

County Broadband

Response to Consultation:

Pricing wholesale local access services in Geographic Area 3 with a BT Commitment to deploy a fibre network



NON-CONFIDENTIAL VERSION

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Introduction

1. County Broadband (“CBL”) is pleased to present its response to the Pricing wholesale local access services in Geographic Area 3 with a BT Commitment to deploy a fibre network (the Area 3 consultation), which is a follow-on consultation to the wholesale fixed telecoms market review (WFTMR) issued in January 2020 and to which CBL submitted a response in May 2020. The WFTMR and the Area 3 consultation are of critical importance to CBL and in addition to this response, we have actively participated in the development of the Independent Networks Cooperative Association (“INCA”) response, which we support.
2. This submission is intended to complement the INCA response and we do not repeat points made in that response, other than at a summary level.

Executive summary

3. CBL welcomes Ofcom’s focus on encouraging competitive investment in full-fibre networks, but we are deeply concerned that the proposals for how this should be done will result in a reduction in competitive investment due to Ofcom’s preferential treatment of Openreach investment in what Ofcom has categorised as Area 3. We submitted our comments and concerns in this respect in our WFTMR response and many of those concerns remain relevant for the proposals in the Area 3 consultation.
4. CBL welcomes the move from the previously suggested CPI-X+K charge control to the CPI-0 charge control for Area 3. CBL believes that, as Area 3 is currently defined, there are sufficient commercial incentives on BT and altnets to deploy new fibre networks to justify the CPI-0 charge control, without the need for a BT Commitment.
5. CBL, however, believes that Ofcom has miscategorised a large number of destinations into Area 3, when they are commercially viable for BT as well as altnets and should therefore be categorised as Area 2. Ofcom should, therefore, reclassify locations where Altnets have build plans as Area 2.
6. CBL disagrees strongly that an aggregate level of altnet deployment of at least 3m premises in Area 3 can be considered immaterial. Ofcom has not offered insight into its materiality thresholds and analyses, which raises serious concerns about transparency of the process. CBL urges Ofcom to reassess the materiality of altnet existing and planned deployments and adjust the boundary between Areas 2 and 3 accordingly.
7. The BT Commitment effectively constitutes an exclusive franchise for BT, consisting substantially of locations included in altnet build plans but which Ofcom has mistakenly categorised as Area 3. The BT Commitment, as currently proposed, will cause considerable harm to altnet deployment possibilities, reduce and slow down fibre deployment across Area 3 and cause direct harm to consumers in Area 3.
8. CBL notes that the Area 3 consultation does not include an impact assessment. Additionally, the consultation does not seek to assess the impact of the very generous BT Commitment proposal, only whether the commitment is sufficient to counter-balance over-recovery due to the CPI-0 charge control. CBL considers this approach to not be in accordance with Ofcom’s duties to perform and present impact assessments of important proposals.
9. Ofcom has a duty to maximise benefits to consumers, but its proposals in the Area 3 consultation will work in direct conflict with that duty. The counterfactual to the imposition of the proposed BT Commitment is that the locations on the BT Commitment list will be covered by new fibre networks by either BT or altnets in any event, and that significant additional fibre deployment will also take place at a faster pace than under the BT Commitment, due to the competition to deploy first in locations that can only support a single fibre network.



10. Ofcom's proposals are discriminatory in favour of BT and against altnets. This is in direct conflict with Ofcom's duties.
11. CBL proposes that, instead of the proposals set out in the Area 3 consultation, Ofcom implements one of the following options:
 - a. Abandon Area 3 altogether, as it is premature to determine which locations will not be covered either commercially or through the Government F20 initiative; or
 - b. Reduce Area 3 to cover only locations that are not on any altnet deployment plans submitted to Ofcom.
12. In either case, Ofcom should ensure that the BT Commitment is adjusted during the 5-year period to not include where altnets have deployed fibre networks or where altnets have fully funded deployment plans and have notified the Highways Authority of build plans. This adjustment should happen once a quarter to reflect updated altnet coverage and plans.
13. CBL urges Ofcom to apply all measures to limit potentially anticompetitive pricing initiatives by BT to both Area 2 and 3 and also urges Ofcom to review the detrimental impact of the proposed pricing of dark fibre access in Area 3.

