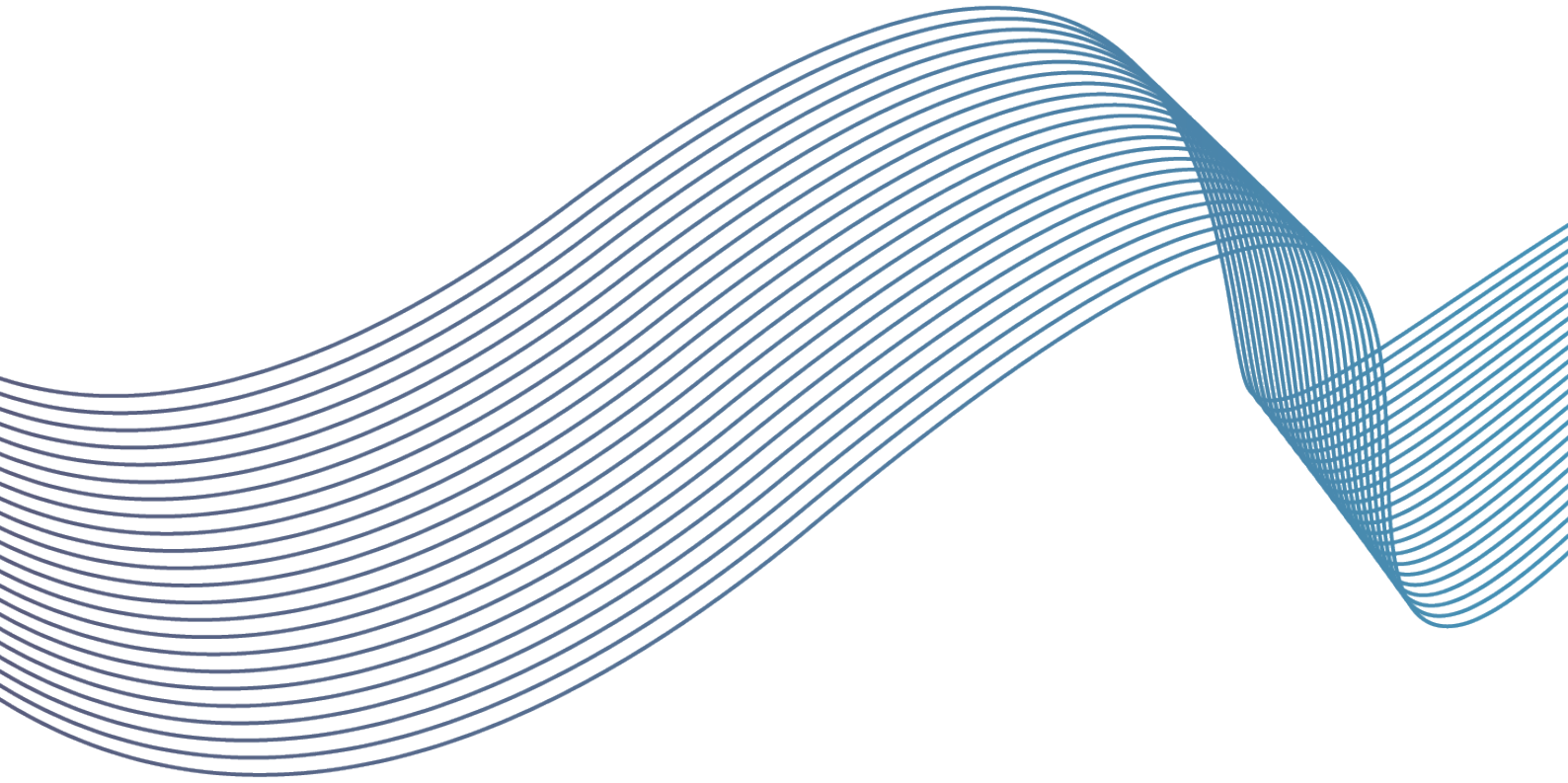
Response to Ofcom Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26

Version 1.0



30 June 2020

hyperoptic

Hyperoptic Introduction

Hyperoptic is a Code Power operator founded in 2011 by Dana Tobak and Boris Ivanovic. Hyperoptic is the largest provider of 1 Gb residential broadband in the UK and currently use a Fibre to the Building infrastructure operating across 28 cities with ambition to service significantly more. We have installed or are in the process of installing to over 400k residential homes and over 10k business units.

Hyperoptic was founded to bring the UK's broadband infrastructure to the next level creating a new full fibre infrastructure, offering 1 Gb services and raising the level of expectations on the role of connectivity in British households and businesses. Customers get the wired speeds they expect, and we have over 95 percent customer satisfaction rating consistently on our quarterly surveys.

To date, we have been expanding our network 100 percent year on year, and having recently secured 100m in debt funding. Our plans are to reach 2m homes passed by 2022 and 5m homes passed by 2025.

