

**Channel Four Television Corporation**

**Channel 4 response to the Ofcom consultation on the  
Future Licensing of DAB Digital Radio**

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## 1. Executive Summary

1.1 Channel 4 urges Ofcom to proceed with the licensing process swiftly to enable the launch of the second national commercial multiplex, and its underlying services, as soon as possible.

1.2 We believe there are strong public policy grounds for asking the Department for Culture, Media and Sport to extend the licence renewal provisions for multiplex licences for at least another three years. This could be done through a Regulatory Reform Order as it would represent a significant reduction in regulatory burdens.

1.3 We welcome Ofcom's intention to consider the nature of proposed digital additional services in terms of the applicant's proposals for promoting digital take-up.

1.4 The relative ease with which multiplex licensees can vary their programme provisions raises considerable problems of uncertainty for potential applicants for the proposed second commercial national multiplex, particularly if Ofcom intends to judge applications according to their 'distinctiveness'.

1.5 In any event, we do not think it is right for Ofcom to interpret section 3(2)(c) of the Communications Act 2003 as requiring 'distinct' services, nor should it take priority over Ofcom's section 3(1)(b) duty to promote competition or the specific licensing criterion set out in section 47(2)(d). To do so may be *ultra vires*.

1.6 To facilitate the successful roll-out of new digital radio services and the ongoing viability of the DAB platform, Ofcom must ensure that its regulatory regime is attractive to both listeners and business. Channel 4 will offer innovation and challenge. But it must be allowed to do so in an environment which encourages investment in exchange for fair returns.

## 2. Introduction

2.1 Channel 4 is a publicly-owned not-for-profit television broadcaster operating in the UK. It was established in 1982 as a publisher-broadcaster required to commission originated content from the independent production sector. Its main public service channel, Channel 4, is a free-to-air service funded entirely by advertising and sponsorship. It also operates a number of other services, including the digital television channels E4, FilmFour and More4; and an expanding range of online services (at channel4.com), including the broadband service FourDocs.

2.2 Channel 4 is also a majority (51%) shareholder in Oneword Radio, a speech radio service providing serialisations of best-selling books read by the greatest actors, as well as drama, comedy, interviews with authors and reviews of the latest film releases. Oneword is available nationally from 6am to midnight everyday on the Digital One DAB digital radio multiplex, and 24 hours a day on Sky, Freeview, ntl cable and on the internet.

2.3 Channel 4 has announced its intention to bid for the second DAB national commercial radio multiplex and is firmly committed to building a significant presence in radio. Creativity and innovation is at the heart of everything which Channel 4 does, and our ambition is to bring our creative, commercial and public strengths to radio. Our vision as a multi-media organisation is to deliver our public service remit across multiple platforms engaging our viewers and listeners when they want, where they want and how they want.

This is a top priority for Channel 4 and critical to fulfilling our ability to deliver our public service remit in a modern digital world. We believe that Channel 4's entry into radio and support and investment in DAB will benefit listeners, advertisers and the radio industry alike:-

- We are the only commercially funded organisation with public service as its *raison d'être*, and are best-placed to provide public service plurality and competition to the BBC at a time when it now commands 55% of all radio listening in the UK. Ofcom has identified in its Radio Review and Review of Public Service Broadcasting that there needs to be strong competition to the BBC and public service plurality in radio, as much as in television.
- Our brand and strong relationship with our audiences, together with our reputation for creativity and innovation, with our ability to cross-promote and develop cross-editorial synergy, will help drive DAB and stimulate radio listening in the UK.
- Our creative and entrepreneurial skills will provide healthy competition to the BBC, and a shot of new energy to the commercial radio sector.

### 3. Proposed licensing process and criteria

Ofcom asks two questions regarding the proposed licensing process and criteria, both of which cover a number of issues. Taking them in turn:

**Do you agree with the general process by which Ofcom proposes to license new national and local radio multiplexes?**

3.1 Ofcom refers to a number of procedural matters relating to the application and on-going regulatory management of radio multiplex licences. Commenting on those which are relevant to the national multiplex:

#### Application procedure

3.1.1 Channel 4 welcomes Ofcom's intention to advertise the second commercial national multiplex licence as soon as it can. Channel 4 would strongly urge Ofcom to put in place a swift timetable and implement a speedy process so as to enable the launch of the multiplex, and its underlying services, as soon as possible.

3.1.2 We note that advertisements will be free-standing with tailored, rather than generic notes of guidance. However, Channel 4 would welcome early notice of the details of the application form and – importantly – how application proposals will be translated into specific licence conditions.

