'in-fill' their current footprint as part their ongoing rollout plans, with the intention of achieving regional ubiquity. We also propose that ubiquity is an unreasonable expectation when assessing the 'potential for competition'.

56. If the above is accepted, then Area 3 will capture increasingly expansive networks delivering current and future state aid intervention areas, as well as scaling commercial network build of alternative operators.

57. We propose that this risks deterring, rather than encouraging full fibre rollout in these areas; we discuss this concern in more detail response to question 2.1v4 and propose an alternative designation model in response to question 1.1v3.

58. Beyond Ofcom's stance on ubiquity, it also worth commenting on the distinction that Ofcom draws between 'broadband only' networks and MSNs. Ofcom utilises the planned rollout of MSN networks to define Area 2, but does not do the same with the rollout plans of 'broadband only' networks. Rather Ofcom takes the Area 2/Area 3 distinction established by MSN current and future rollout as a baseline and then questions whether this should be altered in light of 'broadband only' network footprint (and offers no consideration at all of their future network rollout plans).

59. This approach seems out of place given that in Volume 2, Ofcom acknowledge the increasing overlap between WLA and LL markets. Gigaclear does not currently provided dedicated lease line services simply because there is not the appropriate level of demand for that product range in the geographies we serve and that our P2P FTTP network allows a viable substitution in most cases where it such demand does appear. We would expect this to be true for other exclusively rural network operators. We then propose that this distinction should not be used to differentiate how different network operator's network footprints and build plans are analysed.

60. In summary, our concern is not then with the principle of geographic diversification for developing remedies. On the contrary, we welcome Ofcom's consideration of sub-national geographic markets. This position seems reasonable given the significant variation in density and build cost across different parts of the country. Taking a geographically varied approach to wholesale network competition is then appropriate, as both the barriers to entry and return on investment are materially distinct to the point that competition is impacted.

61. Rather, our concern is that postcode sectors where;

    1. A non-incumbent 'broadband only' network operator has already established scale to be deemed 'present';
    2. They overlap with current state aid lots being delivered by non-incumbent operators;
    3. A non-incumbent 'broadband only' alternative network has already declared that it seeks to rollout its network within this area during the market review period (including in-fill from its current network footprint); and

4. They may be included in a future 'outside in' lot which is awarded to a non-incumbent operator.

… are all captured under the current Area 3 designation.

62. We propose that all of these sub-group geographies have the potential to become competitive, to varying degrees.

Question 7.2: Do you agree with our provisional conclusion on the application of the three criteria test to the wholesale inter-exchange connectivity market? Please set out your reasons and supporting evidence for your response.

63. Yes, we do. In Gigaclear's submission to the BCMR 2019, we evidenced high and non-transitionary barriers to entry in the inter-exchange connectivity market, with specific reference to subsea links between BT exchanges (e.g. [✂]). [✂]. We believe that this evidence is still relevant here.

64. This analysis also evidences why competition alone is unlikely to be an effective remedy; the timeframe required to (potentially) secure access to the interexchange connection through recourse to competition law would result in delaying build for many months, or proceeding to develop our own link. Both would be substantially sub-optimal to ex-ante regulation.

65. We then support Ofcom's conclusion that without ex-ante regulation, BT would have both capability and incentive to exploit its position of dominance, which would likely result in comparatively less consumer choice and reduced investment from would-be competitors, in both BT+0 and BT+1 exchanges.

Question 8.1: Do you agree with our provisional SMP findings and resultant competition concerns for wholesale networks? Please set out your reasons and supporting evidence for your response.

66. We agree that BT has SMP in both Areas 2 and 3. BT, through BT Openreach, has by far the largest and the only ubiquitous network in the UK, which is not easily duplicated due to the high sunk costs involved.

67. Further, as discussed in response to question 3.1v2 there is no widely available substitute and barriers to entry are considerable, despite other network operators emerging to challenge this position on a regional basis.

68. Even where alternative networks are developing at scale, the presence of a single alternative operator, in both A2 and A3 is unlikely to constitute full competition[17]. If these alternative operators lack scale, they are unlikely to be able to price competitively or attract retailers (particularly so if BT were permitted to introduce regionally targeted discounting in either market area).

69. BT also has the advantage of incumbency not just within the physical network, but also through having pre-established relationships with the national ISPs. As Ofcom highlights, there is material cost to ISPs ingesting multiple networks. [✂].

