



Lothian Broadband Networks Limited is a local Internet Service Provider based in East Lothian, Scotland. We were established as a limited liability company in early 2015. We invest in and build our own network infrastructure to deliver NGA standard and superfast broadband connectivity principally to rural areas where the growing demand is for fast broadband services. To date, we have a strong presence in East Lothian and have extended beyond into Midlothian and the Scottish Borders. We are looking to expand further into other areas of Scotland in the near future. Our main infrastructural technology is fixed wireless using both licensed and unlicensed spectrum. We are also initiating a fibre based service as an in-house pilot with the intention of extending this across our areas of operation as our expertise in this field and commercial opportunities to invest develop.

We wish to make a general, rather than a specific answer to the series of questions posed in Ofcom's "Wholesale Local Access Market Review" (WLAMR). We will, however, refer to some specific sections of the WLAMR.

With regard to "Standard Broadband", which many of our subscribers still prefer and are likely to continue to use into the future, the WLAMR consultation document (Vol 1, p7, para 1.25, 31 March 2017) makes the following announcement of regulatory intention that may impact on operators like ourselves who may be considering LLU in some locations or who are already running services using LLU:

"Our main proposals in respect of standard broadband are:

"• BT must continue to offer LLU services. We will continue to impose a cost-based charge control on the main form of LLU (MPF) and the supporting services used by BT's competitors (referred to as ancillary services).

"• To remove the specific network access obligation and charge control on SMPF. However, BT will still have to provide network access on reasonable request, be subject to non-discrimination obligations (including EOI) and must set charges on a fair and reasonable basis.

"• To support the deployment of new technologies such as Long Reach VDSL (LR-VDSL), which has the potential to increase broadband speeds in particular in rural areas. In some areas it may no longer be feasible for BT to provide LLU or SLU alongside LR-VDSL so we are proposing a process which could release BT from its LLU and/or SLU obligations in the small number of geographic areas where this is appropriate."

Our first concern is the proposal to remove the specific network access obligation and charge control on SMPF. This is the only LLU access that would be of interest to us, and we would be excluded from using it. BT make this clear, also, in their STIN522 document (p3, para 1.2, August 2016), which outlines the technical details of their trial LR-VDSL project. They make the point that communications providers would have to cancel their SMPF services. MPF services would be impacted in that ADSL services offered would need to use Openreach's Generic Ethernet Access product, which might have technical, pricing and operating cost implications. As well as other technical barriers, we assume that this also implies that communications providers necessarily have to offer telephony, which we and many others currently do not, since MPF is a dual-service connection, either that or be forced to pass on the unnecessary line rental charge that would be incurred, thus rendering the service costly and uncompetitive.

This proposal by Ofcom, in line with BT's clearly stated intentions, will impact greatly on our ability to enter into this area of the market competitively and, therefore, to generate revenue and invest in

alternative infrastructure and greater improvement of the services we offer, both in terms of delivery speeds and overall quality of service (QoS). In particular, it is likely to adversely affect rural and remote areas where companies such as ourselves operate and where the need for alternatives is greatest. While we can and do provide superfast access (> 30Mbps), our main source of revenue is still from our standard broadband service, which is currently headlined at 10Mbps download, 2Mbps upload. While we do anticipate a move in the market towards a greater take-up of superfast, we do not see this happening dramatically in the next year or two. This is a critical period of time for us during which we need to grow our enterprise rapidly so that we can invest in alternative infrastructure, both wireless and fibre. We can only do this if we are able to enter now into a much more realistic level of competition with the incumbent services, specifically BT in our present area of operation in the standard broadband sector in particular.

We have evidence to show that in the past, where a small local fixed wireless operator has offered an improved service, the incumbent (BT) has immediately countered this by adding capacity to the local exchange. It is a matter of historical record that in June of 2005, when Garvald and Morham (East Lothian) villages got together to provide the first available, always on, broadband service for the local community, BT announced that they had enabled the local exchange on the very day the wireless service went live, having consistently informed inhabitants that they had no plans to upgrade the Garvald and Morham services. When the community service was improved to offer a headline speed of 8Mbps, the local exchanges were again immediately upgraded, along with a local leafleting campaign by BT that specifically targeted the wireless service as "unreliable". The community service survived for a number of years but was only able to operate with staff working on a voluntary, unpaid basis. It failed to attract funding and was unable to compete with BT's superior market power (SMP); which, in fact, amounted to a local monopoly. This could and did very effectively strangle any attempt to compete. Other small local enterprises across the country failed for similar reasons, in spite of their great enthusiasm, technical expertise and single-minded determination to improve on what was available.

