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Dear Peter,

**Orange response to Ofcom consultation: Radio - Licensing Policy  
for VHF Band III, Sub-band 3**

Orange welcomes the opportunity to comment on the proposals set out in Ofcom's consultation. Ofcom proposes to award three local and one national DAB radio multiplexes. It is Ofcom's intention to award the multiplexes under the Broadcasting Act 1996 process to help ensure that Ofcom's policy objectives are achieved.

As is stated in the consultation document Ofcom considers that there are compelling public policy grounds that mean that these spectrum licences should not be awarded by auction in a technology and service neutral way in accordance with Ofcom's strategic spectrum framework. The public policy grounds are the need to secure a wide range of radio services throughout the UK that taken as a whole are both of a high quality and appeal to a wide variety of tastes and interests.

On the evidence provided in the consultation, Orange broadly agrees that Ofcom's proposals are consistent with paragraph (a) of Section 3(1) of the Communications Act 2003 – to further the interests of citizens in relation to communications matters. However we believe that there is one aspect of the proposals that requires adjustment to ensure that it does not place Ofcom in breach of its twin duty under paragraph (b) of Section 3(1) of the 2003 Act to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Orange strongly believes that regulatory interventions to promote public policy objectives must be carefully designed and implemented to minimise the risk of competitive distortion in relevant markets. As is clearly evident from the consultation, Ofcom's sole intention is to promote the availability of digital radio services. There is always a risk that well intentioned regulatory intervention to promote public policy objectives can create unintentional distortions in other markets.

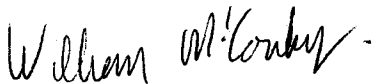
Section 54(1) paragraph (h) of the Broadcasting Act 1996, as amended by The Broadcasting (Percentage of Digital Capacity for Radio Multiplex Licence) Order 1998, requires that *"at least 80 per cent. of digital capacity ... to which the licence relates is available for the broadcasting of digital sound programme services, simulcast radio services, programme related services or relevant technical services."* Consequently 20% of the proposed additional capacity could be used for non radio data services.

It is our understanding that under the Broadcasting Act this spectrum will be awarded by way of comparative selection and licence fees will be in the form of an annual charge based on proportion of turnover. This process allows Ofcom to ensure that the award will be consistent with its public policy objectives and also means that the winners of the award will be subject to a more favourable investment risk profile and business cost model relative to organisations that have or will acquire spectrum under the strategic spectrum framework through competitive auction. In a competitive auction successful bidders will be those who offer to pay the most for the spectrum by way of an upfront fee based on their evaluation of the profitability of future services. Orange believes that as currently drafted the percentage of digital capacity rule creates an unacceptable risk of competitive distortion if the winners of the multiplexes are allowed to compete in other markets on what would essentially be an uneven playing field.

Given that the intention of the proposed multiplex awards are to promote digital radio services Orange strongly believes that the spectrum must be used solely for that purpose and this must be made clear in the interpretation and application of the percentage of digital capacity rule. It is also clear that the change to Section 54 (1) (h) in 1996 was made to promote and support digital audio broadcast. This is particularly in relation to support sufficient advertising to assist in the establishment of sustainable commercial digital radio services. To this extent we refer Ofcom to the House of Commons Standing Committee debate where the intention of Parliament envisages text based services to support commercial radio services.

We believe that current and future usage of 20% of DAB capacity must ensure that a fair and competitive playing field is allowed to develop for all potential providers of new services. There is a risk that some current usage of the 20% creates a risk of competitive distortion and looking forward we request that Ofcom ensures that competition is fair. This should not preclude the development of innovative services that provide visual content as a value added aspect of a broadcast radio service e.g. the provision of synchronised visual material to augment the listeners quality of experience such as scorecards linked to a sports radio broadcast or visual images of major new items linked to a news radio broadcast.

Yours sincerely,



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Director of Regulatory Strategy and UK Public Policy

Cc: Philip Rutnam, Ofcom