Acquisition by nexfibre of Substantial:
Gigaclear response to the CMA's Interim Report

Introduction:

1. Gigaclear is the UK's largest rural broadband operator, with more than 15 years' experience building full fibre networks to connect rural communities. Our network covers more than 620,000 premises and serves over 180,000 customers.

2. Gigaclear welcomes the opportunity to comment on the CMA's interim report on the acquisition by nexfibre of Substantial/Netomnia (the Transaction). The report found that the Transaction amounts to a Relevant Merger Situation (RMS) that may be expected to result in a substantial lessening of competition in the wholesale supply of fixed broadband services.

3. Gigaclear has concerns about the CMA's underlying analysis. Whilst these may not alter the CMA's decision on the Transaction, they are important points for the CMA to consider in relation to this Transaction but also for future transactions in a sector where consolidation is expected.

Comments:

<u>Counterfactual for Substantial:</u>

4. The CMA's conclusion on the counterfactual depends heavily on its analysis that CityFibre would have acquired Substantial, rather than it remaining as a standalone entity. The CMA reaches this conclusion, despite nexfibre winning the sales process and CityFibre not having secured committed funding for the transaction.

5. The CMA asserts that, absent the nexfibre bid, CityFibre would likely have been given more time to raise the funding required and would have been successful in doing so. This conclusion depends on assumptions regarding investor appetite, financing availability and transaction terms in a fibre sector that continues to face significant funding challenges. The outcome of the actual sales process may be a more reliable indication of commercial reality than the hypothetical alternative transaction that the CMA relies upon for its analysis. Recent media reporting concerning CityFibre's ongoing discussions with lenders also serves to illustrate the volatility of financing conditions within the fibre sector and the challenges associated with forecasting future funding outcomes with certainty

6. Gigaclear's concern is broader than this transaction alone. The UK's fibre market is expected to undergo significant consolidation over the coming years. In assessing such transactions, the CMA should be cautious about relying on highly speculative counterfactuals that assume alternative transactions would have occurred. Such an approach risks creating uncertainty for investors and may discourage the consolidation necessary for a competitive fibre sector.

7. Whilst Gigaclear's primary concern relates to the speculative nature of the CMA's chosen counterfactual, we are also concerned that the assessment may not fully reflect the increasingly national nature of competition in wholesale broadband markets. The CMA's analysis appears to place significant weight on preserving competition within the Parties' overlapping footprint. However, competition in the wholesale fixed broadband market is increasingly national in character, with major ISPs evaluating wholesale partners based on network reach, coverage and scalability. The CMA should therefore ensure that the benefits of scale arising from consolidation are appropriately balanced against any reduction in localised infrastructure competition.

<u>Competitive Constraints Provided by Openreach</u>

8. The CMA's analysis downplays the competitive constraints currently provided by Openreach and the wider BT Group, stating that the competitive constraint provided by Openreach is moderated by the fact it is a regulated entity.

9. Openreach is regulated because Ofcom considers BT/Openreach to have Significant Market Power (SMP). The purpose of the regulatory remedies imposed by Ofcom is to create a more level competitive playing field, not to promote a particular market structure. The question for the CMA should therefore be whether the acquisition would materially reduce competitive pressure in a market that remains dominated by an SMP operator, rather than placing disproportionate weight on preserving infrastructure competitors in a local market.

10. Further, the CMA's assessment should take account of the likely future evolution of the regulatory regime. As full-fibre coverage expands and competition between networks increases, the effectiveness and extent of regulatory protections may evolve over time, particularly in areas where multiple gigabit-capable networks are present. In such an environment, the ability of alternative networks to achieve scale becomes increasingly important, particularly for those who have concentrated their build on more urban and suburban areas. Preventing consolidation among these competitor networks risks leaving them at a structural disadvantage relative to Openreach. This ultimately risks weakening the long-term ability of altnets to provide

an effective competitive constraint on Openreach leading to worse consumer outcomes in the long-term. The CMA's assessment should protect consumers from this impact, recognising that some industry consolidation is likely to be necessary for credible and sustainable competition to BT/Openreach to emerge.

Counterfactual for VMO2/nexfibre

11. The CMA's analysis assumes that VMO2 will continue upgrading its cable network to FTTP absent the Transaction and, in doing so, become an increasingly credible wholesale provider. This assumption is important to the CMA's conclusion that VMO2/nexfibre would remain a significant competitive constraint regardless of whether the Transaction proceeds.

12. Whilst the CMA's detailed reasoning is difficult to assess due to the extent of redactions, Gigaclear notes that VMO2's Fibre Up programme (formerly Project Mustang) was originally announced in July 2021 with an ambition to upgrade approximately 14.3 million cable premises by 2028. Independent industry analysis suggests that substantial deployment activity of around 50% of the premises remains outstanding and highlights the inherent uncertainty associated with forecasting the pace and timing of future network upgrades.

13. In our view, the CMA's assumptions regarding the future development of VMO2's wholesale capabilities are subject to a similar degree of uncertainty as its conclusion that CityFibre would likely have secured the financing required to acquire Substantial. Gigaclear therefore encourages the CMA to review carefully the assumptions underpinning this aspect of its counterfactual before reaching its final conclusions.

Conclusion

14. In conclusion, Gigaclear encourages the CMA to ensure that its final assessment appropriately reflects both the realities of financing and consolidation in the fibre sector and the continuing competitive constraints imposed by BT Group, including Openreach. These considerations are important not only for the present transaction but also for the future development of sustainable infrastructure competition in the UK broadband market.

15. Gigaclear therefore urges the CMA, in its final assessment and in future cases, to:

    a) base its counterfactual on evidence of actual commercial outcomes, including the result of a competitive sales process, rather than on speculative alternative transactions that depend on uncertain assumptions about funding, investor appetite and deal terms;

b) recognise that wholesale competition reflects both local infrastructure competition and broader national considerations, and give proper weight to the benefits of network reach, financial resilience and the ability to support national wholesale customers, as well as considering local network overlaps; and

c) fully account for the competitive constraint imposed by BT Group and Openreach as the dominant operator with Significant Market Power, and for the likely evolution of the regulatory regime as full fibre coverage expands.

16. The UK's full fibre ambitions depend on alternative networks continuing to attract investment and achieving sustainable operating models that enable them to compete effectively with BT/Openreach. An overly restrictive approach to consolidation risks deterring that investment and weakening the alternative networks. Ultimately, it could return the market to a structure in which Openreach faces materially weaker infrastructure-based competition to the detriment of consumers.

17. Gigaclear would welcome the opportunity to discuss these issues further with the CMA.

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