The cost and difficulty of access to backhaul in particular was and still is a major barrier. Local access to backhaul at competitive rates would have made all the difference, as would local access to unbundled infrastructure, specifically SMPF. The real barrier is the fact that BT can use its SMP effectively against potentially viable local small competitors in order simply to exploit its investment in copper without really looking to effect radical improvements, either in technology or in quality of service.

Local Loop Unbundling (LLU) is a route to our potential markets that we have been considering for some time and are actively investigating. We are a single service provider, Internet broadband only. We have no interest in offering traditional telephony services. Our telephony option would be Voice Over Internet (VOIP), allowing our customers to use a third party provider of their choice. Our own office telephones use VOIP, as do some of our current subscribers. This encourages a wide range of options for subscribers, including the discontinuation of their fixed wire telephone connection in favour of mobile and broadband only solutions. This would bring about real savings for customers, as well as more variety of choice and much improved services.

Regardless of the quality of broadband and telephone services generally, the pervasive use of mobile phones means that many people would wish to discontinue their landline telephony rental charge but cannot do so without losing their broadband connection. With BT they are obliged to take both. It is our understanding that the discontinuation of SMPF as a single-line option for LLU would prevent that.

Because of the ubiquity and reliability of mobile telephone services and the availability of very cost effective VoIP services, which are a real growth area, those who no longer wish a fixed telephone line but still want and need a reliable broadband service via their existing connection will no longer be interested in switching to a competitive broadband only service since they still have to pay a

telephone line rental to BT or other MPF LLU operator. A broadband only service could be offered at a much lower cost, including by the existing incumbents.

With regard to the expectation that the LLU segment of the market will decline significantly over the period of the market review, SMEs such as ourselves, that operate largely in the rural context, expect to enter into and increase our footprint in this segment over the same period. It is undoubtedly true, however, that our objective would be to invest in our own fibre networks in order to deliver reliable superfast and ultrafast services in the longer term. We will only be able to do this if we are able to enter the current market in this segment with a competitive broadband only service.

Our second main concern, the introduction of a technology that claims to improve the reach of VDSL for application specifically in rural areas, Long Reach VDSL (LR-VDSL), is likely to improve the range of VDSL only marginally, and it is likely to be a short-lived, stop-gap solution in any event. In the rural context in Scotland, distances from exchanges and cabinets typically spread well beyond the effective reach of any of these technologies, including LR-VDSL. LR-VDSL will realistically benefit a relative handful for a limited time. This fact creates a real need and demand for services from Internet only providers. We will, therefore, be prevented from accessing this potential standard broadband market that would allow us to offer services that included VoIP but without a telephone line rental charge on top. The proposal to release BT from its LLU and/or SLU obligations in order to implement LR-VDSL in the "small number of geographic areas where this is appropriate" is, therefore, quite inappropriate.

Furthermore, there is no definition of where these areas might be. Clearly, these need to be defined in order that further objections might be raised or approval given.

It would seem to us to be disingenuous on the part of Ofcom to continue with these proposals as they stand, assuming that our objections have substance. We are surprised that the proposals do not seem to have been thought through with regard to how they might affect BT's current competition. There are over 100 fixed wireless and hybrid fibre/wireless "Altnet" operators out there who will be significantly affected by what is proposed. This will have a serious impact on the levels and quality of services available to all, and principally to those who live, work and play in rural areas.

In terms of quality of service, local operators are able to offer a much more personal approach to customer services and relationships, with far faster response time and much tighter control of the independent networks they operate. They provide local employment and enhance community involvement and capacity. They can offer extended services, especially to local businesses that help to make them more efficient, more digitally aware and competent, and more effective and profitable. Lothian Broadband Networks Limited certainly does that. We employ a dozen or so local people and are currently recruiting a further four. Our technicians and help desk are known by name to our customers, just as our customers are known to us. Together, we are a community with a shared interest in making East Lothian and the other areas in which we operate, or intend to operate, a better place in which to live, work and play.

We certainly welcome the proposals in Section 4 of the WLAMR to require BT to provide wholesale access to its network in general. In particular, we welcome the proposal to ensure competitive access to BT's physical infrastructure, such as poles and ducts, as well as wholesale access to fibre (PIA). It is our firm intention to move in this direction as soon as this is economically possible for us to do so. It goes without saying that we would much prefer to invest in our own network infrastructure than to rely on piggy-back access via BT's existing network. However, as your WLAMR points out, we must rely on LLU, etc., in the first instance in order to build a viable customer base that will provide the revenue to allow us to grow and expand our own networks. It would seem that the consequence of what is proposed by Ofcom would hinder rather than encourage that as far as we are concerned.