3.1.3 A three month closing date for applications is ample.

#### Licence renewals

3.1.4 In order to secure bids for the second national commercial DAB multiplex offering real breadth, quality and range of services, Ofcom needs to ensure that the length of the licence itself is sufficient to allow the operators the time to drive DAB, launch its services and derive a fair return. The lack of provision of renewal for the second national commercial DAB multiplex could potentially affect the quality and range of services on offer. We believe we can offer a solution which will be in the best interests of driving the DAB market and consumer choice for radio listening in the UK and would urge Ofcom to press the DCMS for an extension of the "renewal provisions" by at least another three years. This would allow the second national commercial DAB multiplex to benefit from a renewal beyond the original 12 year term, and could also be developed to ensure an equitable framework for all existing national multiplex operators.

3.1.5 The 2003 Communications Act extended the period during which multiplex licences granted in that period could be renewed. The 1996 Broadcasting Act permitted 12 year renewals for licences granted until 8 August 2002. The 2003 Act allows for renewals of 8 years for licences granted in the following four years. The policy grounds for extending the period of eligibility for renewals were to boost the viability of multiplexes which were launching into a new and fragile market. However, no multiplex licences have been granted since Inverness in August 2003, effectively "wasting" three years of the additional dispensation. Although penetration of DAB has increased over the last few years, it has not reached anything like the predicted figures of the early vanguards, or indeed of the Radio Authority. As a result, the operator of the second commercial national multiplex will have a major role in developing the DAB market, as is recognised by the overriding licensing criterion in

section 47(1) of the Broadcasting Act 1996. Given the significant investment which will be required to develop the market, including infrastructure costs, it would be unfair for the second commercial digital multiplex licence not to benefit from an automatic renewal.

3.1.6 Channel 4 believes there are strong public policy grounds, compounded by the hiatus in licensing since 2002, for Ofcom to press DCMS for an extension of the renewal provisions by at least another three years. As such an extension would represent a significant reduction in regulatory burdens, a change to the Communications Act could realistically form part of the Department's simplification plan and be done by way of a Regulatory Reform Order.

#### Variations of radio multiplex licences

3.1.7 The provisions of section 54(6A) of the Broadcasting Act 1996 (as amended) refer to the capacity of programme services *on that national multiplex* to appeal to a variety of tastes and interests; there is no requirement on Ofcom to consider variations in the light of the totality of national digital sound programme services. This provision raises considerable problems of uncertainty for potential applicants for the proposed second national DAB multiplex. There are no regulatory hurdles to prevent Digital One varying the programme services on the existing national DAB multiplex provided the changes do not diminish the range and choice of the current provision. If, as is proposed, Ofcom intends to consider the extent to which the services offered on applications are *distinct* from those currently available, this gives Digital One the ability to:

- (a) ensure that its services cover as broad a range of tastes and interests as possible, catering for all the key demographic audience groups; and
- (b) vary the services in advance of the award of a second multiplex in order to 'snooker' potential competition.

3.1.8 We have already seen evidence suggestive of this strategy with GCap Media's announcement last November that it intends to include Capital Gold as a national digital sound programme service, and that PrimeTime will cease to broadcast from May 2006, with no replacement disclosed.

3.1.9 Digital One has already lost the Club Dance service promised in its application and the 24 hours rolling news service provided initially by ITN, and then Bloomberg. The change of Talk Radio into TalkSport resulted in the loss of another distinct speech service which was not replaced. The cumulative effect is that Digital One will be providing only three of the seven non-simulcast services promised in its licence application (of which one, OneWord, is majority owned by Channel 4).

3.1.10 As is expressed in greater detail below (3.2.11-19), Channel 4 believes that 'distinctiveness' as a criteria for award needs to be treated with caution; many of the weaknesses of the analogue radio sector result from the lack of effective competition within the industry. Ofcom now have the chance to ensure that radio benefits from 'competition for quality', one of the key regulatory principles that Ofcom applies to other regulated sectors. Nonetheless, Ofcom must ensure that Digital One does not abuse its monopoly position in the run-up to the award of a second national multiplex by cynically varying its licence to hamper competition.

### Additional payments and other fees

3.1.11 We urge Ofcom to recommend 0% payments of multiplex revenue at least until such time as DAB listening overtakes analogue as the primary delivery platform. It is vital during the key development phase of DAB to maximise the investment in the underlying services, programming and marketing to build the DAB platform and drive radio listening.

3.1.12 This should also apply to any proposal to introduce administrative incentive pricing (AIP).

<b>What are your views regarding the ways in which Ofcom proposes to interpret the statutory criteria which must be considered when awarding national and local radio multiplex licences?</b>
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3.2 A number of criteria are discussed by Ofcom. As Channel 4 is primarily interested in applying for the national multiplex licence, we will restrict our comments to those which apply. Listing them in turn:

#### Requirement to invite public comment

3.2.1 Ofcom is required to invite comment on applications, and to take any comments received into consideration. This leaves open the potential for applicants to revert to the 'bad old days' and seek to drum up support from 'worthy' individuals, lodging as many letters as possible with the regulator. Channel 4 would appreciate express confirmation from Ofcom that such practices will not increase an applicant's chances of winning a licence.

