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**Re: BT's Proposed Acquisition of EE – Phase 2 [Non-Confidential Version]**

We welcome this opportunity to provide further input on the competition issues related to the proposed acquisition by BT Group of EE (the “**Acquisition**”). This submission for Phase 2 follows our submissions at Phase 1 that were submitted to the CMA on 20<sup>th</sup> March and 15<sup>th</sup> April 2015.

In our 20<sup>th</sup> March letter we stated that the Acquisition will have a serious adverse impact on competition in three areas:

1. **BT's investment in and delivery of digital infrastructure:** the Acquisition will result in BT deprioritising investment in infrastructure due to its drive towards consumer orientated content and mobile services.
2. **Foreclosure of competitive mobile backhaul:** the Acquisition will result in BT internalising EE's backhaul connectivity requirements, which will harm the competitive market for mobile backhaul. EE's and Three's ambition to migrate to dark fibre connectivity with competitive suppliers will be halted.
3. **Foreclosure of investment in Fibre To The Home (FTTH):** Foreclosure of the mobile backhaul market will harm anchor tenancy for competitive infrastructure in many UK towns and cities, leading to the foreclosure of investment in FTTH deployment.

In the CMA's Phase 1 decision, we note that the “CMA believes that the merger gives rise to a realistic prospect to a substantial lessening of competition (SLC), as a result of vertical effects, in relation to the supply of fibre mobile backhaul services to MNOs in the UK”<sup>1</sup>. Furthermore, the decision report highlights “a concern that the merged entity could engage in customer foreclosure, as EE might have the incentive to cease purchasing mobile services from other suppliers and self supply through BT”<sup>2</sup>.

CityFibre agrees with these findings, and we strongly urge the CMA to carefully consider the appropriate remedies that should be imposed to ensure effective and sustainable competitive supply of fibre backhaul to MNOs. In light of the CMA's findings, we will focus our input at this stage on concern 2) above – foreclosure of competitive mobile backhaul and its related consequences.

Why remedies must be imposed if the Acquisition proceeds.

In our 20<sup>th</sup> March submission we asserted that the UK is at a critical juncture, where its aging communications infrastructure must be upgraded or replaced with new, more capable networks. To be a leading digital economy, far greater investment in fibre-optic infrastructure than has been seen so far is essential. The Acquisition will harm the competitive market for fibre investments with adverse outcomes to business and consumers.

CityFibre is an AiM-listed company that builds new fibre networks in towns and cities where infrastructure is poor. Our networks provide high capacity fibre connectivity to local authorities, businesses, mobile operators and homes (the latter in our joint venture with Sky and TalkTalk). Our growth is fuelled by demand for better infrastructure from CPs, MNOs and government.

<sup>1</sup> CMA Phase 1 decision, paragraph 8.

<sup>2</sup> CMA Phase 1 decision, paragraph 151.

In November 2014 CityFibre entered into a national framework agreement with EE, Three and MBNL to provide dark fibre mobile backhaul; working collaboratively with EE to develop rollout plans Construction in the first city, Hull, is already underway.

[✂ CONFIDENTIAL].

BT's announcement of the Acquisition risks putting an abrupt end to these rollout plans. This should be of concern to the CMA because:

1. It links directly to the CMA findings in Phase 1 of the potential significant lessening of competition in the supply of fibre mobile backhaul to MNOs;
2. When contracting for mobile backhaul, MNO's become anchor tenants for competitive fibre rollout that deliver innovation and sustainable benefits to UK consumers, both at home and at work.

Unless remedies are implemented, BT will be motivated to 'self-supply' all mobile backhaul for EE, the UK's largest MNO. This will result in foreclosure of competitive mobile backhaul and seriously jeopardise investment by CityFibre and other infrastructure builders. By removing EE's anchor tenancy, BT will impede the ability to provide the competitive and superior fibre networks that are essential to power the UK's digital economy.

The remainder of this letter is structured as follows:

**Section 1 – About CityFibre:** who we are and our role in the UK communication sector;

**Section 2 – The Acquisition's impact on services and competition:** outlining effects on BT's wholesale and retail services and the broader competitive market;

**Section 3 – The Acquisition's impact on delivery of competitive fibre optic infrastructure:** outlining the adverse effects on infrastructure competition;

**Section 4 – The Acquisition's impact on mobile backhaul:** the issues for investment and competition in the mobile sector;

**Section 5 – The Acquisition's impact on anchor tenancy and investment in FTTH:** the further effects to investment in the broadband market.