This is not the Ofcom stated aim and we find this contradictory, particularly, as is stated in section 4.20, Ofcom "*do not expect to see competitive fibre investment across a significant proportion of the country in the period of this review*", or "*... customers across much of the country will continue to rely on competition based on access to Openreach's network and it will remain important that we keep an appropriate range of access obligations in place*". We certainly will not be able to do this immediately and will rely on affordable access to our potential specific broadband only market using current technologies in order to grow our business. Ofcom clearly recognise this reality and yet seem to be allowing BT to prevent this from happening by introducing technologies with minimal benefits that effectively block Altnets, who could bring substantial benefits, from entering the broadband only access to their infrastructure.

The continuation of both access and price regulation on LLU (including SMPF), VULA and SLU is vital. Section 4.26 of the WLAMR points out that

"Sky and TalkTalk have each argued that a lower VULA price could incentivise investment as it would help them to build and maintain scale during the medium term while network build takes place. They argue that a lower VULA price would allow them to build and maintain larger customer bases which they could then more easily convert to ultrafast customers once they had built their own networks."

This is precisely the same argument that we are making with regard to SMPF and LR-VDSL barriers to access for operators like ourselves.

It is not true in our case that "*the tighter we [Ofcom] regulate VULA, the more likely it is that we [Ofcom] undermine the incentive for telecoms providers to build new networks as opposed to relying predominantly on buying access from BT*". Our principal aim is to construct our own networks wherever possible and as quickly as possible. Our objective is to be as entirely commercially self-reliant as is feasible. In this way, we would be in a strong position to bring either FTTP services, or Gigabit fixed wireless capability to more remote premises, across the whole of our network well within the 10 years envisaged by Ofcom that it will take to bring similar services to only 40% of premises in the UK. We currently pass around 7,000 premises in East Lothian and after only two years of operation have a subscriber base that is growing steadily. We consider that the "*appropriate balance*" to be struck is to lean towards breadth of access and competitive wholesale pricing in the short to medium term in order to allow businesses like ourselves to hold our own competitively in this market so that we can invest in alternative infrastructure.

In 4.27 the proposals state that:

"... it must not be too 'easy' for competitors to rely on buying access to another's network when there is the potential to invest in their own. On the other hand, we want to ensure that consumers and competition are sufficiently protected in these areas in the short term, as well as in other geographic areas where network competition is not likely to be economically viable."

It has to be stated very strongly that in the rural and remote areas where we operate, to date we have not relied on access to anyone else's network because this was either impossible or made too difficult, especially with regard to access to backhaul. It is also very true that, in terms of profitability, our competitive presence in the market does indeed promise to be viable, in spite of the present obstacles. However, the viability that it promises is perhaps more a case of servicing our existing network and growing only slowly and tentatively, "ticking over", in spite of our enthusiastic determination, rather than the possibility of real dynamic expansion into fibre and innovative service provision that we would like to envisage and that Ofcom would clearly like to facilitate and encourage.

That said, our primary target customer range is for the most part largely beyond the reach of VULA served connections. And LR-VDSL will make little significant difference to that, if any. What we really

need are policies that encourage us to take risk in those more remote areas of the market. Ofcom must be aware that this is the real problem area. In Scotland, CBS have found it difficult to address this. R100 will hopefully fare better. But they can only do so if some of these barriers are lifted. The principal barriers to date are affordable local access to backhaul, access to existing networks, access to poles, and access to ducts.

This has to include regulation by Ofcom of taxes on lit fibre. If these are calculated in terms of distance, then there is no equality. That is the same as building motorways and saying that those that use them least should pay most. A much better basis for calculation would be volumes of traffic. This would effectively reverse the cost table for lit fibre to reflect the actual value of large city business use more fairly. There is no mention in this WLAMR consultation document of taxes on lit fibre, whereas this has real cost implications for the roll out of fibre based services in remote locations. The proposed hold on such taxes (now delivered in England and Wales following the publication of the "*Telecommunications Infrastructure [Relief from Non-Domestic Rates] Bill*") for a period of time does not allow Altnets properly to analyse future risk. It simply promises to punish them for being remotely located at some point in the future.

