

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

7 September 2020

Foreword

This response is provided by Openreach Limited¹. Openreach is a wholesale network provider. We support more than 600 Communications Providers (CPs) to connect the 30 million UK homes and business to their networks. We sell our products and services to CPs so they can add their own products and provide their customers with bundled landline, mobile, broadband, TV and data services. Our services are available to everybody and our products have the same prices, terms and conditions, no matter who buys them.

¹ Openreach Limited is a wholly owned subsidiary of BT Group Plc.

Executive Summary

1. Openreach welcomes the opportunity to respond to this consultation which takes forward discussions on the approach to retiring the legacy copper network and moving the UK onto a full-fibre platform. We support Ofcom's and Government's FTTP objectives but it is clear that if the objective of a smooth but rapid transition to full-fibre is to be met, the right regulatory framework needs to be put in place to incentivise connections to this platform and send the right signals to industry and other stakeholders. Such a framework will help complement and provide a regulatory back stop that can work alongside commercial structures that Openreach is looking to agree with its customers. We support Ofcom's broad direction of travel but propose some important amendments to help ensure that the public policy objectives raised by copper retirement can be met.
2. Openreach disagrees with Ofcom's '100% coverage minus exceptional circumstances' approach to the "second" copper retirement threshold that would enable the removal of regulation relating to the pricing of legacy copper services, with regulation then focused on the FTTP 40Mb anchor product. It is not reasonable to expect our ultrafast coverage to approach 100% in an exchange area given the practical and economic challenges faced.
3. We believe there is a need for a different approach to the "second" threshold and the phasing of copper retirement, which would both give industry greater certainty, encourage earlier migration onto the new fibre platform and ensure a smooth transition for consumers and businesses. This would give the ability to withdraw copper-based price regulation for premises within the FTTP footprint at an earlier stage than Ofcom proposes in order to encourage migrations to the fibre platform: we propose this should take place 12-months after the implementation of stop-sell, without a further coverage threshold beyond 75% ultrafast coverage. We also propose a new third threshold for the removal of all remaining legacy regulation, to take place two-years later.
4. We consider that rather than defer a decision on these thresholds until after the Wholesale Fixed Telecoms Review (WFTMR) has concluded in April 2021, Ofcom should implement the changes we propose in the WFTMR to give stakeholders the necessary clarity on the steps and timeline needed to move the UK to a full-fibre platform. Note we expect such measures to provide an important regulatory back stop but that we would also look to agree appropriate commercial constructs with our customers to drive migration from copper to fibre-based services.
5. Openreach is committed to maintaining our legacy network to continue to offer appropriate levels of service, but as we begin to transition to the full-fibre platform, we want to avoid unnecessary and short-lived expenditure on repairing the copper network and incentivise customers to move onto the FTTP platform to benefit from the better customer experience that platform offers. We are therefore discussing with industry a new 'Fault to Fibre' policy to be introduced on a phased basis, linked to 'stop-sell', [X<].