Introducing CBL

14. The Company was started in 2003 as a Wireless Internet Service Provider and more recently has been deploying Fibre to the Premises networks using a mix of Overhead and Underground new build and PIA infrastructure.
15. CBL is based near Colchester, North Essex, close to the Suffolk Border and is actively engaged in building FTTP networks in Essex, Norfolk and Cambridgeshire and plans to further expand this footprint into Suffolk in 2021.
16. The Company has 80 direct employees. As well as its in-house resource, the Company is engaged with two civils contractors both of which have CBL dedicated administrative and project management resources allocated and use multiple gangs in-field to complete the build plan in place.
17. CBL achieved a £46m ✂ investment from Aviva Investors in 2018. This funding is to support provision of FTTP to 30,000 premises. CBL commenced build in Q4 2019 and is on-target to achieve circa 20,000 premises past this year, with the remaining premises scheduled for completion in 2021.
18. ✂.
19. ✂.
✂
- Figure 1:** ✂
 - a. ✂
 - a. ✂
 - b. ✂
20. CBL has experienced direct competition with BT for first mover advantage to deploy in these small towns and villages. These areas cannot support more than a single network and there is effectively a race to deploy first. We believe this to be to substantial benefit to consumers who would likely be served a lot later if there was no competitive pressure on BT to deploy quickly.



Defining Area 3

21. In the Area 3 consultation, Ofcom does not refer to the definition of Area 3. In our WFTMR response¹ we explained in detail our concerns with how Ofcom has defined Area 3 and, in particular, how Ofcom has interpreted and implemented that definition.
22. In the WFTMR, Ofcom defines Area 3 as *“a geographic market comprising postcode sectors where there is unlikely to be material commercial deployment by rival networks to BT”*
23. CBL deploys commercially to villages and small towns which have all been categorised as Area 3. Given that the locations we deploy to are clearly viable for commercial deployment, we have submitted our build plans to Ofcom (please note: these are limited to current funding received only). But we are very concerned that Ofcom appears to be of the view that the type of locations we deploy to should be categorised as Area 3 despite being commercially viable.
24. As it is unlikely that the locations we deploy to can support two separate competing fibre networks, there is a real first-mover advantage in early deployment. This competition to deploy first means consumers in those locations will benefit from earlier deployment than would be the case if it were considered that only BT would deploy there. It is our view that there is considerable economic value resulting from this competition for the market, even if there will not be network competition in the market.
25. CBL is fully committed to offering wholesale access to its fibre infrastructure. This will help us maximise the utilisation of our network infrastructure and maximise the choice available to retail customers who will be able to select the retail service packages they prefer and thus maximise benefits and utility at the retail level too. We note that Ofcom has a duty to maximise consumer benefits².
26. In our WFTMR response we noted that Ofcom considered only the very largest altnets in the UK to be operators of multi-service-networks (MSNs), this despite CBL and the vast majority of other altnets we know of actively targeting and delivering both broadband and point-to-point services – thus constructing and operating MSNs. It seems that the categorisation of altnets to MSNs and non-MSNs has a significant influence on whether Ofcom considered that the altnets deployments constituted material commercial deployment by rival networks to BT. CBL therefore urges Ofcom to correct the MSN assessment of its own network and of those of many other altnets which clearly provide both kinds of services as specified by Ofcom in order to qualify as MSNs.
27. Despite repeated efforts by our advisors to ascertain the rules Ofcom has applied to determine materiality, no clarity has been provided beyond what is stated in section 7 of the WFTMR V2 and the associated Annex 8. Although Ofcom refers to postcode sectors as relevant geographical units it seems clear that there is a second layer of materiality assessment, as individual postcode sectors for which 50% coverage has been planned by CBL or other altnets have consistently been allocated to Area 3, rather than Area 2.
28. We consider Ofcom’s approach to allocation locations between Areas 2 and 3 to be non-transparent and in conflict with the principles set out in the WFTMR.
29. In conversations, Ofcom has informally suggested that it is very difficult to ascertain the level of certainty of build plans from individual altnets, especially the smaller altnets. This (combined with the erroneous MSN categorisation) resulted in only build plans for CityFibre, FibreNation (now part of CityFibre) and Virgin media being incorporated in Area 2 – although we understand that even some locations included in those build plans have been categorised as Area 3.

