

Consultation: Copper retirement – process for determining when copper regulation can be removed.

Supplementary Consultation to the Wholesale Fixed Telecoms Market Review.

Non-confidential Response of Gamma Telecom Holdings Limited

## About Gamma and this Consultation Response

1. Gamma Telecom Holdings Limited (“**Gamma**”) is a Public Electronic Communications Network (“**PECN**”) that provides wholesale fixed and mobile telephony and data services, to some 1,200 channel partners. Two of these channel partners are wholly owned subsidiaries and represent themselves over 20% of our business. In all cases, our partners and subsidiaries sell almost exclusively to all sizes of businesses and not-for-profit entities throughout the UK and increasingly to various European Union member states. Gamma has a turnover c£285m per annum and is ultimately owned by Gamma Communications plc, a company listed on the Alternative Investment Market with a market capitalisation of over one billion pounds.
2. This consultation response relates to Gamma and its UK subsidiaries. Any conflict between the implied position of Gamma in any UK Competitive Telecommunications Association (UKCTA), Internet Telephony Services Providers Association (ITSPA) or Federation of Communication Services (FCS) responses or that of any other association in which Gamma is involved, or implies Gamma is involved, is accidental and we consider that our views in this response should prevail.
3. Gamma trusts that this response addresses the questions posed by the Office of Communications (“**Ofcom**”) and would welcome the opportunity to elaborate on any points in more detail if required. Please don’t hesitate to contact [REDACTED], address as per letter head), for further detail in the first instance.

## Prudence

4. Gamma’s response<sup>1</sup> to the Wholesale Fixed Telecoms Market Review consultation (“WFTMR”) raised concerns that it was inappropriate to “*fix remedies*” on a forward-looking basis for the 5 years which would cover a substantial portion of BT’s work to close the PSTN, without the benefit of the learning from the Salisbury and Mildenhall trials.
5. Gamma is therefore pleased that Ofcom recognises that it would be prudent, in relation to excluding premises from the definition of a completed ultrafast exchange, to wait for the “*the opportunity to gather the necessary information and evidence, and to learn more about the challenges facing*

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<sup>1</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0013/201514/gamma.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0013/201514/gamma.pdf)

*Openreach when it deploys its fibre network, so our decisions are better informed and intervention more targeted.”<sup>2</sup>*

6. Gamma is however unclear why Ofcom’s prudence does not extend further. Why does Ofcom consider that it should wait to be better informed on one facet of the decision making in relation to copper retirement, but is also happy to act on faith with respect to the rest of the project?
7. If on one hand Ofcom considers it must wait to be better informed in relation to the PSTN closure, it cannot proceed with a market review that acts upon what Ofcom has now acknowledged to be a deficit of information.
8. We do, of course, welcome Ofcom’s view in the Consultation that *“We also want to ensure copper regulation is not removed too quickly to ensure consumers are not put at risk of harm, either because of loss of choice or competition, or the removal of services relied upon by vulnerable customers or critical national infrastructure (“CNI”)”<sup>3</sup>*
9. However, this is entirely our point. If Ofcom truly want to secure such an outcome, if Ofcom is (as the Consultation now lays bare) concerned it is potentially ill-informed and should wait for the outcome of the trials and also absorb learning from other exchange roll-outs, then it stands to reason that the entire WFTMR must follow the same logic.
10. The logical conclusion is, as Gamma suggested in §17-20 of our WFTMR Response; the *entire* WFTMR should only be finalised once the Salisbury and Mildenhall trials are complete and the industry has had an opportunity to review what happened.

## The need to protect VBD and the most vulnerable

11. BT’s closure of the PSTN, as far as we are aware, puts at risk all Voice Band Data (“VBD”) applications, such as alarm systems and remote monitoring, and all services that rely on the 48V power on the line<sup>4</sup>. These are serious applications, which are at best essential for some people’s participation in society and at worst, they are a literal matter of life and death. The integrity of these

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<sup>2</sup> §3.15 of the Consultation.