Introduction

6. Openreach welcomes Ofcom's ongoing support for our approach to copper retirement. Ofcom's proposals in its January WFTMR consultation are generally pragmatic and provide a broadly appropriate regulatory framework for the move to an All-IP and full fibre platform. In line with our accelerating FTTP coverage and build announcements, we are continuing to move forward on the copper retirement journey in conjunction with our industry customers. Following the commencement of the fibre-upgrade trial in Salisbury, we have announced that copper 'stop-sell' will be implemented for a further 117 exchange areas, covering c.1.2m premises, in June 2021, with a plan for further notifications on a quarterly basis in line with our FTTP build programme. This is on the basis that Ofcom's WFTMR proposal for a threshold for stop-sell of 75% ultrafast coverage in an exchange area is confirmed.
7. Ofcom's follow-up consultation on copper retirement, to which we respond here, takes forward the discussion on the important second threshold that would enable the removal of regulation relating to the pricing of legacy copper services, with regulation then focused on the FTTP 40Mb anchor product. In the WFTMR consultation, Ofcom proposed that this 'flipping' of regulation could happen in an exchange area a minimum of two years after the implementation of stop-sell and when ultrafast coverage was complete. Ofcom acknowledged that there would be 'exceptional circumstances' preventing us achieving 100% ultrafast coverage in an exchange area and signalled a further consultation to consider in more detail such factors. This consultation now proposes to defer decisions on how to define these circumstances until after the WFTMR has concluded in April 2021 when there is further evidence available from our FTTP roll-out experience. Ofcom would then consult at a later date on the circumstances in which premises would be excluded from the definition of a completed ultrafast exchange when we have further progressed our network build and use their powers to make an appropriate Direction.
8. Openreach disagrees with the '100% coverage minus exceptional circumstances' approach to the second threshold. It is not reasonable to expect our ultrafast coverage to approach 100% in an exchange area given the practical and economic challenges faced. These factors include the difficulty of gaining landlords' permission to access multi-dwelling units (MDUs) and premises where the build cost for FTTP is prohibitively expensive or too disruptive. More broadly, the definition of relevant premises for the purpose of coverage obligations needs to be reviewed, including whether it is appropriate for Openreach to be obliged to connect 'unserved premises' (for example, traffic lights) and to address premises, both brownfield and greenfield, where other providers own the infrastructure rather than Openreach and we therefore cannot gain access. This is a complex area that requires further discussion and analysis given the point that we have reached on our FTTP build programme, with build underway but not yet complete in a significant number of exchange areas.
9. We believe there is a need for a different approach to the second threshold and the phasing of copper retirement, which would both give industry greater certainty and encourage earlier migration onto the new fibre platform. Earlier this year, we announced that we will increase our FTTP target from 15 million to 20 million premises – almost two thirds of the UK – by the mid- to late-2020s and we expect to invest around £12 billion to reach this target, making this the biggest investment in the UK's digital infrastructure for a generation. It is clearly important then that the right framework is put in place to

incentivise connections to this platform; clearly, commercial arrangements will play a major part in incentivising take-up but sending the right signals through future regulation will also play a key role. Given the complexities of launching long-term pricing agreements, which would have created greater certainty on FTTP take-up, we believe it is now even more crucial that there is a balanced set of incentives in place. The key difference then from Ofcom's proposal is that we would like to withdraw copper-based price regulation for premises within the FTTP footprint at an earlier stage in order to encourage migrations to the fibre platform. Customers unable to order FTTP would continue to be protected by legacy price regulation while we continue our build programme to extend the fibre footprint. We also propose a new Third Threshold for the removal of all remaining legacy regulation. It is important to note that under our proposals, we are not proposing further coverage obligations beyond the 75% ultrafast coverage required for the First Threshold Notice.

10. We consider that rather than defer a decision on these thresholds until after the WFTMR has concluded in April 2021, Ofcom should implement the changes we propose in the WFTMR to give stakeholders the necessary clarity on the steps and timeline needed to move the UK to a full-fibre platform. We think providing such certainty is key to ensuring Government and Ofcom's policy objectives around migration to full fibre networks is met. We set out our revised proposal in this response, including suggested changes to Ofcom's draft legal instruments. We set out later in this response, some key considerations relevant to exchange 'completion' but it is not our preferred approach to make the further thresholds dependent on this.
11. We are committed to maintaining our legacy platform to continue to offer appropriate levels of service, but as we begin to transition to the full-fibre platform, we want to avoid unnecessary and short-lived expenditure on the copper network whilst incentivising customers to move onto the FTTP platform to benefit from the better customer experience that platform offers. Therefore, linked to 'stop-sell' we want to make FTTP the preferred alternative to repair activity on legacy platforms. We are currently discussing with industry the introduction of a Fault to Fibre policy which would enable this. We cover this in more detail later in this response. [§<]

Giving more certainty to copper retirement

12. As indicated above, we believe a revised approach to the second threshold and the phasing of copper retirement would both give industry greater certainty and encourage earlier migration onto the new fibre platform. We set out below a suggested set of milestones which build on those we have consulted on with industry and Ofcom's own proposed phased approach.
 1. Milestone 1: We give 12-months' notice of stop sell of copper-based services in an exchange area
 2. Milestone 2: One year later, at the point of implementation of stop-sell (i.e. when 75% ultrafast coverage is reached – Ofcom's First Threshold Notice), we give 12-months' notice of withdrawal of regulation on pricing for all copper-based services for all premises passed by FTTP;
 3. Milestone 3: One year later, at the point that legacy regulation on pricing is removed for all premises passed by FTTP (Ofcom's Second Threshold Notice), we give 2 years' notice of the

withdrawal of copper-based services for all premises passed by FTTP i.e. the removal of all remaining regulation² on these products.