70. Further, whilst PIA may enable some alternative operator rollout, it is limited to where scale PIA solutions are available. In rural areas this is often not the case; the ducting quality is often insufficient (if present at all) and pole load restrictions can exclude some forms of network architecture. We are not then surprised that evidence gathered by Ofcom points to only modest PIA usage so far, although we do expect this to increase throughout the period of the market review.

71. We then agree then agree with Ofcom's conclusion that 'the sunk costs of network build are still likely to be large and networks are unlikely to be able to roll out using PIA alone'. Absent regulation then, BT has incentive and capability to act in a manner that could distort competition, constrain consumer choice and deter investment in rival operators.

72. Whilst we then support Ofcom's conclusion, we add comment regarding Ofcom's assessment of Area 3 countervailing buyer power. Current state aid programmes encourage rollout of gigabit capable infrastructure in areas that are, by definition, not commercially viable without state aid. The business case for BT to overbuild this intervention at scale is then likely to be significantly inferior to making the same investment in an area where there is no present alternative network. Should these contracts then be secured by non-incumbent operators and they achieve appropriate scale to attract national ISPs (e.g. through ubiquitous regional coverage), they may achieve a level of take up that could eventually provide counter-vailing buyer power.

Question 9.1: Do you agree with our proposal not to regulate WFAEL, ISDN2 and ISDN30 markets on the basis that they no longer fulfil the three criteria test set out in the EC Recommendation? Please set out your reasons and supporting evidence for your response.

73. Yes. Given the migration of existing WLR lines to VoIP and the termination of new supply of WLR services, we would not expect WLR services to remain in scale operation by the end of the market review period.[18] Ex-ante WLA regulation will also ensure that there are (relatively) low barriers for new operators to provide VOIP services. The market for WFAEL can then be reasonably expected to tend towards competition over the review period.

[17] As opposed to the 'potential for competition'.
[18] There may be some remaining due to bespoke technical dependencies.

74. With that said, it is critical to stress that competition in the supply of broadband access will be an important enabler of this change. Should BT Openreach change approach (i.e choose to offer a managed VOIP service and explore forced migration), effective competition would be less likely to develop. Gigaclear then support Ofcom's caveat that provision of broadband access lines will continue to be reviewed and ex ante regulation put in place as appropriate.

Question 10.1: Do you agree with our proposal not to regulate WBA market on the basis that it no longer fulfils the three criteria test set out in the EC Recommendation? Please set out your reasons and supporting evidence for your response.

75. Yes. Given the expected further expansion of BT Openreach's FTTC and FTTP as part of BT's obligations under the broadband USO and state aid programmes to improve broadband speeds in rural areas, it is likely that the size of Market A will reduce. Given how, in more urban areas, this has historically seen the introduction of competition in the WBA market, we agree that this will improve the ability and willingness of ISPs to supply broadband services to customers in Market A in competition with BT.

76. It is then reasonable to conclude that, with the expected expansion of FTTC and FTTP in Market A areas and the resulting increase in broadband service competition, the barriers to entry into the market will become transitory.

Non-Pricing Remedies – Volume 3

Question 1.1: Do you agree with our proposed approach to remedies? Please set out your reasons and supporting evidence for your response.

77. Whilst we support Ofcom's assessment of SMP and the objectives it sets out when considering the purpose of its remedies, we do not support Ofcom's proposals for WLA Area 3.This is because Ofcom's mis-allocation of subsets of WLA area 3 (as set out in our response to question 7.1v2) results in these areas being subject to the 'variable k' RAB model, which, for these subgroup geographies, will deter, rather than encourage investment in full fibre infrastructure.

78. As established in our responses thus far, we agree with Ofcom's assessment of BT's SMP in the physical infrastructure, WLA, leased line access and inter-exchange connectivity markets. We agree that BT's SMP gives rise to the concerns that Ofcom lists in 1.3 v3.

79. With this in mind, it is appropriate for Ofcom to reflect on the specific outcomes it seeks to achieve when considering such remedies. We then welcome Ofcom's reflection that, in line with the DCMR, Ofcom's primary intention is to 'regulate to encourage large-scale deployment of new fibre networks

both to homes and businesses' and that it is 'desirable to see one or more new providers enter the market, competing head-to-head with Openreach and with other existing network operators such as Virgin Media'.

