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

January 2021

We are Hyperoptic. And we go beyond the expected.

Response summary

This short response is a follow up to the supplemental response that Hyperoptic submitted on August 28th 2020.

In that response we explained why we had felt it necessary to submit two Statement of Requirements (SOR) to Openreach ("OR"). We set out how these two problems needed to be addressed in order to meet the policy objectives set out in the WLA Statement 2018.

The response we have received from OR is disappointing and leaves considerable gaps in meeting the policy objectives. It also raises concerns about the SOR process in general and the whether the approach taken by OR when reviewing SORs is legitimate.

Introduction

In our August response, we set out that the SORs aimed to solve two problems currently faced by CPs using PIA: (1) Operators do not have transparency about lead-in capacity and (2) Operators cannot rely on a specified service level agreement (SLA) for additional capacity to lead-ins. The SORs were about to enter the 'feasibility phase' of the OR SOR process.

The two SORs have now completed feasibility and OR confirmed at the Passives Product and Commercial Group on December 16th 2020 that the two SORs will proceed but in a narrow and limited form. We have included the OR response as an Annex to this response.

The review by OR is disappointing and appears to have misunderstood the purpose of the SORs and ignored Ofcom's expectations, focusing instead on whether there are potential benefits to OR. Our view, as set out in our August response, is that the various PIA Statements from Ofcom are clear in requiring PIA to facilitate PIA CPs to meet customer expectations for switching and new connections, as well as having access tools that provide clarity on capacity, which is an essential precondition to provide customer certainty. The proposals from OR do not make this possible. Therefore, as things stand, policy objectives set out in the WLA Statement 2018 will not be met.

Specific comments on OR feedback

SoR8612

Slide 3

Our general comment about the feedback from OR is that it constitutes an OR-centric view. Whilst we appreciate that the problem statement in our SOR may not be as high a priority for OR because where a customer is either upgrading to fibre with the same CP or moving to another CP, OR have the option of meeting customer expectations by swapping out copper for fibre - this is not possible for PIA CPs, and it is therefore more of a priority for CPs.

- The alternative proposed by OR is suboptimal. Whilst it offers some progress on the current status, the categories proposed for the "expedite process" are far too restrictive to allow us to meet customer expectations in the scenarios set out by Ofcom in the WLA and PIMR e.g. customer switching / taking new service.
  - At present sufficient detail has not been provided by OR to enable comprehensive feedback. From what we have seen to-date, for this process to be of value, it needs to be expanded beyond the current categories proposed by OR (e.g. to include lead-in related NAs) and also needs to be have proper SLAs and SLGs to ensure it is sufficiently robust.
- Exclusion of UG is also not acceptable because the legal instrument obliges OR to provide the service to PIA CPs, and does not envisage a two-tier approach where SPO is the only way of meeting certain elements of the obligation.
- The first bullet under next steps would appear to breach the no undue discrimination requirements which require all new products and processes to be the same. If OR are in the process of formulating views on an offering, CPs should be able to input to that design rather than having to consumer whatever OR develop to suit themselves with no ability to ensure it is fit for PIA use.

SoR8613

Slide 3

Again, our general comment on the feedback from OR is that it constitutes a highly OR-centric view. As stated above, the priorities of external PIA CPs do not align with those of OR because OR has far greater control in how it manages connecting customers to new fibre connections.

- We accept that there might not be much UG data, but we cannot see why any data that is available should not be available. Some data is better than no data.
- Comment about CPs being able to survey in advance of build is very OR centric. CPs of course survey in advance of build (both UG and OH), however that is a snapshot taken prior to build. The aim of this SoR is to facilitate customers moving between CPs at a point subsequent to build, by which time survey data will hold little value.
- OH data - there is no reason why any data would be out of date. The concept is that the current status would be captured with a date/time stamp.
  - In the event that there are multiple updates in a short period of time, this would ensure that the most recent data is presented to CPs because the most recent date/time would be presented.
  - The CP would be able to take a view, based on the date/time stamp, as to whether it was something they wished to rely on or whether it is too historic. In which case a survey

could be undertaken. This as least gives the CP an option to take a view and presents a much better end customer experience.

- Data that is missing today because it has been zeroed out should not prevent this from being the way that we operate in the future. The ask is not for 100% accurate data of the whole OR estate, it is to capture what CPs (inc OR) are seeing and present that back - building up a more complete picture over time.
- Saying that it is little benefit to OR and therefore they won't ask engineers to capture information means that OR will effectively reject anything that they will not utilise themselves. Surely that cannot be a valid reason to reject part of an SoR?
- If dropwire counts are to be of value, it would need to include OR and is not a burdensome requirement in terms of capture.

Slide 4

- OH NAs would include any work that OR was undertaking so would not be an indicator of CP building in an area. Equally, NAs could be required to increase capacity etc post-build to facilitate additional customers.

SOR Process

A review of the response from OR suggests that the lens through which OR review SORs submitted by Industry is whether there is a specific benefit to the OR process. If there is not or OR believe that they would not avail themselves of the development, the request is rejected as out of scope. For example, as part of the feedback explaining why the Aerial requirements in SOR 8613 would be implemented to a reduced scope OR state that "Due to limited benefit to our desk teams, as stated above Openreach will defer to field surveys". This cannot be the yardstick by which SORs are reviewed, as this would mean that CPs could only request processes or changes that directly benefit the OR approach to fibre deployment.

When rejecting the main requirement in SOR 8612 OR suggested that "Openreach are already reviewing how we would offer an expedite offering for our own services and once defined could look to offer on PIA". This demonstrates that OR are able to develop their own product offerings in isolation without any input from Industry as to whether they are required or what priority they should take in an already overburdened work stack. This is completely at odds with para 4.82 of the PIMR where Ofcom set out that "Applying the no undue discrimination obligation to network access would mean that when BT establishes new processes or platforms that contribute to the supply and consumption of network access, these should be designed and implemented from the outset such that they are equivalent." Not only is there a possibility that this breaches the no undue discrimination obligation, it is unsatisfactory even on a process level because once OR have developed a process for themselves, there is very little scope for Industry to make sure it is fit for purpose for PIA. Additionally, the SOR response from OR highlights that there is a gap within the overall SOR process that allows OR to sidestep this PIMR requirement to the detriment of PIA CPs.

Conclusion

In conclusion, in the WLA 2018 Ofcom decided that 'retail customer expectations' was a relevant consideration when setting SLAs for OR performed activities relating to end customer connections. However, throughout the Reference Offer negotiations OR declined to set an SLA framework that is sufficiently robust to allow CPs to meet those customer expectations.

Our analysis of the wholesale inputs into the various competing products that end customers can purchase demonstrates the material differences in outcome for consumers based on non-PIA/PIA delivery times. This is consequential for the competitive impact that PIA can hope to have as a remedy so central to the prospects of industry delivering Government's targets.

So far we have had little success via the standard SOR process which should allow Industry to request reasonable improvements to an OR product offering. Therefore we are reiterating our previous request asking Ofcom to write to OR confirming that what constitutes a 'reasonably necessary' service level commitment under condition 8.3B (l) and (m) of the legal instrument should be read and interpreted in light of Ofcom's very clear comments in the WLA. Additionally, regardless of whether OR implement a revised SLA framework, we believe that Ofcom should remove any future room for 'misinterpretation' by amending the relevant provision in the next iteration of SMP condition in line with our suggested amendment in the body of this response.