**Section 6 – Conclusions**

## 1. About CityFibre

CityFibre is an investor, builder and operator of fibre-optic local access networks in towns and cities outside London. Founded in 2011, the company has raised over £60m to date, and is set to play a significant role in the modernisation of the UK's digital communications. As a challenger to BT, our shared fibre-optic infrastructure provides connectivity to mobile sites, public services, businesses and homes.

CityFibre is leading the rollout of UK Gigabit Cities, with projects underway in York, Peterborough, Coventry, Aberdeen, Edinburgh, Huddersfield and Hull. A Gigabit Cities benefits from next-generation pure fibre connectivity to all premises, enable gigabit speed broadband and ultrafast connectivity to businesses and residents. We work closely with local authorities that are seeking to improve the availability and quality of digital communications in their communities.

We are a wholesale only operator. CPs and MNOs use our open fibre infrastructure to deliver vastly improved digital communications to their customers. For example:

- CityFibre's joint venture with Sky and TalkTalk is bringing Gigabit FTTH to residents in York, deploying a pure fibre network that is independent of BT Openreach.

- Under our national framework agreement with MBNL, EE and Three (discussed in Section 4 below) we are delivering dark fibre for mobile backhaul; the first project is delivering in Hull.
- In conjunction with many CPs, we are delivering dark fibre to schools and council buildings, enabling gigabit speed networks to aid education and improve the delivery of public services.

In January 2014 CityFibre listed on the AiM market of the London Stock Exchange, giving the company a solid shareholder base of tier-1 institutional investors. Furthermore, we are pre-qualified for infrastructure debt guarantees from HM Treasury's UK Guarantees Scheme administered by Infrastructure UK; highlighting the importance of CityFibre's work in supporting the digital needs of the Government's National Infrastructure Plan.

## 2. The Acquisition's impact on services and competition

Digital communication services are essential to UK economic prosperity and the welfare of our businesses and citizens. Since Ofcom's 2005 Strategic Review, the past decade has seen improvements in service competition, but at the high cost of underinvestment in infrastructure.

### 2.1 *The issues caused by underinvestment*

CPs and MNOs are dependent on physical infrastructure that enables the delivery of communication services to businesses and consumers. Today, nearly all CPs and MNOs are dependent on the physical infrastructure of BT which controls >70% of the UK's communications infrastructure, a dominant position that has resulted in unhealthy outcomes for customers and competition:

- **Under-investment in infrastructure:** BT has consistently failed to invest in its local access networks. In infrastructure terms, the UK has one of the lowest shares of fibre-connected premises in Europe<sup>3</sup>, as it continues to squeeze cash from its aging copper networks. It is well documented that businesses and consumers are suffering as a result<sup>4</sup>.
- **Recognised market failure:** In 2011 the Government determined that underinvestment had led to a market failure in the provision of fixed/mobile broadband services, resulting in Government intervention at a cost to UK taxpayers of over £1.2b. Investigation by the Public Accounts Committee (PAC) led to Rt Hon Margaret Hodge MP, Chair of PAC stating "*The sole provider BT has been placed in a quasi-monopolistic position which it is exploiting. The consumer is failing to get the benefits of healthy competition*".
- **Consumers are suffering from BT's poor service performance:** A report from the UK Competitive Telecoms Association (UKCTA)<sup>5</sup> states, "*Openreach's service performance in recent years has been consistently poor. It is clear that existing mechanisms for incentivising Openreach to deliver a good quality of service are not working. In the absence of true competition, Ofcom must be more robust in tackling quality of service issues in order to replicate competitive outcomes*"

The above examples illustrate that the UK's current digital infrastructure is underperforming and potentially inadequate to underpin sustainable growth in our digital economy. This is clearly detrimental to effective competition and harmful to business and consumers alike.

### 2.2 *The new generation of competitive infrastructure builders*

Exponential data growth and demand for higher bandwidth is driving the need for new, more capable digital infrastructures. Furthermore, for the reasons outlined in this letter, CPs and MNOs are seeking

<sup>3</sup> <http://www.ftthcouncil.eu/documents/Presentations/20150211PressConfWarsaw.pdf>

<sup>4</sup> For example, see report from Federation of Small Businesses <http://www.fsb.org.uk/policy/assets/FSB-The-Fourth-Utility.pdf>

<sup>5</sup> UKCTA: 30 Years After Privatisation – Is the Telecoms Market Working. November 2014

to reduce their dependency on BT. Over the past five years a new generation of fibre infrastructure builders has emerged, with CityFibre leading the deployment of shared fibre access networks.