Currently, 50 percent of our footprint would, without Hyperoptic, be fibre-free with its residents only able to use ADSL often below 10Mbps – we are a key deliverer to whitespace areas and often target these areas having been neglected by other operators and network builders.

Response summary

Hyperoptic welcome the opportunity to respond to the Ofcom WFTMR Consultation. We have chosen to focus a targeted response on Physical Infrastructure Access (PIA) given it's centricity to both the government's targets and Ofcom's strategic plans. In our response we set out areas where the current version of PIA fails to deliver the functionality required to meet the ambitious nature of the government's targets for the roll out of gigabit capable networks by 2025.

The current PIA framework and incremental approach to product change will not deliver the required changes in an adequate timescale to help fulfil the above mentioned government target and therefore believe that the time is right for Ofcom to become more directly involved in PIA given the opportunity to revise the legal instrument requiring BT to offer PIA. We continue to believe that the right long-term solution is to impose equivalence. To mitigate against lost efficiency from moving to a new accountability mechanism, we recommend a phased approach, in which an end-to-end KPI is designed and implemented on Openreach whilst transition to equivalence is managed through. The end-to-end KPI would set boundaries on the time taken (in days) from receipt of an NOI to Closure of an NOI, minus any CP delays.

We also set out our current thinking regarding the interplay between PIA and other Ofcom consumer policies and the changes that are necessary to PIA in order to ensure consumer outcomes from PIA that are inline with other Ofcom consumer policies.

Approach to Physical Infrastructure Access

We have chosen to focus a targeted consultation response on Ofcom's approach to the access obligation on Openreach (OR) to provide PIA. Given the centricity of PIA to Ofcom's strategic goal of achieving network competition in order to meet the Government's full fibre target by 2025, it is of the utmost importance that the product offering by OR is fit to meet that target. Additionally, given the fact the next regulatory cycle concludes in 2026 – a year after the Government's target date for full fibre coverage, there will not be another opportunity to get this right.

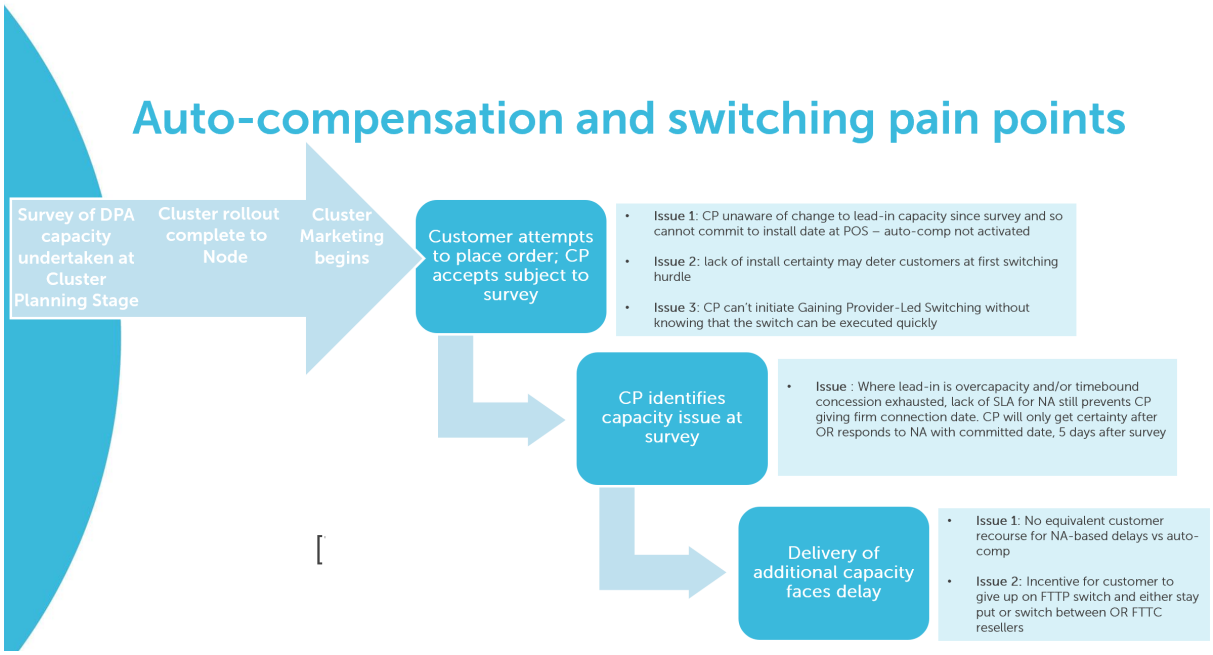
The first part of our response focuses on the high-level problems that are present in the current PIA offering, why we believe a different, more robust regulatory approach is needed, and the obstacles generated by Openreach's current approach to PIA. We then address the following, specific issues:

- Interplay of PIA with other Ofcom policy consumer focused objectives;
- accountability and oversight framework;
- costs of non-equivalence;
- the lack of efficient systems;
- the network adjustment ('NA') process;
    - ways to improve the current processes in the short term;
- The lack of true engagement and reciprocity;
    - forecasting regime;
    - Mid-term review;

- systems SLA and SLGs; and
- Evidential burden.