¹ Please note that we consider the INCA WFTMR response to also form part of the CBL WFTMR response.

² Communications Act 2003 section 4 (8) (b).



30. Ofcom has thus completely disregarded build plans submitted by all remaining altnets as immaterial. CBL considers this to be discriminatory towards those altnets as we believe this results in directly related harm to their investments and deployments – resulting in consequent harm to consumers.
31. CBL considers that the current BT financial situation cannot be considered to be significantly stronger than that of many altnets, including CBL, and as such there is no rational reason for including some build plans and not others.
32. CBL believes that Ofcom should have applied a set of transparent and consistent criteria to categorise locations between Areas 2 and 3 but, given that Ofcom is now unlikely to revert to that approach at this late stage in the consultation process, Ofcom should at the very least ensure that altnet build plans are regularly and properly reflected. CBL considers that Ofcom's approach lacks in both transparency and consistency – both very important regulatory principles often quoted by Ofcom in its proposals.

The Forecast RAB approach

33. The Area 3 consultation proposes to change the approach to price regulation from the previously proposed 'post-build RAB approach' to the 'Forecast RAB approach'. The Forecast RAB approach consists of two elements:
 - a. a charge control of CPI-0 (the same as applied in Area 2, thus avoiding different pricing in Areas 2 and 3); and
 - b. a BT Commitment to deploy fibre networks to 3.2m premises in Area 3 (the BT Commitment).
34. The WFTMR referred briefly to the Forecast RAB approach as being Ofcom's preferred solution, but that it was dependent on BT making a commitment to deploy fibre in Area 3, such that the CPI-0 charge control would not result in an over-recovery by BT in Area 3. In fact the WFTMR did not even specify a CPI-0 charge control but a more generic indexed approach³.

The CPI-0 charge control

35. CBL supports Ofcom's proposal to apply the CPI-0 charge control to both Area 2 and 3. This approach provides investment incentives to all potential providers, not just BT – incentivising BT only would clearly discriminate against altnets and favour BT. CBL notes that Ofcom has duties to not discriminate.⁴
36. As set out in our WFTMR response, CBL agrees with Ofcom that the CPI-0 charge control will have a real impact on investment incentives, as it both sets out the price regulation for a 5-year period and signals Ofcom's longer-term regulatory direction. CBL was strongly opposed to the post-build RAB approach as proposed in the WFTMR.
37. CBL understands that the CPI-0 charge control would result in an over-recovery of costs by BT, if BT did not invest in new fibre networks in Area 3, but CBL disagrees with Ofcom's assessment that BT would not deploy commercially without regulatory inducement (in the form of the post-build RAB ratchet approach or the BT Commitment as set out in the Forecast RAB approach).
38. As mentioned above, CBL has direct experience of BT seeking to gain first mover advantage in small towns and villages, mostly very much smaller and less commercially attractive than those currently covered in the BT Commitment.

³ See WFTMR V4 paras 2.27 though 2.29

⁴ Communications Act 2003 section 4.



39. Because Ofcom has included large towns that are commercially attractive for both BT and altnets, BT has been able to make a commitment to cover places it would most likely have covered commercially in any case and which are included in many altnet build plans.