The Digital Communications Infrastructure Strategy, published 18<sup>th</sup> March 2015<sup>6</sup> sets out Government's ambition for nationwide coverage of ultrafast broadband and ubiquitous coverage of 4G mobile services, states "*Competition has proved a powerful driver of innovation, faster services and improving customer experience... challenger businesses such as Colt, CityFibre, Gigaclear and others are building networks and increasing the choices available to businesses and households*".

In meeting industry needs, fibre investment is needed in three key areas:

- **Mobile backhaul:** Mobile operators are seeking dark fibre (raw unlit fibres) to cell sites to support the growth in mobile data and innovation of mobile network architectures.
- **Fibre connectivity for businesses and public services:** Evidence shows that high-speed connectivity enables the efficient use of cloud services and online tools, producing functionality and flexibility that is essential for business growth and the delivery of better public services.
- **Ultrafast broadband to homes:** Out-dated copper access networks must be replaced, creating a need for investment in new technologies, notably FTTH. Ultrafast network investments underway worldwide, so the UK must embrace FTTH investments to remain competitive.

CityFibre directly addresses these opportunities; deploying open passive fibre infrastructures in towns and cities where BT is dominant and infrastructure is poor. We are delivering the substantial benefits of infrastructure competition, fuelling innovation and better services and value for consumers.

The CMA must understand that there is a serious risk that the progress of new generation fibre infrastructure builders will be threatened by the Acquisition with adverse impacts for UK citizens.

### 2.3 BT's increased size and dominance will adversely impact on services and competition

The Acquisition will substantially increase BT's size and dominance. With BT's 40% share of the broadband market and EE's 30% share of mobile subscribers, we estimate the combined entity will be providing services to circa 50% of the UK's addressable market.

BT will become, by far, the largest communications retailer with a focus on services and content targeted at consumers. As a result, the Acquisition will have serious adverse effects:

- BT's investment in infrastructure will be de-prioritised as it targets its investment towards content and mobile services;
- Services to businesses and public services will suffer as it focuses more on consumer orientated retail services;
- Service delivery and innovation for CPs and MNO will be frustrated, as its revenues from wholesale services become a much smaller proportion of group turnover.

With retail services to >50% of UK consumers and BT's >70% share of the infrastructure market, the Acquisition will drive monopolistic behaviour and BT will be motivated to stifle competition.

CPs have raised serious concerns that BT's current scale and vertically integrated position is harming competition through BT's ability to manipulate its retail and wholesale prices for its own advantage. The Acquisition will exacerbate this problem.

If left as a vertically integrated pseudo monopoly, BT will have less incentive to innovate, improve services and invest in new infrastructure and technologies. At the same time, it will be more motivated

<sup>6</sup> <https://www.gov.uk/government/publications/the-digital-communications-infrastructure-strategy/the-digital-communications-infrastructure-strategy>

to undermine the investments and innovations by other infrastructure builders and CPs, leading to adverse outcomes for consumers.

Therefore, should the Acquisition proceed, it is clear that a comprehensive set of remedies will be required to safeguard effective competition.

The following sections of this letter detail CityFibre's investment strategy and the significant lessening of competition caused by Acquisition; the foreclosure of the mobile backhaul market and the resulting harm to the deployment of FTTH infrastructure in the UK.

### 3. The Acquisition's impact on the delivery of competitive communications infrastructure

Unless appropriate remedies are implemented, the Acquisition will have an adverse impact on the investment and rollout of competitive communications infrastructure from CityFibre and other infrastructure builders. In this section we focus specifically on the adverse impacts to CityFibre.

An overview of CityFibre is provided in Section 1 above. We invest in towns and cities outside of London where BT has Significant Market Power (SMP) and current infrastructure is poor. Ofcom determines SMP as areas deprived of effective infrastructure competition. In that regard, CityFibre is building fibre infrastructure where it is most needed. Consumers benefit from innovation and improved services that flow from effective competition and investment in modern digital networks.