<sup>3</sup> §2.12

<sup>4</sup> For example, emergency phones at level crossings, phones used by the elderly to call a taxi in supermarkets, reservoir monitoring systems.

services is more important than the potential for BT to “game the system”<sup>5</sup> in relation to achieving a threshold by selecting higher density easily reached areas regardless of need or alternative supply arrangements, or indeed, by deliberately excluding some premises.

12. At §2.23 of the Consultation Ofcom state;

*“We continue to expect industry to take all reasonable steps to protect vulnerable consumers and CNI. Industry is currently progressing work on a good practice guide through working groups run by the Office of the Telecoms Adjudicator (OTA2) and Openreach. This work includes the definition and identification of vulnerable consumers, issues around critical national infrastructure and communications/common messaging. Ofcom is supportive of the development of such a good practice guide and we have written to the OTA2 setting out our expectations for this work in terms of scope, engagement with providers and the timing of outputs. We will continue to work with industry to ensure appropriate safeguards are in place to protect vulnerable consumers and to deliver a smooth transition.”*

13. Aside from the OTA2 having no actual legal or regulatory standing and being merely a forum for some of the industry to express views, it is also entirely beholden to BT’s plans. We must remember that BT’s dominance in being a provider of the final mile is so extensive that Ofcom have, for many years, enacted wide-ranging legal remedies to address this dominance. Expecting the industry to be able to develop anything meaningful, without any regulatory backstop, in the face of such dominance is a strange position to take. This becomes quite acute when it seems from the current and impending European legislation that the United Kingdom is obliged<sup>6</sup> – save for an unlikely governmental intervention in 2021 – to ensure either VBD continues to operate, or that the copper replacement provides equivalence.

14. We also note that Ofcom has previously been asked by industry to refine the definition of “vulnerable consumers”<sup>7</sup> because it was too difficult and ambiguous to do so itself; how Ofcom consider that the OTA2 will now be successful in such an endeavour is unclear.

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<sup>5</sup> That said, this behaviour is not beyond BT; Ofcom will no doubt recall allegations in relation to BT’s use of Matters Beyond Our Reasonable Control and in manipulating charge-controlled baskets, whereby, in both cases, Ofcom made further interventions.

<sup>6</sup> See §6-17 of “ITSPA Response to Consultation: Wholesale Fixed Telecoms Market Review (WFTMR) 2021-26”

<sup>7</sup> For example, the responses to “Proposed guidance on protecting access to emergency organisations when there is a power cut at the customer’s premises. Proposals for guidance on General Condition A3.2(b)” published by Ofcom on 24<sup>th</sup> May 2018.

15. Ofcom's *raison d'être* is to protect citizen-consumers from harm, with an emphasis on protecting the most vulnerable. Some of the most vulnerable, in terms of the WFTMR, are those that rely on pull-cord alarms in their houses to summon help in the event of an incident. There is a very real risk, in leaving the most important aspects of the WFTMR to the dominant former incumbent and working groups representing just a small fraction of those Communications Providers delivering services to the vulnerable areas of society, that Ofcom will fail in its most important objective.
16. Ofcom's position in the Consultation that it is ill-equipped to proceed with some aspects of the WFTMR until, *inter alia*, the Salisbury and Mildenhall trials have been completed is a chicken we fear will come home to roost when vulnerable consumers suffer actual harm at the hands of the PSTN closure.
17. With the first opportunity for there to be a variation of the copper remedies not expected until late 2022<sup>8</sup>, there is ample opportunity to pause and assess the reality on the ground before enacting any remedies; other than the expiry of the existing regime<sup>9</sup> we fail to see any rush to vary what we have today, especially considering the risks. Nor do we see any reason why Ofcom should not be taking the lead itself on matters in relation to CNI and the most vulnerable in society.
18. While it is true that our view regarding most vulnerable users is unbiased, given that we are a provider of business services, some of the affected use cases are business related. For example, the monitoring of Ethernet circuits is performed with broadband technology, PDQ machines and PayPoint utilise Voice Band Data.

