

# A Rural Fixed Line Network Access Framework

Date: 5 December 2018

CLA Guidance Note Reference: **GN26-18**

(This guidance note replaces GN16-18 which should be deleted from your files)

## Background

Members need to read this Guidance Note and the example agreement in conjunction with CLA Advisory Handbooks on Telecommunications Wayleaves (CLA39) and A Guide to the Electronic Communications Code (CLA82).

The national fixed line wayleave framework for landowners and infrastructure providers came into effect on 1 October. Covering both the main fixed line infrastructure provider, Openreach, as well as the alternative network providers, the framework represents a major step forward towards universal coverage in England and Wales.

The agreement formats within the framework (Annexes 3 and 4) are templates for alternative network providers (Annex 3) and Openreach (Annex 4). Members should ensure that they fully understand and take professional advice on any long term agreements that they are entering into. In addition, both templates comply with the revised Electronic Communications Code.

These agreements are permanent and can be assigned by the broadband supplier. There will be only very limited circumstances where these agreements can be terminated.

Members should also note that the suggested rates in this Guidance Note are only advisory. Members should ensure that any agreement they reach is subject to revision where appropriate.

## The CLA Approach

The CLA has always recognised that access to broadband is a crucial service for rural communities. Encouraged by Government, the CLA and NFU worked together to agree a wayleave package for alternative network suppliers to assist in the provision of infrastructure for rural broadband where the commercial business case is weak.

We have sought to achieve a balance between the rights of the provider and those of the landowner. Our aim is a fair package which will enable affordable rural broadband to reach as many consumers as is possible, in line with the Government's publicly stated approach and a private sector approach to wayleaves.

We also recognise that in some cases the application of the revised Electronic Communications Code<sup>1</sup> (which underpins the valuation of wayleaves) can be time consuming and costly. Moreover, any statutory approach to resolving the issue is likely to lead to further delays and disputes over the role of private property rights.

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<sup>1</sup> Schedule 3A of the Communications Act 2003

We thus propose a rational and measured package, which recognises the urgency of the issue, while respecting, as far as possible, property rights and law.

## **The Importance of the Fibre Network**

The CLA's overall goal has always been predicated on the need for universal coverage of both fixed line broadband and mobile connectivity. The importance of an extensive and robust fibre network, provided by a number of infrastructure providers, is vital in moving towards this goal.

The CLA has been working to increase the availability of broadband services to rural communities for many years. We have had a number of notable successes including lobbying Government to extend the fibre network through the BDUK programme, the intended introduction of a Universal Service Obligation (USO) in 2020 and the recognition of the importance of an integrated approach using different forms of telecommunications.

## **The Importance of a National Wayleave Framework and its legal basis**

The overall objective of the Government's telecommunications policy is to try and ensure that everyone in the country, irrespective of where they live, can access an efficient and fast broadband connection, the idea being that broadband can boost the overall performance of a business as well as increase social inclusion. However, rural areas have in the main been last when it comes to the rollout of infrastructure, primarily as a result of the costs involved and the engineering complexities of remote networks. Nevertheless, the Government's intention is for everyone to benefit from a Universal Service Obligation by 2020.

But the Government has now announced that it wants to go further. It has said that by 2033, everyone should have access to a full fibre connection, that is fibre direct to the premise. This is where the broadband service is delivered through fibre optic cable, rather than copper. Such a change means that more landowners will be approached by infrastructure providers for access to the land through wayleave agreements.

We have had telecom wayleave agreements in the past. In 2010, we agreed a first telecoms wayleave package with Openreach and the NFU. In 2012, we put in place a wayleave package for alternative infrastructure providers. But over the last five years technology has moved on rapidly together with new and revised laws to regulate the telecoms industry. This has meant we have had to renegotiate these wayleave agreements to reflect the changes in society and the law.

The most significant change has been through the revision to the Electronic Communications Code (the Code) which came into force on 28 December 2017. The Code now makes it easier for infrastructure providers to lay electronic communications apparatus in order to roll out fixed line fibre broadband networks.

In addition, the Government has said that the revised Code will make it cheaper for providers. However, the CLA has managed to negotiate an increase in rates which, we estimate to be worth an additional £40m to £50m to landowners in increased payments.