#### 3.1 Our Market Entry Strategy:

As a new entrant, CityFibre is establishing infrastructure competition, taking market share of connectivity over time as our networks mature. Entry and growth in a new town or city is achieved by contracting with CPs and MNOs following three steps:

- i) **Secure anchor tenancy** – A decision to invest is underpinned by an anchor contract for mobile backhaul or business connectivity contracted for a term of no less than five years.
- ii) **Grow share of mobile backhaul and business connectivity market** – Following entry, we grow market share by providing to CPs and MNOs further fibre connectivity, resulting in incremental network expansion in line with a greater volume of connected sites.
- iii) **Expand to consumer FTTH** – The new infrastructure is designed and deployed with in-built capacity for future FTTH rollout, enabling efficient expansion to the fixed access market. All our networks support this capability.

[✂ CONFIDENTIAL].

To date CityFibre has been successfully implementing this strategy with many Gigabit City projects now in construction, including our project in Hull that was anchored through an agreement with MBNL for mobile fibre backhaul.

However, as identified by the CMA in its Phase 1 decision, the Acquisition will lead to a significant lessening of competition in the supply of mobile backhaul. This will stymie our rollout by harming the opportunity for MNO anchor tenancy.

#### 3.2 The value of Anchor Tenancy from MNOs

CityFibre's aim is to build new infrastructure in over 100 towns and cities. Our delivery programme is underway.

To deliver at national scale, the provision of mobile backhaul and the anchor tenancy that flows from contracts with MNOs is a vital component of our fibre investments plans. Underwriting demand risk through anchor tenancy is common practice in the funding and delivery of infrastructure; CityFibre has adopted this model to aid investor confidence and secure capital.

In the rollout of fibre infrastructure, anchor tenancy takes the form of long-term commitments from CPs and MNOs. Working with CPs in the business and public sector CityFibre has secured anchor contracts that underpin our current Gigabit City deployments. However, the effectiveness of anchor tenancy from public sector of business CPs is limited due to the nature of them being one-off contracts for individual cities, which effects scalability and speed of deployment.

In scaling our investment plans to 100 target towns and cities, the MNOs represent the optimal and only suitable national anchor tenant. Therefore, the CMA must recognise the importance of competitive mobile backhaul as a major driver in funding investments in modern fibre infrastructure.

Our work during 2013/2014 with MBNL, EE and Three focused on securing a national anchoring agreement that would accelerate CityFibre investment plans for a nationwide rollout of competitive fibre infrastructure. EE was the main driver in this activity, seeking a competitive supply of fibre mobile backhaul.

As identified by the CMA in its Phase 1 decision, the Acquisition will lead to significant lessening of competition in the supply of mobile backhaul, with foreclosure of this market resulting from BT incentive to self-supply connectivity to EE. This would halt our investment plans for mobile backhaul and undermine national rollout supported by MNO anchor tenancy.

### 3.3 The MBNL agreement

On 13<sup>th</sup> November 2014, CityFibre entered into a national framework agreement with MBNL and its MNO shareholders, EE and Three (“MBNL Agreement”), to provide dark fibre connectivity for mobile backhaul to EE and Three mobile sites, starting in Hull and then extending to many urban locations.

[✂ CONFIDENTIAL].

Following our three-step market entry strategy, our MNO anchored networks in 100 target cities would expand to business and public sector use, and further be the foundation for a large-scale deployment of FTTH. This would deliver substantial benefits of competition and innovation to business and consumers. When deployed, our fibre infrastructure would cover 30% of the UK’s urban population.

[✂ CONFIDENTIAL].

### 3.4 The harm that would result from the Acquisition

BT’s acquisition of the UK’s largest mobile operator would have negative implications for the mobile backhaul market. As already recognised by the CMA, BT will be motivated to internalise or ‘self-supply’ fibre connectivity to EE mobile sites. Therefore:

- **Unless safeguarded, CityFibre’s deployment of dark fibre connectivity to EE mobile sites under our national framework agreement with MBNL will be halted.** As the MBNL agreement is for shared infrastructure for both EE and Three, halting our deployment to EE will also frustrate deployments to Three’s mobile sites.
- **Undermining national anchor tenancy negatively impacts rollout of FTTH.** Impeding a nationwide rollout for mobile backhaul removes CityFibre’s opportunity for national anchoring. This would significantly slow our rollout to towns and cities, and negatively impact the viability of FTTH deployment to homes and SMEs.

The inter-related effects of the above would substantially hinder the delivery of true infrastructure competition and rollout of open ultrafast gigabit networks. We believe that this would be damaging to consumer welfare and economic prosperity.

Therefore, we strongly urge the CMA to consider appropriate remedies to ensure a competitive supply of mobile fibre backhaul to EE and other MNOs.