Hyperoptic signed as a PIA CP in 2015, our early engagement with PIA was almost entirely focused on its engineering processes and implications as we sought to drive efficiencies in our use of PIA to deliver area-wide deployment. We have been an active participant throughout the reference offer negotiation process as well as mor recently in trying to advance the product to make it fit for purpose for scale roll out.

It is only relatively recently (within the last nine months) that we have activated end customer ordering in our PIA-enabled rollout areas. This has precipitated an intensified focus on the implications for PIA for customer service. Hyperoptic has identified a number of pain points in the customer sales process that result from the lack of clarity a PIA user has regarding the capacity in the lead-in at the point at which we take a customer order. As we have identified these points of friction, we have realised the extent to which other Ofcom imperatives beyond its strategic priority to drive Government's accelerated full fibre rollout ambitions intersect with the PIA process. In particular, we believe that the current process and transparency mechanisms between PIA CP and Openreach may undermine Ofcom's Automatic Compensation and Gaining Provider Led Switching regimes in certain scenarios. The below schematic aims to illustrate that point.



Uncertainty results from the fact that Operators do not have transparency about lead-in capacity, cannot rely on an SLA for additional capacity to lead-ins and are not able to reserve capacity in the lead-in. Without a specific set of rules for lead-in, we foresee risks in dampening consumer demand, erecting new barriers to FTTP switching and undermining the spirit of auto-compensation. This creates a potential asymmetry between FTTP resale over the Openreach network – where Openreach grants CPs an 18 working day window to book an appointment having raised an order – and FTTP deployment over DPA, where Openreach provides no certainty as to when an operator will be able to book a customer appointment.

Hyperoptic has drafted two SORs as proposed solutions to the lack of real-time information and lack of SLA for lead-in NAs.

Real-time information on the capacity and status of each pole:
We would like to have near or real-time information on Lead-In Capacity for Openreach Ducts and Poles that can be extracted alongside the other pole data that OR are making available via the API. This would include:

- Capacity information (date data last updated);
- Whether an NA or OR equivalent has been submitted against a pole (both OR NAs and SPOs)
- Whether a pole is under a time bound concession with relevant date.
- Whether an NA or OR equivalent has been submitted against a UG lead-in (both OR NAs and SPOs)
- This capacity information referred to above is available from the data that OR receives from PIA CPs when submitting NAs (and presumably OR under equivalence rules).

OR is also undertaking around 500,000 pole surveys a year as part of its National Safety Programme. We request that OR add additional fields to this information audit to facilitate capture of capacity information for poles they are visiting anyway. This incremental ask to an existing programme would have great benefit to OR as well as PIA CPs. For the same reason, we believe that CPs and OR should proactively provide additional capacity data gained from their field surveys to capture the same information as part of their ongoing work.

- For Overhead Network this could be done by recording similar information as to what is in captured in the Network Adjustment process i.e. number of existing dropwires, space to fit equipment on pole etc.
- For Underground Network this could be done by recording remaining capacity in the duct I.e. 0-50%,50-75%, 75-100%, Congested.

A fair SLA for Openreach to deliver NAs on poles:

We require a SLA for lead-in network adjustments that CPs are unable to do themselves, either because they do not have engineering resources in particular areas to opt for self-provide or because, under the revised engineering rules for self provide of pole NAs, the specific NA work is not covered.

It is worth noting that the works that CPs are allowed to self-provide on a pole are understandably tightly limited (to removal of bass steps, removal of clearly redundant drop wires – meaning the wire is disconnected and coiled at the end of the pole – and removal of BT Cable boxes). As such, the importance of an SLA for pole work is of particular importance.

We think a reasonable SLA is 6 - 8.5 weeks. We understand that Openreach's own performance for pole improvement or replacement is 8.5 weeks on average today and we expect that to improve with additional data and proactive reporting from CPs. Underground lead-in NAs should be quicker to resolve than pole since we understand that Openreach has a larger trained engineering force for those tasks and CPs will complete a higher proportion of those NAs themselves.

Accountability and Oversight framework

Ofcom has been present as an observer throughout the protracted and at times painful negotiation process in the run up to the re-launching of PIA in April 2019, to comply with the WLR Statement. Therefore, Ofcom will be fully aware of the issues that have been raised throughout the process and

those that remain as yet unresolved. The tried and tested method that has been established by Ofcom to facilitate the negotiation of reference offers and subsequent discussions necessary to develop products has been beneficial for industry. It has made good use of the OTA's position as an unbiased third party and has allowed the knowledge and experience of the OTA for the betterment of UK Plc as a whole.

However, the current process of industry negotiation, leading to incremental product improvement is by its very nature slow and cumbersome. Whilst some progress has been made, the changes that are required to make PIA fit for purpose for large scale deployment of gigabit capable networks are not likely to be delivered in time to meet the Government's target of 2025. Ofcom and the OTA have said that they expect it to take a further 5 years for the product to mature sufficiently (based in part on experience of the development cycle of Ethernet). We agree with this assessment and unless there is a fundamental change in the approach to delivering PIA, it will not stimulate the roll out of full fibre networks in the way that both Ofcom and Government desire.