## Issues with an arbitrary stop-sell threshold

19. Ofcom paused many of its workstreams and open consultations in response to the COVID-19 pandemic; however, Ofcom did set a deadline during lockdown for the WFTMR. Ofcom's logic was that Communications Providers should have adapted to the new way of working and that a response could be forthcoming. What Ofcom did not place adequate weight on was that the relevant personnel in the industry were significantly distracted in working to adapt their businesses to serve the wide-ranging needs of UK plc in response to the pandemic. As such, our submission was somewhat abridged.

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<sup>8</sup> "What we are proposing – in brief" box on page 1 of the Consultation

<sup>9</sup> Ofcom have previously extended remedies either through their emergency powers or through undertakings by dominant suppliers when other market reviews overran.

20. The following is Gamma's submission on the proposals for "stop-sell" in the WFTMR in relation to the PSTN switch off. Notwithstanding that we consider Ofcom's approach to enact regulation in this vein to be misjudged, we have concerns about the use of an arbitrary threshold and the lack of clarity on certain scenarios.
21. While we acknowledge this submission is outside the scope of the Consultation and "late" in respect to the WFTMR, we also note the judgement in *British Oxygen v Minister of Technology* [1971] AC 610, and therefore trust these points will be useful to Ofcom in the WFTMR.
22. The core of our concern is that BT will be able to down tools and say "job done" when it has reached 75% of the premises in an area. We cannot think of any other industry or walk of life where 75% progress is even considered remotely close to completion, let alone a point at which the regulator will allow BT's inadequate voluntary commitments to fall away, as acceptable.
23. Despite requests through the relevant forums, Gamma has not received appropriate assurances from BT about various matters relating to the stop-sell. For example, we are not convinced that repairs to copper products (especially where they may require the replacement of the circuit or other such invasive attention) will be performed. If there is a vulnerable customer at the end of this situation, whose life may depend on VBD operating over it, this is not a place we (nor, we would suggest the rest of the industry) wants to be.
24. Taking this further, does the stop-sell mean that a business that wants to hire another employee and add one channel of ISDN to their bearer at a business park premises that cannot get good enough broadband to support hosted PBX can't hire that employee? In a post COVID-19 economy, where there is a focus on growth, these are real and acute questions.
25. Furthermore, we consider that any threshold that is not in the high nineties (we accept there will be a few premises that cannot be reached for various reasons, such as problematic landlords, health and safety concerns etc.) gives rise to the ability to game the system. Indeed, would a 'full coverage' target with specific areas for shortfall not be a more appropriate and workable measure? Such shortfall areas would, one would think, be made possible as a result of the learnings from the Salisbury and Mildenhall trials. In a recent fixed access market review, Ofcom removed Matters Beyond our Reasonable Control (MBORC) from the quality of service calculations. The logic, we assume, was that such matters are *mitigation* when there is a failure, not a means by which to game the system. This seems like a similar situation; BT should *apply* to Ofcom when it has reached as far

as it can go in a given exchange area, and independent experts can assess how hard BT has tried, or (as we explain below) whether it has cherry-picked etc.

26. An economically rational profit maximising entity will lay fibre to the areas that are (i) most likely to consume it, (ii) where that consumption does not lead to a cannibalisation of existing margin rich revenues and (iii) will apply its own cost benefit analysis so as to understand how to most effectively and efficiently apply its scarce resources. It therefore follows that there is a very real risk that the roll-out will avoid offering an alternative to business premises consuming margin rich ethernet and avoid certain residential areas (e.g. those with a dense population of socioeconomic group DE1) and exacerbate the issue of digital exclusion.
27. Before Ofcom publish a final statement and remedies, these are very real problems that need to be grappled with, and we need to ensure that the risks are appropriately mitigated.
28. Again, we say this is clear justification to wait for the conclusion (and the wrap up) of the two trials before enacting any remedies.