#### 4. The Acquisition's impact on competitive mobile backhaul

##### 4.1 Current mobile backhaul

Today there are approximately 40,000 base stations across the UK requiring mobile backhaul connections. The volume of sites is set to increase as operators deploy small cells and upgrade to 5G in the near future.

Historically, a large proportion of mobile backhaul was self-served by the MNOs via microwave links. However, deployments of 3G and 4G services have led to the majority of microwave connections being replaced with fixed leased line connectivity, mostly provided by BT Wholesale.

As noted by the CMA, 'there is no effective alternative to fibre backhaul for an increasing number of base stations'<sup>7</sup>. Furthermore, CityFibre agrees with the CMA assessment that fibre backhaul represents [60-70]% of all mobile backhaul circuits<sup>8</sup>, of which BT currently supplies [80-90]%<sup>9</sup> of these circuits, mostly through unregulated managed services of BT Wholesale.

BT's dominance, due to historical lack of alternative infrastructure providers, has been a long-standing concern for MNOs. To address this problem, MNOs have been seeking alternative suppliers of mobile backhaul and this has led to Virgin Media, CityFibre and Zayo entering the market – establishing the foundation for effective competition for fibre mobile backhaul.

##### 4.2 BT Wholesale

BT's preferred method of providing mobile backhaul is through the provision of managed Ethernet access products provided by BT Wholesale, and we note in the CMA's findings that [90-100]% of BT's mobile backhaul circuits are supplied this way.

As a current near-monopoly supplier in this market, BT Wholesale's contracts will subject MNOs to a lock-in to unregulated products. MNOs will face unreasonable price increases (in particular in respect to increased bandwidth needs), poor service performance and an unwillingness to innovate.

Furthermore, the long-term nature of these contracts and the minimum volume commitments create significant barriers to exit these agreements.

The Acquisition will exacerbate these problems. BT would become the largest player in the mobile retail market with incentives to seek competitive advantages over rival MNOs that are tied into contracts with BT Wholesale. CityFibre agrees with the CMA's findings that BT "would have the ability to foreclose rival MNOs as a result of price increases and/or quality deterioration in the fibre backhaul services provided by BT Wholesale, both at contract renewal and under MNO's current contracts"<sup>10</sup>.

In addition to the foreclosure of competitive backhaul that flows from the Acquisition, undermining investment incentives by alternative suppliers, taking the above into account, it is now clear that the Acquisition results in two further forms of competition problem associated with fibre backhaul:

1. Foreclosure of rival MNOs at the retail level (as outlined above and further in the CMA's Phase 1 decision); and
2. Foreclosure of competitive supply of mobile backhaul through BT self-supply for EE whilst keeping rival MNOs locked into contracts with BT Wholesale.

<sup>7</sup> CMA Phase 1 decision, paragraph 74.

<sup>8</sup> CMA Phase 1 decision, paragraph 73.

<sup>9</sup> CMA Phase 1 decision, paragraph 102.

<sup>10</sup> CMA Phase 1 decision, paragraph 119.

Therefore, we believe it is critical to safeguard the opportunity for competitive supply of fibre backhaul, and remedies should be considered which enable rival MNOs to exit current BT contracts without delay or penalty should the Acquisition proceed.

#### 4.3 Dark fibre connectivity for mobile backhaul

To enable higher speed mobile data services, it is essential that mobile backhaul circuits can support ever-increasing bandwidth requirements. To do this effectively, MNOs have been calling for the provision of dark fibre to base stations. Dark fibre is the unlit fibre that allows MNOs to implement their own transmission electronics to control higher speed mobile backhaul at efficient costs.

As BT has been publically opposed to providing dark fibre solutions, MNOs have initiated strategies to encourage the competitive market to supply dark fibre for mobile backhaul, with the beneficial effects of increasing competitive supply of mobile backhaul market and gaining fibre infrastructure that paves the way for innovation in mobile architectures.

EE has been a market leader in the drive to dark fibre [✂ CONFIDENTIAL]. Three has followed a similar strategy, and activities to implement this migration are underway through MBNL, the JV company that is owned by these two MNOs.

However, these plans will be adversely impacted by the Acquisition, as BT will be motivated to self-supply base station connectivity to EE removing >50% of the volume of fibre backhaul circuits from these plans. Consequently, the viability of migrating Three's sites will become significantly less as the economic benefits of network sharing are jeopardised.