Whilst the process of negotiation and product development may well have delivered the desired outcome to meet the Government's target by 2033, the Government has significantly reduced the target date to 2025. Given this fundamental change in the window for delivery of the Government's targets, we urge Ofcom to undertake a similarly fundamental change in the way PIA development is managed through the regulatory process.

OR has real commercial incentives to frustrate the development of PIA as it serves to slow down its competitors. As OR is not required to consume PIA on equivalent terms to alternative operators OR is not subject to the deficiencies of PIA and can deploy fibre in more efficient ways than CPs can using PIA. The OTA does not have formal powers to intervene, which has led to several areas of the negotiation where the OTA process has reached a plateau where no further progress can made, as agreement on necessary changes cannot be reached. Ofcom has both the regulatory arsenal as well as the opportunity to use this Review to bring PIA into full alignment with the Government's target.

The manual duplication of work that CPs are required to do in order to input data to the OR portal places CPs at an operational disadvantage. Experience with other regulated products (e.g. WLR, LLU) has demonstrated that where BT Group companies are required to use the same systems and processes as all other CPs, i.e. equivalence of input (EOI) these inefficiencies get addressed much more rapidly. It also has the effect of ensuring there is no scope for OR to discriminate against CPs in favour of downstream BT Group businesses. Whereas with the current absence of EOI it is for other CPs to prove that undue discrimination has taken place. Given the lack transparency of OR systems, processes and development stack, this is not something that CPs are able to readily do. The result of this is to create a suspicion of a lack of fairness even where it is possible that none exists.

However, in the WLA Statement of 2018 and subsequent Statements on PIA, Ofcom set out that despite EOI being the "most appropriate form of non-discrimination obligation to impose where there are concerns that a dominant provider will discriminate in respect of network access.", it would not be appropriate to impose EOI on BT "at this time" (WLA Volume 3 para 3.39). In introducing the necessity for a form of non-discrimination remedy Ofcom set out at para 3.34 "Therefore, an effective PIA remedy requires BT being prevented from discriminating, on both a price and non-price basis. This

will help ensure a level playing field on which other telecoms providers can compete with BT." Ofcom continue at para 3.45 to set out that "we have decided that in order to ensure a level playing field in downstream markets, this non-discrimination requirement should be as close to EOI as possible.", and at para 3.46 "in respect of all processes and sub-products that contribute to the supply and consumption of duct access, with discrimination permitted only in cases where BT demonstrates that a difference in respect of a specific process step or sub-product is justified.".

We appreciate that the decision to opt for non-discrimination was a pragmatic one – Ofcom was rightly concerned about lost time in implementing an equivalence framework. However, non-discrimination looks an outdated benchmark against current political expectations of fibre delivery. It is not sufficient for all operators to be as inefficient as each other, or slightly less inefficient than Openreach. To deliver a radically accelerated delivery schedule for fibre we need to remove inefficiency to as great a degree as possible.

The issues arising from the absence of EOI can be summarised as three categories:

Slow and incremental change:

Openreach has selected its pre-existing "Statement of Requirements" (SOR) process for managing customer change requests to DPA. The SOR process is set to a timeframe of six to 24 months for even "non-significant" changes – an intolerable delay at either end of the spectrum given the urgency of Government's target. The implementation timeframe can extend to 48 months for more significant asks. The SOR process was designed to give Openreach time to respond to complex new product requests, not to resolve often relatively simple process issues that we see in DPA.

As a current example, DPA users requested that Openreach put in place rules to govern what operations we are allowed to undertake on their poles at the very beginning of the reference offer. After months of unresponsiveness to the ask, CPs proposed their own model and submitted to the SOR process in early December 2019. Openreach has now established a proof of concept (May 2020), which industry is participating. However, there is no timeframe for full implementation following the proof of concept or clear parameters on how long the PoC will run. Moreover, the PoC is limited to the network adjustments that CPs will be allowed to self-provide. Openreach has still not responded to industry's requirement for an SLA to govern its delivery of network adjustments of the type that CPs can't or are unwilling to self-provide.

***Misconstrued requirements*:**

Because Openreach is not consuming the product and processes, it has less of an operational understanding of what problems CPs are trying to solve than we do ourselves. Each ask of Openreach requires a continuous, significant effort to ensure that the stated requirements are translated properly into solution design. The challenge of doing so is exacerbated when management of an ask moves from those involved in the IWG to more technical groups.

A current example is in the translation of requirements under the PIA Agile API systems work stream. A core requirement of the API – "Build Complete" (the purpose of which is discussed below) – was dropped from the work stream and is still not understood by Openreach 11 months after the request was made.