4. Milestone 4: Two years later, we are able to withdraw copper-based services for all premises passed by FTTP. (a new Third Threshold Notice)
13. A crucial difference from Ofcom's proposal is at Milestone 2 where at the point of implementation of stop-sell, we propose to give 12-months' notice of withdrawal of regulation on pricing (any charge controls plus the 'fair and reasonable' 'network access obligation in respect of pricing) for all existing copper-based services - for all premises passed by FTTP within that exchange area. We also differ from Ofcom in that we do not propose to make this subject to a further coverage threshold, although given this would take place 12 months after the 75% coverage threshold was passed to trigger stop-sell, it would reasonably be expected that ultrafast coverage would have increased significantly in each exchange area by this point with our build plans on a trajectory towards exchange 'completion'.³ Ofcom notes that we have already passed the 75% coverage figure in 82 of the 117 exchanges where stop-sell has been notified for implementation in June 2021.
14. In practical terms, for the 117 exchange areas, this would mean that price regulation would 'flip' in June 2022 rather than in June 2023 as Ofcom proposes, albeit only for those premises passed by FTTP – whilst all other remedies would remain in place. We think this is important to maintain the pace of copper retirement and encourage industry discussions on commercial models rather than simply waiting for this regulatory back stop to come into force.
15. We also differ from Ofcom in that we propose a new threshold for the withdrawal of copper-based services. We note that Ofcom has not consulted on this, presumably on the basis that this would largely sit outside the current WFTMR period. However, we believe it is important to give industry clear signals to help operators prepare in a timely manner for the inevitable switchover to the new full fibre platform. We note elsewhere in the WFTMR that Ofcom makes assumptions about copper retirement by 2031. If this is to be in any way achievable, we believe Ofcom should consider this 'third threshold' now and it cannot be deferred to 2026
16. The milestones above indicate that we would seek to withdraw legacy services for premises passed by FTTP in these 117 exchange areas in June 2024, which is earlier than national WLR withdrawal in December 2025, in order to create the right incentives for migration.
17. It is important to stress that we share Ofcom's view on the importance of the consumer experience as we move to a full-fibre, All-IP world. We want to make the upgrade to FTTP a smooth process for residential, business and public sector customers, and to make the experience of the new platform a brilliant one. We are also determined to make sure that vulnerable customers are protected through this transition. We will continue to work with our CP customers through industry working groups to develop and agree migration processes at every stage. We aim for the large majority of migration to be voluntary, with an industry developed process to manage and support any late adopters.
18. In order to implement our suggested approach, changes are required to Ofcom's draft legal instrument. We set these out in Annex 1 to this response.

² The requirement to provide these products on a fair and reasonable basis (excluding price)

³ The definition of 'completion' is subject to further consultation.