## The main features of the new wayleave framework

The wayleave agreements set out the rights and responsibilities of both the providers and the landowners. In addition, the new templates are designed to speed up the process of negotiating a wayleave. However, it is important to stress that there are two different types of agreement: one that covers the deployment of telecommunications infrastructure by Openreach; and the other covering infrastructure deployment by alternative network providers, such as Gigaclear and Virgin Media.

A major difference between the two agreements is that the wayleave will apply to different types of infrastructure. The agreement with alternative network providers only applies to the length of cable deployed and the installation of joint boxes and cabinets. It therefore only relates to the laying of cable underground, not on or over ground. This is not the case with Openreach where the agreement covers the deployment of infrastructure under, on and over ground. This is why there are a number of different rates in the Openreach agreement as it covers appropriate agricultural compensation.

Members should pay particular attention to the following:

- Before they sign a wayleave agreement, they should seek professional advice;
- It is important that they engage with either Openreach or the alternative network provider to ensure that they are fully aware of the terms of the agreement;
- They need to negotiate the most appropriate depth for the laying of the cable. Landowners will be in a far better position to know the soil structure and the right depth that a cable should be laid without it being damaged;
- Indemnity is set at £5,000,000;
- It is very likely that alternative providers will pay the wayleave as a one-off payment.

## **A Memorandum of Understanding with Openreach**

The CLA and the NFU have agreed a Memorandum of Understanding with Openreach (Annex 2) which sets out the process through which Openreach will negotiate and conclude a wayleave agreement with a landowner. The intention of the Memorandum of Understanding is to provide sufficient guidance to landowners and ensure that they are made fully aware of the Openreach process.

## **Alternative Network Infrastructure Providers**

Where rural broadband is to be supplied by an alternative network infrastructure provider, such as Gigaclear, the calculation and value of a wayleave will be different to the rates offered by the country's largest provider, Openreach.

Indeed, the provision of the service is not strictly 'commercial' as the level of demand in the rural community does not support a fully commercial approach to broadband service development.

We contrast this situation with that of high volume data transfer over fibre, as evidenced in the commercial sector by Energis and other long distance service providers, where (as demonstrated in the *London and India Docks v Mercury* case) values can be very high.

Thus, when valuing “consideration” under the provisions of the Electronic Communications Code, such services have only a nominal value.

This was tested in the case of *CableTel v Brookwood* ([2002] All ER (D) 136 (May)) where the Appeal Court (following the Communications Code reference by the operator) found that the value of the rights required by CableTel, given it was to serve only a few customers with cable TV services, was only £0.70 per metre as a one off payment.

Since CableTel was decided Openreach undertook research on the open market value of fibre on the final mile, between the exchange and the consumer, which showed that some grantors were willing to accept modest open market payment rates for limited rights. In 2010 CLA and NFU came to a new agreement with BT Openreach which reflects these market realities. The new telecommunications national wayleave framework revises the 2010 agreement to ensure compliance with the Code.

In response to many requests from both members and from the emerging alternative networks sector which is engaged in delivery of fixed line fibre broadband, the CLA and NFU came to an agreement in 2012 to recommend rates for the length of cable deployed and the installation of joint boxes and cabinets. These rates have now been improved following the entry into force of the revised Electronic Communications Code. The CLA and NFU suggest an advisory figure (taking into account the terms and conditions of the standard wayleave) as set out in Annex 1.

## Conclusions

The CLA is grateful to the NFU for its support and assistance.

Given the importance now attached to the provision of broadband by the public and the changes that were introduced through the revised Electronic Communications Code we are confident that the wayleave agreement we propose for the use by alternative network infrastructure providers and landowners and the advisory rates attached to this guidance, will bring much needed clarity and stability to the market in assisting the continued rollout of fixed line broadband services to rural areas.

The national fixed line wayleave framework for landowners and infrastructure providers takes effect on 1 October. Covering both the main fixed line infrastructure provider, Openreach, as well as the alternative network providers, the framework represents a major step forward towards universal coverage in England and Wales.

## Annex 1: New Wayleave rates

The revised wayleave rates for Openreach and alternative infrastructure providers are as follows. It is stressed that these are advisory rates and are designed to save members time and money in individual negotiations.