80. This goal compliments it stated ambition set out within Volume 1, that being 'seeking to give all UK consumers access to as wide as possible choice of fibre networks'. We agree that this position aligns Ofcom's statutory duties, as well as the 2018 EECC directive's instruction to NRAs to support investment in VHCN, as well Government objectives set out within the FTIR and the SSP.

81. In considering this objective, Ofcom is right to acknowledge the geographical variation in the nature of competition. As set out in the volume 1, Ofcom identifies that some areas are unlikely to see competition develop. These are often areas typified by high cost of rollout and low density. It is in consideration of these areas that Ofcom acknowledges that, where competition is unlikely to develop, it is appropriate to consider incentivising BT Openreach network investment. This is due to the risk that without doing so, BT faces a reduced incentive to upgrade its infrastructure to full fibre in these areas.

82. As stated in response to question 7.1v2 we do not oppose this logic. We accept that there are many areas that this will be the case.

83. However, we argue that as proposed, Area 3 includes sub-group geographies that can reasonably be expected to be potentially competitive, specifically where:
    1. A non-incumbent 'broadband only' network operator has already established scale to be deemed 'present';
    2. They overlap with current state aid lots being delivered by non-incumbent operators;
    3. A non-incumbent 'broadband only' alternative network has already declared that it seeks to rollout its network within this area during the market review period (including in-fill from its current network footprint); and
    4. They may be included in a future 'outside in' lot which is awarded to a non-incumbent operator.

84. A potential solution would be to include all such areas in Area 2. This may be a suitable solution for postcode sectors captured under points 1 and 2. Indeed, the only reason Ofcom seems to have not done this for Gigaclear (but has for CityFibre and FibreNation) is because it believes that Gigaclear is not an MSN and lacks regional ubiquity, both of which we have addressed in our response to question 7.1v2.

85. However, we accept that for points 3 and 4 this may not be a suitable solution. Both points require an assessment of how realistic the network's future ambition is, as well as Ofcom having to predict the scale and location of lots that alternative operators may win (and BT not win) from the 'outside in' programme.

86. For example, on point 4, we have proposed that where alternative operators secure these lots, they could achieve a material presence, as they achieve scale and ubiquity in an area defined by only being

able to support a single VHCN. However, Ofcom cannot know which geographies will be included in these lots, nor which operators will win them, or whether the winning operator will have preexisting scale in that area. Transitioning areas captured under points 3 and 4 to be in area 2 may not then be a viable solution.

87. Instead, it may be more suitable to exempt these postcode sectors from BT's capital allocation under the 'forecast' remedy model. Under such a proposal, BT Openreach would set out where they intended to deliver full fibre throughout the period of the market review, which would then justify being permitted to recover costs across their asset base in order to fund the said full fibre delivery commitment. In doing so, BT would be prevented from including postcode sectors that fall within points 3 and 4 listed above. This would then incentivise BT to build full fibre in areas that are extremely unlikely to see scale competition to BT and prevents BT from gaming it's fibre capital allocation in order to frustrate alternative network operators delivering VHCNs in parts of Area 3 that could potentially become competitive.

88. By BT declaring its rollout intention up front (rather than on an annual basis as proposed under the 'variable k' model), this data can also be used to inform the 'Outside In' programme; allowing BDUK to focus state aid where it knows BT does not intend to deliver full fibre within the timeframe of the market review. We discuss the merits of this model over that of the 'variable k' RAB model in response to question 2.1v4.

89. Regarding the prohibition on BT Openreach using price discounts for FTTC in Area 3, we naturally support this as a sensible means of ensuring that BT cannot leverage its incumbency to the detriment of emerging competition, which Ofcom itself acknowledges: 'While we consider that the probability of competitive network entry in this area at scale is very low, there is still the potential for competition for the market in some geographies, potentially also linked to public funded initiatives. For this reason, we would not wish Openreach to undermine new network provision by setting low access prices for FTTC in specific areas and we are therefore, proposing to prohibit geographic price discounting for FTTC in this area'.

90. Yet whilst the restriction is then welcome, the logic behind it contradicts Ofcom's approach to the 'variable k' RAB model. This prohibition on price discounts is predicated on acknowledging the detrimental impact of low access prices for FTTC on the potential for competition to emerge. Yet the proposed 'variable k' RAB model would also drive down FTTC wholesale costs in parts of Area 3 where there is the potential for competition. It is then counter-intuitive for Ofcom to acknowledge and seek to remedy the danger of falling wholesale FTTC pricing's impact on competition in area 3, whilst then consciously choosing to deliver this outcome through the variable k RAB model.