As a general comment to sections 4.28 to 4.35, we would welcome greater reliance on network competition in the longer term. We intend to be competitive. But this does depend on how Ofcom regulates effectively to make this possible in the short term. However, the prediction is that FTTP will reach only 40% of premises in the next decade. There is little doubt that this will be mainly in the towns and cities. 10 years is a long time to allow BT to continue to exercise SMP in the context of the potential for real competition in the rural context that will be stifled by the proposals outlined in this WLAMR. SMEs entering this market need to do so within the existing structure so that they can build up a viable client base that will allow them to invest in new networks, especially if they plan to deliver FTTP in the future, as we do.

Section 4.32 states that:

"We consider that the proposals set out in this consultation should give BT's competitors strong incentives to invest in their own networks, anticipating the potential for reduced access regulation in the future. Competitors who invest now in new networks can therefore expect to benefit from a first mover advantage, and consumers can expect to benefit from competition between networks."

We certainly hope that this is the case, but fear that the obstacles described above may preclude this, both from our point of view and that of the consumer.

Section 4.33 states that:

"In time, a greater degree of differentiation in our regulatory approach across the UK may also emerge. Different remedies may be needed in different geographic areas. For example, charge controls could be applied to higher bandwidth services in areas where there is no potential for competing networks, with pricing flexibility continuing, or even further deregulation, in areas with competition between networks."

This clearly has to apply to rural areas, which will become closed to operatives like ourselves in terms of unbundling due to the removal of SMPF and the introduction of new technical constraints imposed with LR-VDSL technologies. These will have little real impact on the range and scope of service delivery in rural areas where distances from cabinets or exchanges far out-reach the capability of the technologies to provide an improved service. On the contrary, the quality of service beyond the effective reach of LR-VDSL will almost certainly be inferior to what was previously available with simple ADSL. In addition, as we argue above, the removal of access to SMPF will inevitably stifle entry into the unbundled market place for SMEs that wish to offer broadband only services.

This might suggest that geography should play a significant role in determining the objectives and nature of relevant aspects of the proposed regulation.

Section 4.42 states that:

"Openreach Limited will be responsible for setting its own strategy to meet its purposes, within a financial envelope set by BT Group. In doing this, it will consider the interests and strategies of all its downstream customers, including BT and the overall BT Group strategy."

There is a clear conflict between this policy and the removal of SMPF services from the WLA list of products available to BT's competitors.

Section 4.42 further states that:

"While ultimate ownership of all assets would remain with BT plc, Openreach Limited will be empowered to control the underlying network used to provide Openreach products and services on behalf of BT, including investing in and maintaining that network in support of its overall strategy."

It is our view that, in law, a parent company that owns the assets of a subsidiary has a fiduciary duty to answer to and act in the sole interests of the shareholders of the parent company with regard to those assets. Likewise, the Board of the subsidiary company have a similar duty with regard to those assets. That is to say that the Board of Openreach must act solely in the interests of BT shareholders with regard to the management of those assets and related policies and strategy implementation. What is proposed with regard to the relationship between BT and Openreach will result in a contradictory and ambivalent situation that can only achieve proper resolution by the complete severance of Openreach from BT. The Board of Openreach, otherwise, are faced with a clear conflict of interests that is open to legal challenge by the shareholders of BT or other parties if they are to implement systems that facilitate and encourage competition to BT. There is simply no other solution to this problem.

Section 4.49 states that:

"In our view, the remedies on which we are consulting for WLA are appropriate having regard to BT's section 89C notification which, like the Undertakings, will sit alongside and complement any SMP regulation that we impose on BT. We do not consider that any new SMP regulation is necessary specifically to take account of these arrangements and nor do we consider that any of our proposals are now unnecessary or requirement (sic) amendment. Stakeholders are invited to express their views on this position as part of any representations made on the substance of our proposals."

On the contrary, Significant Market Power (SMP) exerted on the market by BT spills over into activities of Openreach that potentially support and enhance BT's SMP in a most significant manner where specific technologies deployed in the delivery infrastructure, notably LR-VDSL, prevent competition at the SMPF level and in respect of VULA, as described above. Further, we recommend that Ofcom consider all of the other points that we have made above in this context. In particular, we refer Ofcom to our view that the Board of Openreach have a fiduciary duty with regard to their connection with BT. This link must be severed.

In Table 5.1 the word "*unduly*" in bullet point 3 should be removed. There should be no discrimination whatsoever. If a level of discrimination, which is implied by the use of the word "*unduly*", is to be allowed, what criteria are set out to measure whether or not this level is '*undue*'?