Challenges in reaching 100% FTTP coverage

19. Ofcom has acknowledged in both its January consultation and this follow-up document that the definition of 'complete' ultrafast coverage as the threshold for removing legacy regulation is problematic. We are pleased that Ofcom continues to recognise that reaching 100% ultrafast coverage is not practically achievable in an exchange area and that there will always be factors that prevent this, in effect creating a 'glass ceiling'. Based on our experience to date, we can see already very clearly that 100% coverage is not realistic and that the threshold needs to be set in a way that recognises this ceiling. This section addresses Ofcom's proposed approach to the coverage required to trigger the second threshold. However, as covered above, we do now consider that there is a need for a different approach to this threshold and the phasing of copper retirement, which would both give industry greater certainty and encourage earlier migration onto the new fibre platform. Under our proposals, we are not proposing further coverage obligations beyond the 75% ultrafast coverage required for the First Threshold Notice
20. Ofcom recognises the difficulties in reaching 100% ultrafast coverage in that it proposes to exclude those premises where Openreach has made all reasonable efforts but has nevertheless been unable to provide ultrafast services. We do however remain disappointed that having acknowledged that there are many possible reasons as to why Openreach may not be able to connect a premises despite all reasonable efforts having been made, Ofcom says that the expectation is still that premises would only be exempted from the coverage assessment in very limited cases. Although our intention is to extend ultrafast coverage as far as possible within each exchange area, there are real, practical and economic barriers under a commercial build programme to achieving coverage levels approaching 100% and the assumption that this is possible needs to be revised when Ofcom consults further on this issue after April 2021.
21. Ofcom proposes to exclude those premises where Openreach has made all reasonable efforts but has been unable to provide ultrafast services because of long-term restrictions to street or premises access, or other factors beyond Openreach's control. Ofcom indicates that such factors could include flooding, or a 'no-dig' order from a Local Authority that prevents any civil works from taking place within a specific area for several years. In our experience, the main areas of difficulty, which would need to be reflected in any defined list of exclusions, are:
 - Premises where the access required to make FTTP available is not granted. For example, a block of flats where the landlord refuses permission for internal cabling work to be performed
 - Premises where the build cost for FTTP is prohibitively expensive or too disruptive. For example, an historic building or a housing estate where no duct is available and local residents oppose the use of telegraph poles
 - Areas where another operator's physical infrastructure is available but where we have been unable to obtain access on reasonable terms, or where the costs of build and connection render the presence of a second ultrafast provider uneconomic
22. As indicated above, the definition of relevant premises for the purpose of coverage obligations also needs to be reviewed, including whether it is appropriate for Openreach to be obliged to connect

'unserved premises' (for example, traffic lights); and to connect address premises, both brownfield and greenfield, where other providers own the infrastructure rather than Openreach and we therefore cannot gain access.

23. As Ofcom notes, our build programme is currently in progress and our body of learning is still developing with every exchange area differing in terms of engineering challenges, extent of directly buried cable, and the number and type of multi dwelling units (MDUs) requiring landlord permissions for access.
24. There have been many learnings to date from the Salisbury fibre build, not least that uncooperative landlords represent a material obstacle to achieving a ubiquitous fibre build. We continue to campaign for access to the remaining buildings with the assistance of the local MP and the local council. We strongly disagree with Ofcom's current position regarding Landlord access issues, whereby Ofcom expect us to have used the Lands Tribunal to seek to impose Code powers rights. Our experience with our fibre build programme to date, including in Salisbury where we have invested significant additional resources in this area, is that this is much more complex, time consuming and costly than Ofcom suggests and there are significant issues with identifying, contacting and agreeing internal works with landlords and their agents, over and above the difficulty of using existing legal routes to try to obtain the necessary wayleaves. The Government's proposed legislative reform is only of limited help and will not be sufficient to address the issues identified. It is not realistic to expect Openreach to take all these steps, in every case in its commercial build programme.
25. We also found a number of premises in Salisbury with substantially higher build costs that we have absorbed for the purposes of the trial, but which would be not be viable to include in our business case under normal circumstances without some form of Government subsidy. This has pointed to a 'glass ceiling' currently of about 90% ultrafast coverage within an exchange area on the basis of our Salisbury experience given all the practical and economic issues we face, but this may not be typical of what we find elsewhere.
26. As indicated, this section addresses Ofcom's proposed approach to the coverage required to trigger the second threshold but we now consider that there is a need for a modified approach to this threshold and the phasing of copper retirement, which would both give industry greater certainty and encourage earlier migration onto the new fibre platform. We therefore propose that Ofcom's proposed legal instrument be modified such that the Second Threshold Notice is triggered once the First Threshold Notice has been published in relation to an exchange for a minimum period of 1 year and ultrafast network access is available to at least 75% of Relevant Premises served by that exchange. We set out this proposed modification in Annex 1.