91. Furthermore, in proposing this remedy, Ofcom also acknowledges that competition may develop in area 3 where 'potentially also linked to public funded initiatives'. If Ofcom accepts that open tender public subsidies can play a role in facilitating competition, it is not clear why Ofcom places all current and future state aid intervention areas within a designation defined by the absence of the potential for competition. Instead, Ofcom refers to only 'the potential for *commercial* [emphasis added] rollout' when assessing whether a postcode may be potentially competitive.

92. On inter exchange remedies, we welcome continuation of remedies in both BT only and BT+1 exchanges, as well as the introduction of ancillary obligations, which we discuss in response to question 6.1v3. As previously discussed, Gigaclear believes IE dark fibre can help to reduce barriers to infrastructure build in marginal areas of access network rollout.

93. Since its trial introduction in 2019, Gigaclear has explored utilising the DFX remedy. From this experience, we believe that the remedy is not fit for purpose, as operational elements of the remedy render it ineffective. We detail these concerns in [✂].

Question 2.1: Do you agree with our proposed approach to copper retirement? Please set out your reasons and supporting evidence for your response

94. Gigaclear supports the proposed approach to copper retirement. Specifically, we welcome the requirement for BT to publicly notify the timeframe to achieving 75% exchange footprint coverage, as this will allow network operators to plan ahead/ factor any increase in competitor price point through the fibre premium.
95. However, the entirety of Ofcom’s consideration of copper retirement is given to BT Openreach. In light of the scale of investment in Area 3, it is reasonable to foresee a scenario where BT Openreach may decommission copper infrastructure and consequently migrate customers not to their own FTTP, but that of an alternative operator. Should such a potential scenario emerge, we would expect Ofcom to consult on how SMP would be considered, along with USO obligations, for the geography in question.

Question 3.1: Do you agree with our proposed general remedies? Please set out your reasons and supporting evidence for your response.

96. Yes we do. The concerns for competition that Ofcom describes are reasonable. In the physical infrastructure market, absent regulation BT will have the incentive and ability to set excessive prices and to impose a price squeeze in relation to new forms of network access. This is because some new forms of physical infrastructure access may be very difficult to replicate by rival operators, and the specific PIA product and any active services provided are unlikely to be viable substitutes.

97. In the WLA, LL Access and IEC markets, whilst charge controls and/or basis of charges obligations should act as an anchor to limit the risk of excessive pricing on new forms of network access, we agree that given BT’s vertical integration and SMP, there is again a risk of a price squeeze in relation to other forms of network access.

98. We then support Ofcom's intention to impose in each relevant fixed telecoms market an obligation for charges for network access to be fair and reasonable, (except to the extent that a charge control or a basis of charges obligation applies).

99. Strong downstream competition, facilitated by alternative network build, is vital to ensure the best outcomes for consumers. To achieve this, it is also important that Openreach does not unduly discriminate between different customers when supplying access services. Wherever possible, it should then provide access to BT downstream, non-BT access seekers and internally to Openreach itself on the same terms.

100. Without this level playing field, BT could engage in practices that could distort downstream competition, for example by providing access on less favourable terms compared to those obtained by its own downstream businesses. This may in turn discourage alternative network deployment and consequently negatively affecting consumer outcomes. A non-discrimination obligation is then appropriate to prevent such discrimination in favour of BT's own downstream divisions.

Question 4.1: Do you agree with our proposed specific PIA remedies? Please set out your reasons and supporting evidence for your response.

101. Given the conclusion that BT has SMP in the proposed Physical Infrastructure market, we consider it likely that BT would have the incentive and ability to favour its own downstream businesses over rivals in the relevant downstream markets, thereby distorting competition.

102. Whilst the proposed general network access remedy is aimed at addressing this competition problem, establishing a request for access under this provision is likely to require complex industry negotiations about the specific terms of the requested network access. Indeed, the history of the OTA2 working groups can attest to this.

103. We then argue that it is necessary for Ofcom to require BT to continue to provide a specific form of network access. This approach means that telecoms providers will have certainty as to the basis on which they may have access to BT's physical infrastructure, thereby providing a more effective means of addressing the above concerns than just the general obligation.