The BT Commitment

40. The Area 3 consultation calculates the over recovery that would result for the application of the CPI-0 charge control in Area 3. It then calculates the 'fibre shortfall' – i.e. the incremental costs to BT of implementing its commitment to deploy fibre to 3.2m premises in Area 3, less the incremental revenues resulting from that deployment. The fibre shortfalls must at least cover the over recovery. That calculation relies on a number of assumptions and Ofcom has therefore estimated a range within which the fibre shortfall will likely fall.
41. Ofcom's analyses show that the BT Commitment has a significantly higher probability of resulting in an under-recovery than and over-recovery. The assumption used needs to be at the extreme negative end before there is a justifiable need for BT to commit deployment to as much as 3.2m.
- 42.
43. CBL considers it unusual that BT should over-commit to the extent it appears to have done. In conversation with Ofcom, Ofcom has stated to CBL that 'if BT had offered to deploy to 2m premises then Ofcom would likely have accepted that'. This suggests an overcommitment of more than 50%. It is our view that BT would not do so if it were not in its commercial interests.
44. CBL notes that Ofcom does not make any effort to assess the impact of the BT Commitment, beyond checking that it is likely to compensate for the over recovery.
45. In fact, we note that the Area 3 consultation does not contain an Impact Assessment statement at all and we have considered whether that could be because it could be considered as covered by the Impact Assessment statement in the WFTMR. We do not, however, consider that this could be the case.
46. The Forecast RAB approach is described in the WFTMR in just three paragraphs. It does not specify what the charge control would be (it refers to 'indexation') and there is no indication of what the BT Commitment would be. It could therefore not be reasonably argued that the WFTMR Impact Assessment could have covered the Forecast RAB approach and proposals as set out in the Area 3 consultation.
47. CBL notes that Ofcom has a duty to perform an Impact Assessment on important proposals⁵ and is concerned that Ofcom may be in breach of its duties by not having done so in this case. CBL considers this is of particular concern due to the significant harm the BT Commitment, as proposed, could have on altnet deployment and ultimately on consumers. As described above, at present BT and altnets have incentives to deploy first in smaller towns and villages, as those locations can only support a single fibre network. If altnets cannot invest, then there is no incentive for BT to deploy early and consumers in those locations will suffer delays in getting fibre services.
48. In CBL's view, considerable harm will arise from the BT Commitment as currently proposed, not least in its impact on investment in the sector, and we have serious concerns that Ofcom has not attempted to assess that harm. At the very least, Ofcom should ensure that the BT Commitment reflects the mid-values of Ofcom's assumptions and not more. That said, CBL is confident that at least 3.2m premises in Area 3 would have access to fibre connections during the price control period, without any need for a BT Commitment.
49. The BT Commitment is already having an impact on the market. CBL is aware of at least one altnet having negotiations with a local authority terminated, due to that location being included on BT's published list for the Commitment. It is CBL's view that the BT Commitment will have a significant

⁵ 2003 Communications Act section 4.



chilling effect on altnets' ability to finance deployment in any location included on the BT Commitment list, thus effectively creating a list of (attractive and commercially viable) locations where it will face extremely limited competition. This will almost certainly delay deployment to many locations on the BT Commitment list – to the significant detriment of consumers.

50. Inviting BT to effectively create its own franchise areas, whilst not allowing any altnets to do the same, is in our view clearly discriminatory in favour of BT and against altnets. We note that Ofcom has specific duties to not discriminate between providers of electronic communication services and/or networks and we believe that the current proposals are in breach of those duties. We outline those duties below:

Communications Act 3002 4. (6)

The fourth Community requirement is a requirement to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour—

- a. (a); one form of electronic communications network, electronic communications service or associated facility or
- b. (b) one means of providing or making available such a network, service or facility, over another. [emphasis added];

and

The European Electronic Communications Code 3. 4. (b)

ensure that, in similar circumstances, there is no discrimination in the treatment of providers of electronic communications networks and services;⁶

Alternatives to Ofcom's proposals

51. CBL understands that Ofcom is under time pressure to propose solutions for how to regulate BT in Area 3 for the period 2021 – 2016, and also that it is not helpful to simply set out criticism of Ofcom's proposals without offering potential alternatives. We therefore outline below some options that we believe could work. We would be pleased to discuss these with Ofcom in more detail.