Failure to deliver competitive dark fibre for mobile backhaul will result in higher cost mobile connectivity, bottlenecks in mobile data transmission, and reduced innovation. Higher costs will be passed onto consumers who will also be receiving poorer quality services.

#### 4.4 Ofcom's BCMR

In the current BCMR review<sup>11</sup> Ofcom seeks to mandate BT to provide dark fibre access in geographic markets where BT has SMP (all of the UK with the exception of Hull and central London). If implemented, BT's dark fibre products will be available from April 2017 and will be useable for mobile backhaul, either via Openreach or as an input to the managed services of BT Wholesale.

By mandating BT to provide dark fibre, any technical advantage offered by dark fibre suppliers (notably CityFibre and Zayo) is neutered, further exacerbating the competition problem. This adds further weight to the argument that suitable remedies to safeguard competitive supply of fibre backhaul will be necessary.

#### 4.5 The MBNL Agreement

As stated in 3.3 above the MBNL Agreement was signed on 13<sup>th</sup> November 2014.

The provision of dark fibre backhaul to EE sites is contracted via MBNL, its infrastructure sharing joint venture with Three. The MBNL Agreement is structured to enable both EE and Three to avail of competitive supply of dark fibre mobile backhaul to a large number of mobile sites in urban locations. The mechanism for national anchor tenancy is embedded within the MBNL Agreement.

[✂ CONFIDENTIAL].

When BT announced the Acquisition, all activities beyond Hull with EE were immediately halted; indicating potential intent to foreclose CityFibre's deployment of competitive mobile backhaul.

<sup>11</sup> Business Connectivity Market Review, published by Ofcom 15<sup>th</sup> May 2015

Discussions with Three and MBNL have continued, indicating in the counterfactual case the strong desire for competitive supply of CityFibre's mobile backhaul to be realised.

4.6 [✂ CONFIDENTIAL].

[✂ CONFIDENTIAL].

If the Acquisition proceeds, as already recognised by the CMA, BT will be motivated to self-supply mobile backhaul to EE and will be further motivated to foreclose the competitive supply by CityFibre and other fibre infrastructure builders. This results in a significant lessening of competition in the mobile backhaul market, and BT strengthening its quasi-monopoly position with adverse outcomes for MNOs and their customers.

In the counterfactual case, EE and Three will continue with these rollout plans, establishing nationwide competitive supply of fibre backhaul to MNOs, enabling significant benefits of service innovation and better outcomes to business and consumers alike.

#### 4.7 Summary of supporting evidence

CityFibre, MBNL, EE and Three enter the MBNL Agreement on 13<sup>th</sup> November 2014 for the provision of dark fibre for mobile backhaul.<sup>12</sup>

Commenting on MBNL Agreement,<sup>13 14</sup> EE's public message stated the MBNL Agreement provides dark fibre backhaul enabling lower costs of 4G whilst increasing both capacity and performance. EE is keen to embrace and promote the emerging eco-system for dark fibre, with an expectation of rolling out new fibre infrastructure across 10,000 sites in a three to five year timeframe.

Three's public message echoed EE's,<sup>15</sup> stating that upgrading the cables that support Three's mobile network is vital, and that the nationwide infrastructure agreement with CityFibre for supplying dark fibre to Three's mobile masts would provide a more reliable service for customers. Three mentions that evaluating CityFibre and dark fibre in other metropolitan areas is a main focus.

[✂ CONFIDENTIAL].

## 5. **The Acquisition's impact on investment in FTTH**

The foreclosure of competitive supply of the fibre backhaul to mobile operators is the primary concern for CityFibre. However, significant lessening of competition in this market has serious consequential impacts for investment in fibre to the home technologies.

In section 3 of this letter we outline the nature of market entry for competitive fibre infrastructure, and in particular:

1. The fact that core fibre infrastructure deployed for mobile backhaul and/or business connectivity act as the foundation networks for efficient deployment of FTTH, and
2. Contracts with MNOs (in particular the MBNL Agreement) enable national anchor tenancy to a target 100 towns and cities, which enables subsequent FTTH rollout [✂ CONFIDENTIAL].

We believe foreclosure of this opportunity should be a major concern to the CMA for the reasons given in section 2 of this letter, and that investment in fibre infrastructure is essential for UK's economic prosperity and delivery of better services to businesses and consumers.