104. As for alternative network operators, an effective PIA remedy can reduce the absolute costs and time required to build ultrafast broadband networks at scale, which will encourage competitors to invest in their own networks. To the inevitable extent that the remedy displaces some end-to-end competition, this is likely to be outweighed by the significant benefits of realising network competition based on PIA in potentially many more geographic areas. As already provided to Ofcom in the early phase of the WFTMR work programme, Gigaclear's business model supports this proposal; detailing an increasing utilisation of PIA to support our access network expansion, specifically into otherwise marginal geographies.

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Question 5.1: Do you agree with our proposed specific remedies in the WLA, LL Access and IEC markets? Please set out your reasons and supporting evidence for your response.

105. Yes, it is appropriate that this product range is subject to charge controls. In the absence of a specific access obligation, BT would have an incentive to put its competitors at a disadvantage by not offering MPF services, or by doing so only on unfavourable or discriminatory terms. This would result in consumer harm in the form of service degradation, restricted choice of provider and/or higher prices. We then support Ofcom retaining the specific access obligation on BT to protect the ability of telecoms providers using its network to continue to compete with BT downstream in the provision of broadband services.

106. As for the VULA requirement, without this BT would have the ability and incentive to favour its own retail operations, thereby hindering sustainable competition in the corresponding downstream services and ultimately harming the interests of customers. VULA prevents this harm to consumers by enabling telecoms providers to provide retail superfast and ultrafast broadband services. It is then appropriate to reimpose this obligation.

Question 6.1: Do you agree with our proposed dark fibre access and dark fibre interexchange remedies? Please set out your reasons and supporting evidence for your response

107. We welcome the dark fibre access remedy. In areas where only BT can deliver full fibre connectivity, without this remedy, BT can effectively limit the service that downstream operators can provide. This is because such providers will not be able to utilise their own electronic equipment (at either end of the line) to better suit their needs and the needs of their customers.

108. With that said, [✂].

109. [✂].

110. We support Ofcom's assessment that a dark fibre remedy in inter-exchange connectivity could significantly reduce costs it what would otherwise be marginal or unviable areas. It could therefore promote competition, not only in the provision of connectivity between exchanges where there are no or insufficient competitive networks, but also function as an enabler for infrastructure build in marginal access areas. This is because backhaul costs are a critical cost consideration when building new access networks.

111. We also add that the remedy can also function to drive more efficient delivery within state aid interventions; the ability for the remedy to mitigate the otherwise high cost of delivering fibre into a new area would result in driving down costs, allowing more premises to be served through the intervention.

112. As part of the 2019 BCMR, Gigaclear expressed interest in utilising DFX, initially as part of scoping our R100 bid related work, and later as part of our commercial build plans.

113. [✂].

114. In light of this concern, we welcome Ofcom's clarification around Openreach's obligation to provide ancillary services. Consumption of DFX via Cablelink without a need for presence in the BT exchange should be the goal of these ancillary obligations, as this will enable wider use of DFX by those most likely to be customers (who will not typically have exchange presence or historically need for such). This would then mitigate the capacity and power limiting issues currently inhibiting use of DFX.

Question 7.1: Do you agree with our proposed approach to QoS? Please set out your reasons and supporting evidence for your response.

115. Absent QoS standards for the circuits discussed, BT Openreach would have the ability and incentive to offer poor service levels for provisioning and fault repairs for the proposed products it would offer in the markets that SMP has been identified. Whilst Gigaclear has a limited history of utilising BT Openreach products, [✂], we note recent publication of Ofcom's analysis of Openreach QoS performance, which highlights improvement across these markets.

Pricing Remedies – Volume 4

Question 1.1: Do you agree with our proposals for charge controlling WLA and LL access services in Area 2? Please set out your reasons and supporting evidence for your response.

116. In this area Ofcom is of the view that maintaining the current level of price regulation would be effective to achieve its objective of supporting investment in fibre networks through promoting network competition, while protecting consumers from excessive pricing or a loss of retail competition in the short term.

117. We broadly support this position. We agree that 'cost-based controls' and 'adaptive regulation' models would be less inclined to support network level competition, because cost-based price caps would

make buying from Openreach relatively more attractive. This would consequently reduce the incentives for potential competitors to Openreach to build a network themselves or for ISPs to purchase wholesale services from an alternative competitive network.