Timeline of Build Complete discussion

- **July 2019:** CityFibre presents API Systems SOR at IWG with Build Complete explicitly referenced
- **25th October 2019:** PIA meeting: Build Complete listed as Hyperoptic priority No.1
- **12th November 2019:** Follow up email to 25th Oct meeting contains Build Complete explanation
- **16th December 2019:** API workshop - Build Complete in scope
- **17th February 2020:** Handover from Product Managers to Technical working group
- **Early March 2020:** Roadmap with Document Upload but no specific mention of Build Complete
- **19th May 2020:** CityFibre raise concern that Build Complete is missing from the roadmap
- **1st June 2020:** Build Complete relisted in roadmap for Ofcom roundtable
- **16th June 2020**: Hyperoptic-Openreach Exec meeting shows Build Complete still misconstrued

This is a requirement that Hyperoptic identified as it's number one priority for the API work stream and one of the seven priorities raised by CityFibre on creating the SOR in July 19.

Our objective is to remove the time-consuming process of our planners having to compile a standalone report and manually upload As Built evidence to Openreach's "big tin can" data repository, as part of the Build Complete process. We want to be able to do this activity in an automated fashion via the API – allowing our engineers to essentially take picture evidence in the field and upload there and then to the API.

Openreach appears to have misconstrued this requirement following a technical session in December 2019, subsequently (and confusingly) referring to it as "Document Upload" in their materials. Following escalation prior to the 1st June 2020 Ofcom roundtable the language "Build Complete" re-emerged in the documentation, but as of today, Openreach's work is limited to improving the upload process of the document (minimal pain) rather than solving the underlying problem of the time spent producing the document in the first place.

Costs of non-equivalence

CPs are required to purchase ancillary products or follow process/standards that are not required of Openreach and that carry cap-ex or op-ex costs which reduce our ability to match Openreach's cost-per-premises for FTTP rollout.

We note that Cityfibre models the inefficiency gap in DPA (which we believe would be closed if Openreach has the incentive generated by EOI) at £150 per premises, and we agree with this order of magnitude.

A clear example is the requirement for CPs to purchase the Cablelink product where CPs are seeking to either connect existing back-haul and rack capacity in an Openreach exchange to a new PON rack within the same exchange, or to their own PON access network terminating at a handover point outside of the exchange. Crucially, this "interconnection" is not linking a third party network to an Openreach network; it is linking our backhaul and racks to our PON network – it just so happens to be taking place in an Openreach exchange as that is the location of our existing racks and termination point for our backhaul.

For each fibre bundle we bring into an Openreach exchange, we face an ancillary charge for the Cablelink product of £12900. This is a cost that doesn't appear anywhere in Openreach's rollout economics. Conceptually, it is the door charge for entering the exchange.

A single Cablelink costs £2150 and is constrained to receiving a 48 strand fibre from a CP. Hyperoptic's PON fibres are currently provisioned at 288 strands of fibre, which is then spliced to cover an entire cluster. As a result, we have to purchase six Cablelink products per exchange. We have worked with Openreach to develop this product to trial, but currently the cost is a straight multiple of the single product cost.

Other costs of non-equivalence are operational owing to the processes CPs are required to follow purely to satisfy Openreach requirements for PIA use. A large part of the deficiency of PIA is down to the fact that most of the activities that require interaction between a CP and OR involve duplication of effort by the CP, having first to enter information into our own systems and then again manually into the OR systems. Examples of this would be the placing of a Notice of Intent (NOI) at the beginning of the network roll out stage phase, amending the NOI, or at the end of the process confirming the exact route built by the CP and providing evidence that each element of the build was performed to the required standard. This is known as the build-complete or as-built.

In order to submit an NOI, a CP must download and import network data into our own GIS network planning tools, go through all internal process steps in order to produce a deployment plan. We are then required to duplicate much of this process again in order to provide an accurate record the inventory of OR physical infrastructure we intend to use as part of our network deployment. All of this information has to be provided to OR as part of the NOI. If we have to deviate from the original e.g. because of lack of capacity or too many blockages, the route has to be amended in our GIS system and then manually a second time on the OR portal. Once the route has been built, we need to provide the 'as-built' to OR. Internal data suggests that preparing each as-built take an average of a minimum of three hours. Based on current volumes of NOIs raised, this effort is equivalent to two full-time headcount doing nothing but producing as-built reports. All of these additional steps are something that OR is not required to do, as OR themselves set out in their internal reference offer because it would be "a duplication of activities already carried out'.

CPs are also required to submit Whereabouts reports to OR, this includes details of specific locations and the parties who will be carrying out work on or in the OR network, this has to be submitted at least 1 working day prior to commencing work. The process has been improved recently to allow this information to be sent via a CSV file and uploaded via the OR portal. However, even this improved process there are limits as to the number or lines within the file (originally 50 individual records) and the whereabouts for different types of jobs have to be submitted separately. The impact of this is that even when tactical solutions to improve a process have been developed by OR, the burden of all manual elements still remains with each CP – in this case having to produce and split multiple files rather than OR filtering them as required upon receipt.