### *Wayleave payments from Openreach*

<b>Apparatus</b>	<b>One-off payment</b>	<b>Arable</b>	<b>Pasture</b>	<b>Hedges</b>	<b>Annual</b>
Pole	£157.50	£367.92	£185.38	£168.53	£10.50
Stay	£157.50	£311.85	£190.42	£185.06	£10.50
Strut	£157.50	£311.85	£190.42	£185.06	£10.50
Pole and Strut	£168.00	£521.27	£228.80	£206.59	£11.19
Pole and Stay	£168.00	£521.27	£228.80	£206.59	£11.19
Pole and 2 Stays	£325.50	£833.12	£419.21	£391.65	£21.69
Joint chamber, manhole	£409.50	£803.25	£535.50	-----	£30.92
Cabinet (all sizes including DSLAM)	£787.50	-----	-----	-----	£52.50
Cat 1 cable and duct (per metre)	£6.30				£0.49
Cat 2 cable and duct (per metre)	£4.31				£0.34
Cat 3 cable and duct (per metre)	£2.36				£0.17
Block terminal and bracket	£157.50				£10.50
Small connections boxes, eyebolts and cable on wall	£26.25				£1.58

### *Wayleave payments from alternative infrastructure providers*

	<b>One off payment*</b>	<b>Annual payment</b>
Cable and ducting (per metre)	£3.90	£0.26
Cabinet/joint box	£468.00	£31.20

(the preference for alternative infrastructure providers is for a one-off payment)

## **Annex 3: Alternative Network Providers**

(Title heading of Broadband Infrastructure Provider)

**WRITTEN AGREEMENT**  
**TO ALLOW ACCESS TO INSTALL AND MAINTAIN**  
**ELECTRONIC COMMUNICATIONS APPARATUS**

### **Network Access Agreement**

- This is a written agreement made under the Electronic Communications Code (set out in Schedule 3A to the Communications Act 2003).
- The purpose of the agreement is for You to allow Us to place electronic communications apparatus on or under your property as part of Our communications network. Once installed, the apparatus will be kept there until We agree to its removal or You obtain an order from the Court, although We will do Our best to move it if You obtain planning consent that requires this or you have permitted development rights.
- This agreement has been approved by the CLA and the NFU together with the payment rates set out in this agreement.
- We recommend You keep this agreement with Your title deeds.



**SECTION 1: DETAILS OF AGREEMENT**

Commencement Date	
Property:	
Your details (‘Property Owner’ ‘You’ ‘Your’)	
Our details <i>[‘name of broadband provider’]</i> , ‘We’ ‘Us’ ‘Our’	
Payment	<p>£3.90 per metre subject to a minimum payment of £100  Length of installation: xxx metres  [Joint/Cabinet: £468.00 each]:  The total single payment is: £</p> <p><b>This is a one-off payment</b></p>

This agreement consists of three sections: (1) these details; (2) the terms and conditions; and (3) the plan(s) showing the property and the works. Annex 1 also sets out those dates where access to the property is prohibited, as stated under 3.4 below.

**You confirm** that You are the freehold owner of the Property or You occupy the Property under a lease which has a term of one year or more. You understand that Your signature means that others are bound by this agreement under the terms of the Code (which will include a purchaser of the Property).

**We confirm** that *[name of broadband provider]* is an Operator with powers granted by Ofcom under the Code (this includes Our agents, servants, employees, contractors and sub-contractors and anyone who takes over Our assets or business).

**By signing below, both parties accept the terms of this agreement:**

.....	For and on behalf of <i>[name of broadband provider]</i>
..... Name	
..... Position	Date



.....	For and on behalf of the Property Owner
..... Name	Date

## SECTION 2 – TERMS AND CONDITIONS

### 1. Definitions used in this agreement:

- 1.1 In addition to the terms defined in Section 1 above, the following definitions apply in this agreement:
  - 1.1.1 'Apparatus' has the same meaning as 'electronic communications apparatus' in the Code and includes fibre optic cables and any conduits, pipes, ducts, terminals or transmission equipment and any associated or ancillary apparatus
  - 1.1.2 'Works' includes civil and cable work necessary to exercise any or all of the rights granted in this agreement.