118. This is precisely why we are concerned with cost based price caps being considered in Area 3 under the variable k RAB model; as evidenced in response to question 7.1v2, there are sections of Area 3 that have/are likely to see scale rollout of alternative networks. Cost-based price caps would then function to deter investment in these alternative full fibre networks through reducing the comparative cost of superfast (copper) services, thereby making BT Openreach copper services more attractive.

119. With that said, we query Ofcom's assessment of the 'copper wedge' as proposed by Vodafone. We agree that this approach supports network level competition by avoiding regulating copper products down to cost, but also add that it has the potential to further competition through reallocating the funds raised through competitive open tender.

120. In response, Ofcom raise two arguments against this model; legal viability and disproportion of the intervention due to high administrative burden.

121. On the later point, in 1.72-V4, Ofcom set out the administrative process that the copper wedge would require, as evidence of disproportion. However, the mechanism Ofcom describe is already well established through BDUK's pre-existing superfast state aid programmes. Rather than then have Ofcom reproduce its own process to reallocate funds gathered through the wedge mechanism, Ofcom could allocate this process to BDUK. Ofcom's only role would then be to administer the charge; the re-use of funds to support competitive tenders would then be administered by BDUK. If this solution were utilised, we believe that the concern regarding disproportionate administration can be overcome.

122. On the legal point, we accept that such an intervention would likely require primary legislation and so it is reasonable to not select the copper wedge mechanism here as this is not within Ofcom's powers. However, it raises the question of whether such a measure would be viable if Government had appetite to pursue legislation that would enable this approach.

Fibre premium on a 40/10 FTTP equivalent product

123. In light of Ofcom's obligation to encourage network investment, introduction of a fibre premium is necessary to achieve the objective of supporting investment in fibre networks through promoting investment in competing networks. FTTP 40/10 price needs to reflect the higher value of the FTTP product in comparison to the FTTC 40/10 product, in order to maintain the relative profitability of building a network in comparison to buying from BT Openreach. The intervention is also proportional as it reflects improved service over FTTC (and consumer choice enabled through that).

124. Our only further point of comment here concerns clarity around the 'fair bet' principle. For the reasons we set out in response to question 8.1v2, the principle of fair bet may well become relevant to non-

Openreach operators that achieve scale in Area 3. Should that scenario develop, alternative network operators would welcome Ofcom's commitment to extending the same principle of 'fair bet', in line with Government's recommendation set out with the SSP.[19]

Question 2.1: Do you agree that a RAB based control will achieve our objective in Area 3? Please set out your reasons and supporting evidence for your response.

Question 2.2: Do you agree that is appropriate to impose a post-build RAB charge control in Area 3? Please set out your reasons and supporting evidence for your response.

Question 2.3: Do you have any comments on our proposed design and method for calculating the proposed post-build RAB charge controls? Please set out your reasons and supporting evidence for your response

125. We are concerned that if the 'variable k' RAB model is introduced, the remedy will function to deter, rather than encourage investment in VHCN in the parts of Area 3 that could reasonably sustain competition. We propose that this would place Ofcom in breach of Article 74 of the EECC. This requires NRAs, in determining whether price control obligations would be appropriate, to take into account the need to promote competition and long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of VHCNs. To avoid this and to meet the requirements of Article 74, we urge Ofcom to abandon the 'variable k RAB model', and instead utilise the forecast model with restrictions around where BT can allocate capital under this approach.

126. We agree that, absent regulation, BT Openreach would have the incentive and ability to fix and maintain prices for access (across both WLA and LL markets) in areas where it genuinely faces no competition. This could be done through either setting excessively high prices or imposing a price squeeze to constrain competition in downstream markets. Additionally, in the absence of competition, Openreach will face weak incentives to upgrade networks and may instead 'sweat' its pre-existing assets.

127. However, we are extremely concerned by Ofcom's statement that it will exercise 'discretion in setting these controls in favour of an approach that sets appropriate incentives for BT to invest in fibre networks, while protecting consumers from excessive pricing. We give less weight in Area 3 to setting

[19] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/842918/SSP_-_as_designated_by_S_of_S_.pdf - page 9

charge controls that incentivise rival network investment, as we do not believe that there will be material competitive fibre deployment in these areas.' Ofcom justifies this 'discretion' wholly on its assessment that 'there will not be material competitive fibre deployment in these areas'.