We continue to believe that the right long-term solution is to impose equivalence. To mitigate against lost efficiency from moving to a new accountability mechanism, we recommend a phased approach, in which an end-to-end KPI is designed and implemented on Openreach whilst transition to equivalence is managed through. The end-to-end KPI would set boundaries on the time taken (in days) from receipt of an NOI to Closure of an NOI, minus any CP delays.

Throughout the remainder of this response we set out a number of specific issues which remain to be adequately resolved and urge Ofcom to consider an alternative regulatory approach or risk PIA failing to fulfil the role that was envisaged when Ofcom set out their strategic approach to meet the Government's full fibre targets.

Disadvantages faced by CPs using PIA compared to OR when rolling out fibre networks (set out in chronological order not importance):

1. OR are not subject to the same forecasting regime as CPs and do suffer consequences of failing to forecast. CPs will lose SLGs (minimal as these are) and qualification for 'Path to Collaboration' (see below) if they fail to forecast.
2. OR planners are subject to no area size limitations whereas CPs are limited to a $5km^2$ area.
3. OR do not have any manual duplication when specifying routes, amending routes clearing blockages / capacity constraints or finalising build. CPs are hampered by duplication at each element of the process.[1]
4. Openreach can clear blockages as they are found, something that CPs are prohibited from doing. This results in ORs rollout capability being much quicker than is possible for any CP.
5. OR can quickly identify redundant copper and use it as a draw wire. This both removes a capacity constraint and makes fibre installation quicker. CPs are prohibited from doing this.
6. Despite the significant improvements made by recent changes to CP08 and the proposal to allow CPs to carry out some work on polls, there remains some work that CPs are prohibited from doing.

Systems

As set out above, there is a large element of manual duplication of effort required for CPs to interact with the OR systems. This results in a time consuming, inefficient and expensive system, the downside of which is magnified, the more at scale a CPs network build program. The most logical way to resolve this problem would be for CPs to be able to interact with ORs systems via an API, as this would remove any duplication. A Statement of Requirements "SOR" was submitted by CityFibre is August of last year and OR are in the process of running a programme to implement the requirements set out in the SOR. Upon receipt of the SOR asked CPs to set out their requirements for an SOR including "user stories" to allow OR to fully understand the needs of their customers. These were collected in the lead up to the first session regarding APIs (which took place in December 2019). Hyperoptic's views were submitted in November 2019. In the OR slide deck associated with this meeting (PIA API Requirements review session 161219 slides) OR set out a description of the top user requirements that they had captured.

OR have kicked off the first phase of implementing an API solution, but based on the current delivery plan and assuming no further delays, it is unlikely that an API delivering all of the functionality that CPs have asked for will be complete before 2021. Until that point, OR will continue to be able to roll out their fibre network whilst CPs remain encumbered by the issues set out in points 2 and 3 above.

As mentioned above, of all the manual duplication the most time consuming and inefficient is the build-complete process. Release R4450 was slated to include "Document Upload" and our assumption was that this would include the functionality that was originally requested in November 2019 as this was included in the description of Document Upload in the OR slide pack for the API kick off meeting. In a bilateral March, we explicitly asked if Build Complete was part of Document Upload and were told that we would have the functionality as part of a July 2020. This has since been bumped to R4450 in September, however OR is now telling us that R4450 only includes uploading the word document (that

[1] For Hyperoptic,the manual effort involved is as follows: specifying routes (~12 mins / NOI), amending routes (~20 mins/NOI), clearing blockages / capacity constraints (~30/40 mins for each NA raised, this is in addition to any follow up if they fall out of the standard process) or finalising build (~3 hours/NOI).

takes around 3 hours to produce) via the API instead of via the portal rather than the ability for a CP to use photographic evidence from CPs own systems (e.g. received from direct from engineers in the field) and submit this to Openreach without the need to reformat/ place in a template. In other words, this fails completely to address the actual issue with build-complete. We would expect OR to demonstrate similar flexibility in ensuring this is delivered in previously agreed timescales as has been the case in carrying out the developments required to make the new ONSA process work (see NA section below).

Given that OR have missed off a critical element of the API, despite it being clear in the original SOR submitted by CF in August 2019 and by Hyperoptic in October we suggest that there are interim process amendments that could be made in advance of OR actually meeting their commitment to deliver the API functionality. In a recent bilateral session, we discussed at a high level whether there is scope to explore the minimum data set required to close an NOI (which is the trigger for OR to commence charging rental). One possibility could be to move to a process where CPs retain the relevant evidence but that it is submitted only if OR requests it, rather than it being submitted as a matter of course for every NOI. That would allow a CP to confirm the actual route built to OR, and for OR to commence billing whilst relieving some of the burden on CPs. It is also far from clear that OR use the evidence submitted by CPs as a matter of course for every NOI.

NA process

The current NA process is heavily flawed and inefficient.