### 2. *[Name of broadband provider] Rights*

- 2.1 You agree that We have the right to:
  - 2.1.1 execute Works at the Property in connection with the exercise of any of Our rights;
  - 2.1.2 install Our Apparatus on, under, or over Your property as detailed in the plan and the description;
  - 2.1.3 inspect Our Apparatus;
  - 2.1.4 repair and maintain Our Apparatus;
  - 2.1.5 upgrade Our Apparatus;
  - 2.1.6 remove Our Apparatus;
  - 2.1.7 add further cables in existing duct; and,
  - 2.1.8 enter the Property to exercise any of the above rights, save the dates set out in Annex 1 under clause 3.4 below

### 3. *[name of broadband provider] Responsibilities*

- 3.1 We agree to:
  - 3.1.1 pay the Payment to You before installing any Apparatus. If We make a change to some or all of the apparatus to which this agreement applies We will write to you. If this means a further payment is due to You as a result of either an extension of cable or the addition of a cabinet or joint box or both, We will make that payment;
  - 3.1.2 give as much written notice as reasonably possible (which shall be not less than 7 days notice) of Our intention to enter the Property to exercise Our rights under this agreement (except in an emergency where we will endeavour to contact You before coming onto your Property);



- 3.1.3 carry out Works in a good and workmanlike manner and taking all reasonable precautions to avoid obstruction to or interference with the use of the Property;
- 3.1.4 install Our apparatus so as not to interfere with any normal foreseeable agricultural use of Your property as at the date of installation;
- 3.1.5 maintain the apparatus in good repair;
- 3.1.6 where We break open the ground on Your Property, as far as is reasonably practicable, reinstate it to its former condition;
- 3.1.7 We will lay underground cables as prescribed by the National Joint Utilities Group guidelines<sup>2</sup> or greater depending on and taking into account the state and nature of the land. We will agree with You the most appropriate depth up to 900mm depending on the agricultural, or other, use of the land;
- 3.2 If We need to bring vehicles or heavy machinery onto your property or We see or think there may be livestock in the field, We must ask You before taking entry unless it is an emergency.
- 3.3 We will agree with You and use only defined access routes across Your Property.
- 3.4 Save in the case of an emergency and provided that you have given Us not less than 14 working days prior written notice of such dates, We shall not be permitted to access the site according to the dates listed at the end of this agreement where You wish to restrict non-emergency access for genuine operational access. You shall not be able to prevent us from accessing the site for any more than five (5) prohibited dates in any calendar year.

#### 4. Liability and Insurance

- 4.1 We will use reasonable endeavours to minimise physical damage in carrying out the Works and shall make good to Your reasonable satisfaction any damage We cause or compensate You where it is not possible to make good the damage, up to a maximum of £1,000,000 (one million pounds).
- 4.2 We agree to be responsible for any claims made against You up to a maximum limit of £5,000,000, if someone makes a claim against You as a result of our Works provided that:
  - 4.2.1 You did not cause or contribute towards the claim;
  - 4.2.2 You give Us notice of the claim as soon as is practicably possible;
  - 4.2.3 You do not settle any part of any such claim without Our written permission (which shall not be unreasonable withheld or delayed).
- 4.3 *[name of broadband provider]* does not exclude or restrict its liability for death or personal injury caused by its negligence or that of its employees, subcontractors or agents acting in the course of their employment or agency.
- 4.4 We will compensate for any actual loss of Basic Payment (BP) under the Basic Payment Scheme (BPS) or for actual loss or penalty under any agri-environment scheme and/or any payments under any other successor statutory land management scheme or voluntary agri-environment scheme unavoidably incurred as a consequence of Us carrying out Works:
  - 4.4.1 where eligible land is taken out of production and which does not qualify for payment;
  - or

<sup>2</sup> The guidelines can be found in the following link <http://www.njug.org.uk/wp-content/uploads/V1-Positioning-Colour-Coding-Issue-8.pdf>. See also the attached guidance note.