See EU Commission commentary on LLU and VULA

http://europa.eu/rapid/press-release_IP-10-654_en.htm

Section 5.16 states that:

"In proposing these conditions, we have taken into account the factors set out in section 87(4) of the Act. When considering the imposition of such conditions in a particular case, we must take into account the following six factors set out in section 87(4):

"• the technical and economic viability (including the viability of other network access products, whether provided by the dominant provider or another person), having regard to the state of market development, of installing and using facilities that would make the proposed network access unnecessary;

"etc."

It is assumed that it is consideration of this clause (87/4) of the Communications Act (2003) that is used to justify the removal of SMPF services from the WLA LLU packages proposed. We suggest that proper regard has not been given to the state of market development by proposing the release of BT from its LLU and/or SLU obligations. It is our understanding that no alternative facilities have been installed or are in current use that would render network access to SMPF and other infrastructure for enterprises that wish to offer broadband only services using LLU and/or SLU, unnecessary, especially in rural and remote areas, the very areas where we operate and hope to expand into.

Section 5.24 states that:

"Section 47(2) requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. In our view, the proposed condition is:

"• objectively justifiable, in that it facilitates and encourages access to BT's networks and therefore promotes competition to the benefit of consumers;

"• not unduly discriminatory, in that we are proposing to impose the requirement on BT. We have not provisionally identified any other telecoms providers as holding a position of SMP in the WLA market in the UK excluding the Hull Area;

"• proportionate, in that it is targeted at addressing the market power that we propose BT holds in the WLA market and does not require it to provide access if it is not technically feasible or reasonable; and

"• transparent, in that the condition is clear in its intention to ensure that BT provides access to its network in order to facilitate effective competition."

None of the above applies to the LLU proposals as they stand with the removal of SMPF services and the proposed release of BT from its LLU and/or SLU obligations. It is our view that Ofcom's intended outcomes are likely to be completely thwarted in practice.

- Access to BT's networks is not only discouraged at SMPF and SLU (where LR-VDSL is deployed) level, it is prevented, and so the conditions proposed cannot be objectively justified;
- Lack of access at SMPF level and SLU level where LR-VDSL is deployed is highly discriminatory, especially to operators who offer broadband only services in rural areas, and so the conditions proposed cannot be unduly discriminatory (we have raised elsewhere an objection to the term "unduly");
- It is technically feasible (it currently exists) and reasonable to require BT to offer SMPF LLU and SLU services. It is unreasonable to argue the LR-VDSL via VULA is a viable alternative. On the contrary, this creates not only a technical barrier to operators who wish to offer broadband only services but a significant cost barrier also, as line charges for telephone functionality and other costs will apply. Therefore, the conditions proposed are disproportionate in that, with specific reference to broadband only services, especially in rural areas, they will effectively cement BT's SMP in this sector.

- In consequence, competition within the broadband only market, especially in the context of rural and remote areas of the country, is effectively prevented from accessing BT networks, and so the conditions proposed cannot be said to be transparent in the sense defined here.

Section 5.29 states that:

"We consider that in the absence of such a requirement, BT has the incentive and ability to refuse to provide new forms of network access at the wholesale level, thereby favouring its own retail operations with the effect of hindering sustainable competition in the corresponding downstream markets, ultimately against the interests of consumers. Our regulation is particularly important in relation to new forms of network access requested by third party telecoms providers, as the incentive for BT to favour its own retail operations by rejecting requests for new forms of network access would have the potential to result in a substantial limitation of innovation in this area. This is particularly significant given the impact that we consider network level competition will have on the market in the coming review period."

Following from our comments above, we strongly argue that this is precisely what will happen by removing access to SMPF LLU services and with the proposed removal of SLU in favour of LR-VDSL. From our position, what is proposed by BT in this respect is tantamount to a *"refusal to provide new forms of network access at the wholesale level, thereby favouring its own retail operations... etc."*.

Out of scope of this WLAMR but of significance to us with regard to the fairness of our competition is the fact that BT advertises its superfast broadband service as "Superfast Fibre". This is both misleading and a distortion of the truth. Their service is still delivered over copper with all of the limitations of that medium. It is only their backhaul from cabinets or exchanges that is fibre. We could make the same claim, since our backhaul is also fibre but do not. Our view is that BT should be prevented from selling their copper services in this way. We have encountered potential customers who are desperate for a better service but who state that they are waiting for BT "fibre". We know that they are too far away from the exchange or the cabinet to see any improvement, but they cling to the notion that they will because it is "fibre". This is a bit more than a simple marketing exaggeration and is a significant barrier to competitive entry into this market space in particular.

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