Fault to Fibre

27. We are committed to maintaining our legacy network to continue to offer appropriate levels of service, but as we begin to transition to the full-fibre platform, we want to avoid unnecessary and short-lived expenditure on the copper network whilst incentivising customers to move onto the FTTP platform to benefit from the better customer experience that platform offers. Therefore, linked to 'stop-sell' we want to make FTTP the preferred alternative to repair activity on legacy platforms. We are currently considering a phased approach, currently being discussed in principle with industry, which would include

(i) initially, offering within the stop-sell footprint a fast-track FTTP provide in the case of a copper fault causing Total Loss of Service (or repair the copper for free) and charging for other copper repairs where a new FTTP line is available as an alternative; then (ii) introducing charges for repairing copper faults causing Total Loss of Service (with the above-mentioned fast track FTTP available as an alternative). The initial phase would come into effect in December 2021 at the earliest (for those exchanges where we have announced stop-sell between June and December 2020), whilst the second phase would come into effect 24 months after stop sell being implemented (in June 2023 at the earliest).

28. We consider this policy will help to incentivise take-up of FTTP as we near build completion in these exchanges. We have commenced discussions with industry on this proposal, and those discussions will be continuing in the coming months. [3<]

Response to questions

Question 1: Do you agree with our proposal to wait until after the publication of the WFTMR statement to define the circumstances in which premises can be excluded from the definition of a completed ultrafast exchange, by giving a direction under the future WFTMR SMP conditions? Please set out your reasons and supporting evidence for your response.

As covered above, Openreach disagrees with the '100% coverage minus exceptional circumstances' approach to the second threshold. It is not reasonable to expect our ultrafast coverage to approach 100% in an exchange area given the practical challenges to achieving this.

We now consider that there is a need for a modified approach to the second threshold and the phasing of copper retirement, including a new third threshold, which would both give industry greater certainty and encourage earlier migration onto the new fibre platform. We set out our alternative proposal in this response.

We consider that rather than defer a decision on these thresholds until after the WFTMR has concluded in April 2021, Ofcom should implement the changes we propose in the WFTMR to give stakeholders the necessary clarity on the steps and timeline needed to move the UK to a full-fibre platform.

Annex 1 – Proposed changes to Ofcom’s draft legal instrument

We agree that Ofcom’s proposed changes to the draft legal instruments correctly give effect to the proposal to defer a decision on the definition of Relevant Premises and allow Ofcom to issue a direction in relation to this at a later date.

However, the changes below (shown in red to the version in Ofcom’s consultation document) are proposed as an amendment to Ofcom’s proposed legal instruments to give effect to our revised proposal, that is:

- (a) The Second Threshold Notice (on a “75% plus” basis rather than “100% minus exceptions” basis) coming into effect 1 year after implementation of stop-sell and triggering the withdrawal of pricing regulation on copper-based services; and
- (b) A new Third Threshold Notice with respect to the withdrawal of remaining legacy regulation 2 years after the Second Threshold Notice. (Please note the proposal below only covers the substantive change we believe is required; there will be consequential changes to other sub-conditions.)

Changes proposed

1.7. The Dominant Provider may publish a Threshold Notice in respect of a Local Serving Exchange where:

- (a) Ultrafast network access is available to 75% of Relevant Premises served by that Local Serving Exchange but excluding any premises that Ofcom may from time to time direct (“First Threshold Notice”); or
- (b) a First Threshold Notice has been published in relation to that Local Serving Exchange for a minimum period of 1 year and Ultrafast network access is available to at least 75% of Relevant Premises served by that Local Serving Exchange (“Second Threshold Notice”); or
- (c) a Second Threshold Notice has been published in relation to that Local Serving Exchange for a minimum period of 2 years and Ultrafast network access is available to at least 75% of Relevant Premises served by that Local Serving Exchange (“Third Threshold Notice”):

“Relevant Premises” means all premises in a Local Serving Exchange Area as at the date of the First Threshold Notice given in respect of that Local Serving Exchange.

New SMP condition

(WLA Area 2, WLA Area 3)

Where the Dominant Provider publishes a Third Threshold Notice in relation to a Local Serving Exchange, SMP Conditions [1.x to 1.y to be defined] shall cease to apply to Copper-based network access in respect of any end user supplied with electronic communications services using that Local Serving Exchange provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any such end users.