- 4.4.2 where losses arise (including losses arising from a breach of cross compliance or other land management obligations) as a consequence of Us carrying out installation works.
- 4.5 We will undertake to use reasonable endeavours to provide the owner and the occupier with such reasonable information as We have available to enable BPS, agri-environment and such like payments to be obtained.
- 4.6 We will indemnify (compensate) you or the occupier for losses or penalties incurred under any land management scheme as governed by EU Regulation 1305/2013, 1307/2013 and EU Commission Regulations and or any successor scheme as a result of Us exercising Our rights.
- 4.7 In the event of an outbreak of infectious animal or plant disease in the area We and Our contractors will observe any precautions and bio-security measures recommended by Department for the Environment Food and Rural Affairs (DEFRA) or Welsh Government as appropriate or such replacement organisation for the purpose of preventing the spread of the disease and We will comply with Your reasonable day to day guidance and instructions with respect to bio-security conditions.
- 4.8 Before works commence We will ask You to advise Us of any fishing and or other sporting rights that may exist on Your property. We will take all reasonably practicable steps to protect these fishing and other sporting rights from disruption and will pay compensation for any loss or damage to such rights arising out of Our Works undertaken on restricted days agreed under clause 3.4 above.
- 4.9 Except as set out in this Agreement, We do not accept liability for any direct or indirect losses whether based on a claim in contract, tort (including negligence), breach of statutory duty, misrepresentation or otherwise arising out of, or in relation to this Agreement

## 5. Your Responsibilities

- 5.1 You acknowledge that *[name of broadband provider]* owns the Apparatus at all times.
- 5.2 You and anyone You are responsible for must avoid damaging Our apparatus. If You or someone You are responsible for damages our apparatus You will be liable for the reasonable costs of repair up to £1,000,000 (one million pounds save in the case you accidentally damage an underground cable which is laid at a depth of less than the recommended industry standard. However, You will not be liable for any consequential losses unless You maliciously or wilfully damage the Apparatus.
- 5.3 You may not, without Our prior written consent, place, build or plant anything on Your property which denies Us reasonable access to or will interfere with Our Apparatus but this does not apply to pre-existing trees or other vegetation.

## 6. Redevelopment

- 6.1 If You intend to redevelop all or part of the Property and could not reasonably do so unless Our Apparatus is removed, You must provide Us with notice in writing as set out in clause 7 below. If You propose a suitable alternative position for the Apparatus on Your land, We will endeavour, within a reasonable period after receipt of Your notice and proposed new route, to alter the Apparatus to the new

route You have indicated at no cost to You, or to negotiate an alternative route with You.

- 6.2 If the Apparatus is relocated, the provisions of this Agreement will continue to apply to the Property and the Apparatus in the altered location.

## **7. Ending this Agreement**

- 7.1 We may end this Agreement by giving You six months' notice in writing. This Agreement will also end if We permanently remove all Our Apparatus from Your property.
- 7.2 You may end this agreement by giving Us not less than 18 months' prior written notice in accordance with paragraph 31 of the Code if You intend to redevelop all or part of Your property and could not reasonably do so unless the agreement is ended and an alteration under Clause 6.1 above is not possible.
- 7.3 You may end this agreement by giving Us 18 months' written notice under paragraph 31 of the Code if:
- 7.3.1 this Agreement ought to come to an end as a result of substantial breaches by Us of Our obligations under the Agreement; or
  - 7.3.2 We have persistently delayed making payments due to You under the terms of this Agreement; or,
  - 7.3.3 the prejudice caused to you by the continuation of this Agreement is incapable of being adequately compensated by money and the public benefit likely to result from the continuation of the Agreement does not outweigh the prejudice to You.
- 7.4 This Agreement will remain in force until the apparatus is no longer required unless terminated in accordance with the above.

## **8. Notices**

- 8.1 The procedure for sending notices under this Agreement is set out in the Code. We will send notices in writing to Your address shown on page 2 of this agreement. You must send any notice in writing to Our address at page 2.

## **9. General**

- 9.1 If any dispute arises between the parties concerning the interpretation of this Agreement, the parties will resolve that dispute by negotiations for a period of no more than 30 days. If the dispute is urgent or unresolved after 30 days, the dispute will be referred to a single arbitrator where the parties can agree on one, or otherwise to an arbitrator appointed by the President of the Royal Institution of Chartered Surveyors on the application of either party, and in any case the Arbitration Act 1996 or any statutory amendment or re-enactment will apply to the reference.
- 9.2 This Agreement will be governed by the laws of England and Wales and the Parties agree to submit to the exclusive jurisdiction of the English and Welsh Courts.