Abandon the Area 3 category

52. CBL believes that, in reality, the locations that are currently included in Area 3, but which are commercially viable for both BT and altnets, should be moved to Area 2. The remainder of locations in Area 3 are not commercially viable and would naturally fall into the Government's final 20 ("F20") category, to be addressed through state aid initiatives.
53. It therefore seems that the creation of a category in which BT needs special incentives that are not applicable to altnets – which in fact deter altnet deployment, is premature and will result in market distortions with the unintended results of delaying and reducing overall fibre deployment in what is currently defined as Area 3.

Reduce Area 3 to locations not included on any altnet deployment plans

54. CBL has a strong preference for Ofcom deploying transparent and consistent criteria for where fibre deployment is commercially viable. Given, however, that Ofcom has abandoned that approach in favour of using deployment plans from operators, we urge Ofcom to not arbitrarily exclude some plans

⁶ Note that the EECC is expected to be in force when Ofcom issues its Final Statement on the WFTMR.



and include only a small subset. Even if a small number of altnets may cease to trade or may not deploy to all the destination they have listed, those destinations comply with criteria for commercial deployment (and have in most cases been reviewed by investors as part of due diligence procedures) and are therefore commercially viable for deployment even if they will not be deployed by the altnet that has included them in its plans.

55. It would therefore be wrong for Ofcom to consider itself the arbiter for what is commercially viable and what is not. Altnets and investors go through significant efforts to determine where to deploy and Ofcom should not simply discount those efforts. This is especially the case as Ofcom is not willing to disclose the criteria it has applied to justify excluding all but three altnet build plans from Area 2.

Adjust the BT Commitment to exclude altnet build

56. In discussions with CBL, Ofcom has suggested the possibility of adjusting the BT Commitment to remove locations where either an altnet has already deployed. CBL believes that, in order for a measure like that to be effective, it should include locations where altnets have either finished deployment or have fully funded plans to deploy, which have been notified to the Highways Authority.
57. Ofcom need to publicly state the BT Commitment will be removed according to the actual and planned deployment of Altnets. This would serve to reduce the “chilling” impact of BT Commitment on Altnet deployment opportunities and funding applications.
58. This would ensure that, at the least, very advanced build plans and existing coverage by altnets would be excluded from the BT Commitment. It would, however, be much preferential that the Area 3 definition be adjusted to exclude locations where altnets have already built or have plans to build.

Other proposals in the Area 3 consultation

59. CBL notes that Ofcom proposes to extend its proposed restrictions on BT’s ability to introduce geographic discounts to Area 3 – CBL welcomes this proposal. CBL, however does not understand Ofcom’s rationale for not also extending its proposed restrictions on other pricing arrangements that could have anti-competitive effects to Area 3 as well. We refer Ofcom to the INCA response for more details on this respect.
60. Additionally, CBL considers that Ofcom’s proposals for dark fibre access in Area 3 are priced at a level that cannot be replicated by an altnet using PIA to build a new all fibre network. This denies the altnet access to the economies of scale and scope which BT benefits from, and again favours BT over altnets.
61. In discussions, Ofcom has acknowledged that, in some locations where only a single network is viable, that single network may be operated by an altnet. The BT dark fibre obligation (on the specific terms mandated), however, results in BT having to continue to operate infrastructure in those locations, if another communications provider is using the dark fibre service. The dark fibre pricing mandated by Ofcom allows BT to recover its costs on the basis of the economies of scale achieved when BT operates a full network with a significant market share. If BT were to provide only a dark fibre service in an area where it no longer provided active services, the costs to provide the dark fibre would be considerably higher than the mandated price.
62. CBL therefore believes that the proposed dark fibre pricing is too low and could lead to long-term untenable situations whereby neither BT nor an altnet would be able to recover their costs on the provision of dark fibre.