#### Extent of Proposed Coverage Area

3.2.2 We note Ofcom's intended focus on population, rather than geographic coverage and agree with this approach.

3.2.3 As a prospective applicant for the second national commercial radio multiplex licence, Channel 4 agrees with the Ofcom policy that the holder of the new multiplex should commit to providing coverage to reach at least the same coverage as the existing national commercial multiplex.

#### Timetables for coverage roll-out and commencement of services

3.2.4 Whilst a speedy roll-out reaching a maximum number of potential listeners is optimal for both public policy and commercial reasons, should a trade-off be necessary, Channel 4 suggests that ultimately covering the greatest population is a reasonable public interest objective.

#### Ability to establish and maintain the proposed service

3.2.5 Channel 4 supports Ofcom's view that the services offered on the second national radio multiplex should be of a quality and range to sustain and grow the DAB platform as a whole

### Appeal to a variety of tastes and interests

3.2.6 Channel 4 notes the basis upon which Ofcom intends to assess this licensing criterion, and would refer to our comments under paragraphs 3.2.11-19 below, in particular regarding the proposal to have regard to “distinctiveness” of services compared with those carried by the other national commercial multiplex.

### Promotion of digital take-up

3.2.7 We welcome the range of matters which Ofcom will take into account when assessing an applicant’s plans for promoting digital take-up. We would welcome clarification of how an applicant’s proposals in this area will translate into licence conditions. . We would also welcome clarification of Ofcom’s statement that it will take account of “any evidence that [proposals] may prove fruitful.”

3.2.8 We are pleased with Ofcom’s intention to consider the nature of proposed digital additional services under this head, as they will undoubtedly affect the overall attractiveness of the DAB package, and hence the up-take of receivers

3.2.9 Section 54((3) of the Broadcasting Act 1996 (as amended) gives power to the Secretary of State to amend the percentage of the capacity on digital radio multiplexes which can be used for digital additional services. The percentage is currently 20% - but Channel 4 would support changing this figure to at least 30%, with potentially the regulations being set to guarantee a minimum number of sound programme services to be broadcast, with the remaining allocation to be used for digital additional services at the discretion of the multiplex operator (this would ensure that the multiplex remains as flexible as possible to cater for changing consumer demands as technology improves and media habits evolve over the coming years). We believe that a compelling mix of both sound programme services (with their programme-related material) and additional services will be the driver for growth in DAB. The ratio between radio sound and additional services should be kept under review as compression technology improves.

### Fair and effective competition

3.2.10 As an intended applicant, Channel 4 will follow fair and transparent processes in its dealings with all potential service providers. It is not, however, clear from the consultation document the extent to which Ofcom will undertake investigations under this heading in the absence of a complaint, nor what standard documentation Ofcom will require as part of the application procedure.

### Other statutory duties

3.2.11 Channel 4 is committed to diversity, choice, innovation and risk in all of its programming, and this will be extended to its intended programme line-up for the second national radio multiplex. We would not seek to replicate the format selection on the current commercial national multiplex, as this would not meet our public service nor our commercial objectives.

3.2.12 However, we do not believe it is right of Ofcom to seek to assess applications on the basis of the ‘distinctiveness’ of its programme services as compared to those on the existing commercial national multiplex (nor as compared to other services, on any platform). While Ofcom is instructed by section 3(2)(c) of the Communications

Act 2003 to secure “the availability throughout the UK of a wide range of ... radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests”, it also has an overriding duty set out in section 3(1)(b) to “further the interests of consumers...where appropriate by promoting competition”.

3.2.13 The UK commercial radio industry can be categorised as one which, as a result of the regulatory policy applied by the Radio Authority, is fairly uncompetitive. Many stations (the so-called “heritage stations”) avoided any local competition for some years, and even now in major markets such as London and Birmingham, there is virtually no competition for formats. Arguably, this has led to an industry which has rested on its laurels, and not sought to innovate to attract new audiences.

3.2.14 Ofcom now has the opportunity to introduce real competition into the provision of national services, and thus to provide competition for quality. As stated above, Channel 4 is committed to the introduction of innovation into the radio market, but, there will undoubtedly be competition for listeners. This is healthy, and we believe should be actively encouraged by the regulator. However, worryingly, the consultation document seems to suggest that Ofcom supports the maintenance of monopolies for national formats. The document states that Ofcom “would not *necessarily* preclude consideration of programme services which may compete for audience or revenue with those on the existing national multiplex.” (emphasis added). By definition, all new commercial services will compete for national revenue, and given the breadth of audience appeal of the current Digital One line-up, it is inevitable that services will compete for audiences.