<sup>12</sup> <http://www.cityfibre.com/news/2014/11/12/cityfibre-signs-dark-fibre-deals-with-ee-and-three-to-enhance-mobile-networks>

<sup>13</sup> <https://www.cable.co.uk/news/dark-fibre-will-force-4g-costs-down-capacity-up-ee-700000271/>

<sup>14</sup> <https://www.cable.co.uk/news/ee-says-dark-fibre-will-deliver-gigabit-speeds-to-mobiles-700000254/>

<sup>15</sup> <https://www.cable.co.uk/news/mobile-customers-internet-use-driving-three-network-improvements-700000261/>

### 5.1 Current status of Fixed Access Networks

Fixed access networks connect homes and businesses to communications networks, enabling voice and broadband services. Today, BT provides the vast majority of the fixed access network using copper wires installed many years ago for voice telephony. Virgin Media operates a copper & cable fixed access network for its own use to circa 30% of UK households.

BT's dominant position of 70% of fixed access connections, and a virtual-monopoly in the wholesale market (as Virgin chooses not to provide wholesale access to other CPs), has long been a concern for CPs that are dependent on regulated access to BT's infrastructure.

The UK fixed access infrastructure requires significant investment to be upgraded or replaced with new technologies capable of supporting future data demands and Internet delivered video content. As stated earlier, the UK has one of the lowest levels of fibre-connected premises in Europe<sup>16</sup>.

### 5.2 The ambition for 'ultrafast' broadband infrastructure

Recognising the need for investment in next generation digital infrastructure, the Government published its Digital Communications Infrastructure Strategy<sup>17</sup> on 18<sup>th</sup> March 2015. This outlines Government's ambition for a new generation of ultrafast networks to nearly all UK premises, stating "The ultrafast market is in its infancy, but the market is beginning to mobilise to deliver it at scale. As this deployment gains momentum, competition between different network providers will drive further investment and innovation, and see the reach of ultrafast grow across the UK".

As a challenger to BT, CityFibre is at the forefront of ultrafast network deployment, being one of the few companies investing in future-proof FTTH for gigabit speed broadband.

In April 2014, CityFibre entered into a joint venture with Sky and TalkTalk to deliver FTTH to York and further cities. FTTH network construction is underway, utilising CityFibre's 120km core fibre network in York as its foundation. Sky and TalkTalk's gigabit broadband services will be launched in 2015. The Ultra-Fibre-Optics (UFO) brand has been launched and on 23<sup>rd</sup> June Sky and TalkTalk announced the start of their marketing campaigns towards consumers and businesses<sup>18</sup>.

### 5.3 Foreclosure of FTTH investment

The harm to FTTH investment flows from the foreclosure of the competitive mobile backhaul market. If CityFibre's rollout of dark fibre to MBNL sites is impeded or halted, the opportunity for anchor tenancy is harmed and investment in subsequent FTTH deployments will be impacted negatively.

Foreclosure of FTTH investments by CityFibre and other new entrant fibre builders will result in a substantial lessening of competition at the infrastructure layer of digital communications. BT retaining its dominant position will result in the adverse effects of continued underinvestment and a pro-longed use of out-dated copper access networks and an ongoing reduction in delivery and service quality from BT.

A less competitive environment for fibre investment will impede deployment of modern gigabit networks, and digital communications services to business and consumers may suffer.

### 5.4 Summary of evidence

The UK is absent from the 2015 Global Ultrafast FTTH Broadband Ranking.<sup>19</sup>

<sup>16</sup> <http://www.ftthcouncil.eu/documents/Presentations/20150211PressConfWarsaw.pdf>

<sup>17</sup> <https://www.gov.uk/government/publications/the-digital-communications-infrastructure-strategy/the-digital-communications-infrastructure-strategy>

<sup>18</sup> <http://www.talktalkgroup.com/press/press-releases/2015/ultrafast-broadband-lands-in-york.aspx>

<sup>19</sup> <http://www.ispreview.co.uk/index.php/2015/02/uk-remains-absent-2015-global-ultrafast-ftth-broadband-ranking.html>

CityFibre, Sky and TalkTalk entered into a joint venture agreement to provide FTTH broadband in the City of York.<sup>20</sup>

TalkTalk have publically stated an ambition to reach 10m households with FTTH within a five to ten year period if trials in York prove successful.<sup>21</sup>

## 6. Conclusions

In this letter we have focused on the issues raised by the Acquisition and have not detailed potential remedies. However, in conclusion, we believe it would be short sighted to allow the Acquisition to proceed on terms that would significantly lessen infrastructure-based competition and impede pro-competitive investment in modern, fit-for-purpose digital infrastructure in many of our towns and cities.