- CPs are required to submit details of a blockage or lack of pole capacity to OR via the OR portal.
- OR complete a desk-based (and in some cases) field verifications, before they then return a cost estimate and together with a Customer Confirmed Date (CCD) to the CP. The SLA for this is 5 working days.
- The CP must then decide whether to opt for Openreach to carry out the NA work or to do the work itself.
- If the CP chooses OR to carry out the work it must accept the NA order, after which ORs contractor has a further 8 working days to amend the CCD under recent unilaterally imposed OR ONSA contract arrangements.
    - Even where there is a material change to the CCD originally supplied by the end of day 5, OR will not permit CPs to switch the order to a self-provide order (SPO), which is where the CP carries out the work on their own and invoices OR.
    - If a CP does wish to switch to an SPO they will have to cancel the NA, be subject to the full charge of carrying out work that was not done and then go through the submission process again.
- If the CP chooses OR to carry out the work, there is then a separate delay while Openreach carries out the relevant work, before the CP can resume their network build.

The cumulative impact of this process is that a CP's network build activity is frequently and significantly interrupted by the need to report blockages, lack of pole capacity, pole decay and other damage, even in the event that the CP chooses to go down the SPO route. Should the CP utilise OR to carry out the work, OR will have met their contractual commitment as long they respond to the initial request within the 5 working day SLA and then meet the CCD that is confirmed by the end of the 13 working days – regardless of how long the work takes to carry out. CPs have objected to this process from the very

start of the reference offer negotiations and asked for the ability to take a more efficient approach would be to allow CPs to resolve problems in the OR network (such as blockages) quickly and efficiently as they are encountered. The costs incurred by the CP repairing the network can then be reclaimed from Openreach after the event, evidenced with well-documented details and photos as appropriate., the ONSA amendment has merely exacerbated the issue. Such an approach would address the concern highlighted in point 4 above.

This request for retrospective NAs was rejected out of hand by OR, but as a way forward they committed to Ofcom an offer for a competency-based approach (rebranded as the path to collaboration) as a key part of phase II deliverables. This was to allow CPs who had demonstrated their ability to raise NAs on only valid cases to be able to avail themselves of a more efficient process whilst at the same time ensuring that OR have proper fiduciary control and auditability over the NAs they pay for. Once a CP has met the criteria (measured on a quarterly basis), OR would no longer require a field verification for every NA, and aside from a % which would still be subject to a field visit, the rest would be responded to straight after desk verification. Crucially OR have refused to amend the SLA for verification responses for 'collaboration qualified' CPs. In effect, given the SLA remains the same regardless of qualification, OR have made workforce savings by not auditing every NA, whilst refusing to commit to contractual improvements that should underpin the fact that most NAs do not require a field visit. OR have pointed to the fact performance is very good so it doesn't matter, however CPs can only build processes around contract timescales and we remain unable to hold OR to account if performance starts to slip as long as it remains within the 5 working days. OR have called out in their slides on performance at each IWG that performance is likely to slip as volumes grow.

The above demonstrates not only the imbalance in process between OR and CPs, but also that even when giving a clear commitment to Ofcom to improve process in response to CPs needs OR fail to deliver anything substantive. It is certainly not the type of response one would expect from a provider were the request to have been made in a competitive environment.

The lack of true engagement and reciprocity

Forecasting

Hyperoptic acknowledges that in order to help OR provide a quality level of service it makes sense to provide them with as much visibility of forthcoming work so that they can resource appropriately. However, this is a burdensome process and we have had concerns over the onerousness and inflexibility of the forecasting rules — particularly given the far distance ahead that CPs must look and the high number of regions into which forecasts much be split. The value of forecasts is also unclear because of the inherent difficulty of translating usage of DPA into the likely number of network adjustments that may occur. CPs have also questioned the unprecedented linkage between forecast accuracy and SLGs which has yet to be justified.

OR have also refused to address the fact that since the forecasting regime was initially imposed, the product itself has been changed by the PIMR. The forecasting regime is not designed to address the new types of build permitted by the PIMR in any way.

When imposing ONSA. OR explained that they conduct on a rolling basis reviews with their relevant contractors for each nine-week period to make sure that the contractor's geographical position and capacity is aligned with the anticipated network usage that will occur in the relevant section of the network. That nine week period is exactly the period during which CPs are not allowed to amend their forecasts under the current forecasting rules in the contract. This was pointed out to OR together with the point that if forecasting was to give OR the best chance to manage resources efficiently, CPs should be given the same flexibility. This was rejected.

Mid-term review

Throughout the initial reference offer there were a number of significant issues that could not be agreed e.g. forecasting and SLAs/SLGs. In an effort to move things along, CPs suggested that issues were parked and that a mid-term review would take place to review these issues in light of actual experience of the revised product. Of all the issues that were meant to be reviewed, the only review to have taken place so far related to forecasting. At this meeting, rather than engaging in a review of the impact of forecasting on OR and CPs, OR presented some high-level stats and informed CPs that it was 'not minded to change the forecasting regime'. Tellingly, OR revealed that despite CPs forecasting accurately their own accuracy in converting forecasts to the level of NAs was only 42%. This does little to dispel the notion that CPs are engaging in a pointless activity and also class into question whether the current forecasting regime can be objectively justified. It also highlights the absence of any bona fide engagement on these sensitive issues on the part of OR. Given that there is no regulatory requirement for them to engage, the OTA have no formal powers and they are not impacted, this attitude is of no real surprise.