128. In our response to question 7.1v2, we set out why we believe that there are 4 subgroup geographies of postcode sectors currently captured in Area 3 that could, to varying degrees, deliver material competitive fibre deployment. In response to question 1.1 v3, we also proposed that subgroup categories 1 and 2 should be captured under Area 2. For subgroup categories 3 and 4, we acknowledged that these could not easily be shifted to Area 2 as they carried greater uncertainty.

129. To address 3 and 4, we proposed that Ofcom utilise the RAB forecast model to support competition in postcode sectors that fall under these categories. The significant benefit of the forecast model is that as BT already commit to building the postcode sectors where it intends to build full fibre during the period of the market review, the downward pressure on the 40/10 FTTC pricing proposed under the 'variable k' RAB model is not required.

130. With BT's full fibre rollout in Area 3 declared, the outside in programme can also exclude these locations from eligibility for state aid support which then avoids future state aid intervention areas (which as set out in response to question 7.1v2 can encourage alt-net rollout) overlapping with where BT have already declared their intention to rollout. This then ensures that the state aid intervention does not crowd out commercial investment.

131. However, the material risk of this measure is that it is open to gaming; if BT is left to its own decision making, they may declare areas to build in Area 3 (capital allocation) with the intention of disrupting emerging competition rather than seeking to secure the highest return on their investment. For example, BT may declare postcode sectors where alternative networks are already present or that overlap with state aid intervention areas being delivered by alternative networks.[20] We then propose that Ofcom exempt postcode sector in subgroup geographies 3 and 4 from BT's capital allocation under the forecast model.

132. This would then ensure that the Area 3 remedy is targeted to where Ofcom can have the most certainty that competition will not develop and consequently protects the subgroup categories of Area 3 that are most likely to have potential for competition to develop.

133. This outcome would be considerably superior to that of the 'variable k' RAB model.

134. The 'variable k' model would reduce the FTTC 40/10 price by applying a CPI-x% (Ofcom propose that 'x' is between 5% and 15%) control to the GEA element, which will cause a gradual reduction to Openreach's cost base over the period of the market review. It will also allow Openreach to recover full-fibre investment costs it incurs across all services in Area 3, the 'K' in the CPI-X+K control. On a retrospective annual basis, Ofcom will adjust the charge control to reflect BT Openreach fibre investment in the previous year. For areas where BT Openreach delivers full fibre, this will result in

[20] [✂].

reducing the pace of the fall in wholesale price (assuming a middle point of Ofcom's model of BT's expected fibre build).

135. The most severe element of this proposal is that in areas where BT does not deliver full fibre, copper prices will fall. This would make BT Openreach copper less expensive relative to that of a full fibre VHCN being delivered by alternative network operators in these postcode sectors. As this part of the remedy operates where BT is not delivering full fibre and functions to make copper infrastructure (as substantiated in volume 2, a substitute product) more attractive in these areas, it consequently makes it more difficult for full fibre alternative networks to attract retail ISPs. This is because the price differential between BT Openreach and alternative network wholesale access charges will have expanded to the detriment of the alternative network. The remedy would then function to deter, rather than encourage investment in VHCNs in these areas.

136. Such an outcome would mean that Ofcom would arguably be in breach of Article 74 of the EECC. This requires NRAs, 'in determining whether price control obligations would be appropriate, to take into account the need to promote competition and long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of very high capacity networks… NRAs are also required to ensure that any mandated cost recovery methodology or pricing mechanism serves to promote the deployment of new and enhanced networks.'

137. Further to this, annual review of K would mean that the BDUK Outside In programme would not be able to plan ahead of BT's build plans – raising the danger of the Outside In programme targeting areas that BT would have committed to upgrade under the forecast model. Indeed, BT may then choose to defer their plans in order to compete for the state aid tender for that area. Further, the variable k option would more readily allow BT to adapt its build intentions in order to react to alternative operators securing state aid contracts that BT itself fails to secure. [✂].

138. The variable nature of K would also mean that operators have could never have certainty over what the following years 40/10 FTTC price point would be. This would make it even more difficult for alternative operators in area 3 to structure their business plans, model competitive pressure and consequently secure investment.

139. We then strongly urge Ofcom to abandon the variable k RAB model and adopt the forecasting model with the capital allocation exemptions we have proposed. Whilst we acknowledge the enforcement complexities around requiring BT to make a network build commitment to Ofcom, this outcome is far better suited to achieving the goal of 'seeking to give all UK consumers access to as wide as possible choice of fibre networks' than that of the variable k solution, for the reasons we have set out in this submission.