### 6.1 We concur with the CMA findings in Phase 1

In particular that “CMA believes that the merger gives rise to a realistic prospect to a substantial lessening of competition (SLC), as a result of vertical effects, in relation to the supply of fibre mobile backhaul services to MNOs in the UK”<sup>22</sup>, and “a concern that the merged entity could engage in customer foreclosure, as EE might have the incentive to cease purchasing mobile services from other suppliers and self supply through BT”<sup>23</sup>.

Without remedies being implemented, BT will foreclose CityFibre’s national rollout to EE and Three base stations under the MBNL Agreement, with serious adverse implications for rival MNOs and their customers. Furthermore, meaningful investment in FTTH infrastructure will be adversely impacted.

### 6.2 The counterfactual

The CMA has outlined the counterfactual case as the Acquisition not proceeding and the Three/O2 merger proceeding without remedies (or in the alternative, 3 and O2 remaining separate MNOs).

In the counterfactual case, we believe it is clear that our rollout under the MBNL Agreement to EE and Three will proceed resulting in substantial investment in fibre infrastructure; and in particular the creation of effective and sustainable competition in the supply of mobile backhaul circuits to MNOs.

Furthermore, in the counterfactual case, CityFibre’s investment in fibre infrastructure establishes the opportunity for the broader economic and consumer benefits that flow from expansion to FTTH.

### 6.3 Comprehensive remedies will be needed if the Acquisition is to proceed

To safeguard the welfare of UK citizens, we believe a comprehensive set of remedies that protect effective competition at all levels of the value chain will be needed.

We have not considered the shape of potential remedies. However, in the context of the identified competition issues, it is clear that remedies will be needed to:

- Ensure a competitive supply of mobile backhaul to EE sites is maintained;
- [✂ CONFIDENTIAL].

The above is not intended to be comprehensive – CityFibre will give the topic of remedies more detailed consideration in later stages of the Phase 2 process.

<sup>20</sup> <http://www.cityfibre.com/news/2014/4/14/sky-and-talktalk-partner-with-cityfibre-to-launch-ultra-fast-broadband>

<sup>21</sup> [http://www.uswitch.com/broadband/news/2014/12/talktalk\\_targets\\_10m\\_uk\\_households\\_with\\_fibre\\_broadband\\_network/](http://www.uswitch.com/broadband/news/2014/12/talktalk_targets_10m_uk_households_with_fibre_broadband_network/)

<sup>22</sup> CMA Phase 1 decision, paragraph 8.

<sup>23</sup> CMA Phase 1 decision, paragraph 151.

#### 6.4 Taking into account Government policy and potential evolution of Ofcom's regulation

On 12<sup>th</sup> March 2015, Ofcom announced its overarching Strategic Review of Digital Communications.<sup>24</sup> Ofcom's stated aim of this review is to make sure communications markets continue to work for consumers and businesses. The review will focus on three topics:

- **Efficient investment:** How can incentives for efficient private sector investment and innovation be maintained and strengthened?
- **Competition:** What should be the focus of competition policy to ensure effective competition and removal of enduring bottlenecks?
- **Deregulation:** What is the scope for deregulation?

The Strategic review is timely, as investment in the next generation of digital infrastructure is vitally important. By enabling infrastructure competition and investment by parties other than BT, the enduring bottlenecks in the UK's communication structure can be reduced and a healthy pro-competitive market encouraged.

Government policy seeks to ensure that UK remains a leading digital nation with ubiquitous availability of ultrafast broadband and 4G coverage. Effective competition and incentives for infrastructure investment are vital components of turning this ambition into reality

Should the Acquisition result in foreclosure of competitive supply of fibre backhaul to MNOs, there is real risk that infrastructure investment and the above policy aims will be jeopardised.

Therefore, we ask that the CMA consider carefully the best approaches to [safeguard the competitive market for fibre infrastructure deployment, in particular the competitive supply of mobile backhaul and the opportunity for anchor tenancy that is an essential component of infrastructure investment.]

We look forward to further dialogue with you throughout the Phase 2 process.

Yours sincerely,

#### **Mark Collins**

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CityFibre Infrastructure Holdings PLC

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<sup>24</sup> <http://stakeholders.ofcom.org.uk/telecoms/policy/digital-comms-review/>