Systems SLAs and SLGs

The current product offering utilising the OR portal is highly dependent on the system being available in order for CPs to carry out their contractual obligations. As such Industry has long been pushing for a systems SLA to give assurance and protection to CPs that the systems they are required to use to consume DPA are robust and fit-for-purpose. OR invited Industry to make suggestions and in February 2019, industry detailed proposals to Openreach on the scope and nature of a systems SLA that it would like to see implemented. Despite the considerable amount of time that has elapsed, no progress has been made. The urgency of system SLAs will only grow once a fully functional API is available.

During negotiations for SLGs under the current reference offer, it became clear that OR apply a different standard between OR and CPs depending on who is at fault. On the one hand, as set out in the section on above on NAs, in the instance a CP cancels an NA (either because it was raised in error or because of a material change to the CCD after the ONSA review)they are unable to amend it and cannot cancel it without incurring the full product charge(s) for the work requested despite the fact that it could be a number of months before the CCD and OR will not have commenced any work based on this acceptance. This is known as the Point of No Cancellation (PONC). Contrasted with this is the model OR have implemented for a daily SLG rate based on an average for the number of days each of the SLAs are missed by. E.g. to calculate the SLG for a stranded engineer, OR use the following calculation:

> average daily cost of Engineering team x Average percentage of Engineering teams being unallocated as a result of missing CCD / Average delay to CCD = Daily additional cost.

CPs have pointed out that we incur costs in every time an SLA is missed, and in the case of a stranded engineer we incur the full cost immediately. Nonetheless OR have implemented an SLG of £3.10 per day for stranded engineers. Given that OR require CPs to pay the full order charge associated with a NA order, even if it is cancelled immediately after submission this duality of approach is highly questionable and is arguably discriminatory. To satisfy the no-undue discrimination obligation, CPs believe OR should apply 'equal' treatment to CPs by appropriately compensating CPs for Immediate Costs.

Evidential burden

There is a lack of reciprocity in the process around providing evidence to prove that NA work has been carried out in the OR network. For CPs to qualify for payment either for SLGs where OR fail to deliver or to be paid for work carried out by the CP, Openreach requires the CP to submit to Openreach 'full details and photographic evidence' — with 'photographic evidence' being defined in a detailed and burdensome way. Conversely, when CPs asked for an equivalent obligation on Openreach, in this case to prove that a network adjustment had been carried out to the required standard, CPs met with strong resistance. OR refused to include in the contract the same wording as applies to CPs in part citing their inability to amend the contract with their contractors. The opportunity to remove this imbalance as part of the recent contractor renegotiations (ONSA) was not taken. This would suggest that the evidential burden that OR place on PIA CPs is higher than that that placed on the their contractors including when working on ORs own fibre rollout programme.

In addition, in relation to damage to Openreach's infrastructure, CPs are required to provide detailed information to Openreach about the work that has taken place, and when and where it occurred. Conversely, when CPs discover damage to their installed apparatus within the Openreach network, CPs find it very difficult to extract any useful information from Openreach to assist the CP in identifying who might have caused it and pursuing them for redress. This is despite the fact that OR set out at para 58 of their internal reference offer that they impose obligations on their own contractors in terms of 'whereabouts' information, plus tracking the location of their own personnel which is recorded in OR's operational systems

These are two of many examples where CPs are required to accommodate and accede to Openreach's demands, without Openreach demonstrating a reasonable level of compromise and willingness to accept reciprocity. This situation naturally gives rise to questions as to Openreach's discharge of its no undue discrimination obligation.

Conclusion

Working within the current regulatory and industry working group set up, OR is at best slow to acknowledge and resolve, and at worst merely rejects issues out of hand. If these issues impacted on BT Group's business operations there would be commercial incentive to give these issues the priority they deserve.

Failing that, the issues preventing operating or attempting to operate PIA at scale are a long way from being fully addressed and resolved. This has the potential to leave operators at a significant

disadvantage when compared to Openreach, both in terms of the rigidity of the product as well as the operational overhead that is currently required to operate PIA.

The No Undue Discrimination was meant to resolve these issues, but our experiences to date do not give us confidence that this has been the case and we are still firmly of the view that EOI is the only way forward. We believe that this makes it essential for Ofcom continue to take a very active and proactive involvement at this stage of the development of the product. Given the revised FTIR targets that have been floated in advance of and through the recent election, it is clear that allowing the product to follow the normal course of a product development cycle will result in a product that is unfit for scale roll-out throughout much of the build period to meet the targets set by government. This in turn could raise issues of equivalence. As PIA is seen as central to meeting those policy aims, we must do all that we can to ensure that it is the driver for successful scale network build that we believe it can be.