3.2.15 The suggestion that quasi-national digital services (or any other nationally-available services) should be brought into direct comparison is misguided for a number of reasons. Not only would this be extending Ofcom’s powers in a way which would be *ultra vires* (see 3.2.17 below), it also goes against precedent. As noted in 3.1.8 above, GCap will be seeking to add Capital Gold to the Digital One multiplex, despite it being broadcast on a quasi-national basis on local multiplexes.

3.2.16 There is, in any event, a clear distinction between most ‘networked’ services and a truly national one. The formats of the majority of quasi-national services include a requirement for some local material; at least once a certain level of digital penetration has been achieved. Regulation based on ‘distinctiveness’ from such a large potential group of services would be disastrous on grounds of uncertainty, given the relative ease with which multiplex (and other) operators can vary their programme services.

3.2.17 Channel 4 is concerned that Ofcom is proposing to apply section 3(2)(c) in such a way as to change the meaning of the specific licensing criterion for the national radio multiplex set out in section 47(2)(d). Section 47 refers specifically to a consideration of the capacity of the digital sound programme services proposed to be included *in the service* to appeal to a variety of tastes and interests (italics added). The rules of statutory interpretation provide that general duties and objectives are modified in the light of specific statutory provisions. In this case, the Communications Act instructs Ofcom to consider the likely range and breadth of appeal of the multiplex’s programme services looked at as an internal package, without reference to other available services. This is in sharp contrast to the licensing process for local radio multiplexes, where Ofcom is instructed to compare the package with the other DAB local services which are already on offer.

3.2.18 To extend the section 47(2)(d) licensing criterion as proposed may be *ultra vires* and is certainly contrary to the rules of statutory construction.

3.2.19 We understand and accept Ofcom's desire to ensure that the second national commercial multiplex does not merely replicate the types of services already offered nationally. . However, a consideration of Ofcom's responsibilities under section 3(2)(c) requires no more than a broad brush assessment of the extent to which an applicant's proposals *as a whole* enhance the overall mix of national commercial services; there is no obligation on Ofcom to ensure that a maximum number of tastes and interests are catered for. Any other reading of section 3(2)(c) goes beyond the natural meaning of the words and assumes an interpretation not intended by Parliament.

3.2.20 To facilitate the successful roll-out of new digital radio services and the on-going viability of the DAB platform, Ofcom must ensure that its regulatory regime is attractive to both listeners and business. Channel 4 will offer innovation and challenge. But it must be allowed to do so in an environment which encourages investment in exchange for fair returns.

#### **4. The proposed areas and licensing timetable**

4.1 Ofcom proposes licensing ten local multiplex licences in areas identified by them as most likely to expand the potential listening to local DAB, being areas of greater population not currently served by dedicated local DAB multiplexes.

**Do you agree that the proposed ten local multiplex areas to be licensed first are the right priority areas?**

4.2 Channel 4 supports Ofcom's proposals to deliver the maximum benefit from DAB radio to the largest number of people as soon as possible.

**What are your views on the potential viability of the smaller areas on the proposed licensing timetable?**

4.3 Channel 4 has no specific views on the potential viability of the smaller areas on the proposed licensing timetable.

**What are your views on the potential viability and the level of demand for the proposed second (or third) local multiplexes in existing licensed areas? Would you prefer any such licences to be advertised before, at the same time as, or after the local multiplex licences in areas which currently do not have such a licence?**

4.4 We note Ofcom proposes to prioritise licensing of local multiplexes to fill in areas where no local digital provision currently exists. Only then does it propose to consider adding a second (or third) tier of local and regional multiplexes for areas already covered.

4.5 Channel 4 welcomes this approach. While we generally believe that healthy competition will benefit listeners and add to the growth of DAB, we believe that the public interest would best be served by first extending local DAB services across the country. Ofcom's licensing strategy should enable as many existing analogue services as wish to migrate to be able to do so.

4.6 An orderly process of licensing, with a measured growth in services will better ensure a steady but growing support from advertising revenue. Advertising revenues for DAB radio services are currently very low; no DAB service is self-funding. As a result, investment in programming for digital-only radio services has been kept to a minimum which neither serves the interests of listeners nor, ultimately, DAB radio. Digital simulcasting for existing analogue services remains an expensive overhead, bringing no revenue returns.

4.7 We believe the biggest driver for increased take-up of DAB radio will be the launch of the second commercial radio multiplex. In anticipation of the likely surge in audiences, we would urge Ofcom to speed up the advertising of local, and then additional tiers of local/regional licences in order to help facilitate a concerted effort to drive DAB take-up across the UK.

## **5. Looking further ahead**

5.1 Channel 4 looks forward to contributing to Ofcom's consultations on the future direction of the UK radio industry. Channel 4's team consists of individuals with significant and senior radio experience, all of whom are keen to share their expertise for the benefit of the overall health and growth of the sector.