



**UNITED FOR LOCAL TELEVISION (“ULTV”)
& COMMUNITY MEDIA ASSOCIATION (“CMA”)
WITH A FOREWORD BY AUSTIN MITCHELL MP**

**JOINT ULTV AND CMA RESPONSE TO OFFICE OF COMMUNICATIONS
 (“OFCOM”) CONSULTATION “*OFCOM DRAFT ANNUAL PLAN 2010/11*”**

FOREWORD BY AUSTIN MITCHELL MP

CHAIR, ALL-PARTY PARLIAMENTARY MEDIA GROUP

For many years, members of United for Local Television (“ULTV”) and the Community Media Association (“CMA”) have been at the forefront of the campaign to introduce local and community TV to the UK. The campaign has attracted enthusiastic support from many mainstream MPs across the political spectrum (195 MPs have openly signed early day motions on local TV in the past two years).

Ofcom has now set out its priorities for the coming year. Ofcom’s Chief Executive, Ed Richards, has generously described community radio as “*one of the best things that the Government enabled.*” I know many MPs are grateful to Ofcom for its tremendous work in implementing community radio licensing. Many of us firmly believe that community TV could provide an equally exciting new dimension to UK television. I would argue that it is misguided, in the second decade of the 21st century, for anyone to seek to suggest that local communities are capable of operating their own radio stations but not television channels.

I envisage a future in which community TV channels on Freeview provide opportunities for community organisations to produce and broadcast their own programmes alongside local information, ‘question time’ discussions, sport, history, arts, culture, religion, ethnic and other engaging programming produced by and for the community. I see community TV making a significant contribution to public service purposes with reach and impact (as well as viability) maximised through long-term secure access to Freeview as its primary distribution platform.

I believe I speak for many MPs who look to Ofcom to implement an effective licensing regime for local and community TV on Freeview. Ofcom has said its current intention is to auction much of the spectrum most suitable for community TV to the highest cash bidder and to gift the remainder to a band manager. I know there is considerable concern this policy could lead to dominant local spectrum gatekeepers holding market power. Interested MPs look to Ofcom to fully address these concerns.

I welcome the proposal from ULTV and the CMA for suitable interleaved spectrum to be reserved (wherever reasonably practical) for Community Multiplexes. Under this proposal, a Community Multiplex would deliver a mix of services (including at least one service carrying local content) in the public interest and designed to broaden choice for local viewers.

The ULTV/CMA proposal for Community Multiplexes is intended to complement the proposal for “Channel 6” on Freeview to be reserved as a local TV channel. The ULTV/CMA proposals are designed to help meet the concerns of many MPs and many others who have called for a small amount of spectrum to be protected for local communities and new broadcasters meeting public service purposes. This is also in line with resolutions on community media of the European Parliament and Council of Ministers (of which the UK is a signatory).

Much of the democratic world makes provision for local and community TV. Ofcom has given some welcome indication it may be open to reviewing its policy approach. I hope that Ofcom will want to give priority to considering the options to protect spectrum for local and community TV including options for trials and experiments in the short-term.

In addition, I am sure that Ofcom will want to maintain a dialogue with MPs on other areas of its planned work relating to the broadcast sector in the coming year. Some of these issues include:

- Ofcom's proposals for a flat-rate 'poll tax' on Video On Demand (broadband TV) service providers which are of particular concern to some smaller groups;
- further building on the success of local and community radio;
- reviewing the direct and indirect costs and benefits of existing regulation and proposed changes (Ofcom's reviews of product placement and the ITV networking arrangements are likely to be of particular interest to many MPs);
- options to continue to build on Freeview's success as a distribution platform for a wide range of quality SD (and now HD) programming in the long-term; and
- supporting the government's programme to promote media literacy and digital inclusion.

Ofcom will be aware of the challenges facing the Parliamentary and government timetable in 2010 and 2011, not least the forthcoming general election. This may sometimes make it difficult for MPs (individually or collectively) to input into Ofcom consultations on major policy issues to the extent they would wish.

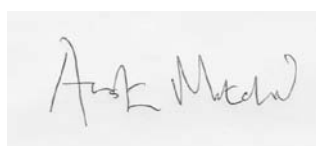
I believe it is vital that Ofcom continues to engage constructively with industry groups such as the CMA and ULTV as it develops its policies. These are groups which have made a considerable effort to develop their own proposals in discussion with interested MPs and to build a coalition for these policies with other industry groups.

It is, of course, important that Ofcom reaches its own judgements in line with its statutory duties. However, Ofcom will understand the good reasons why many MPs are keen to understand its intentions on local and community TV so that they can (with government and others) review the policy options.

I see local and community media as an important tool to enhance democratic participation and citizen engagement. I am convinced that, in a modern democracy, there should be a dedicated terrestrial TV network, available to all citizens, focused on local events, people and issues and providing a more level playing field for local advertisers who are often unable to secure access to terrestrial TV on cost-effective terms.

It is clear that many MPs wish to see a decision made by Ofcom, working constructively with industry, government and others, to put in place an effective licensing regime for local and community TV. Indeed, I regard this as part of the core purposes for Ofcom envisaged by Parliament at the time of implementing the Communications Act 2003.

I look forward to studying Ofcom's response to the issues raised in this and other relevant consultations. Ofcom's research strongly suggests citizens do not wish to see spectrum suitable for local TV auctioned to the highest bidder with no public service conditions attached. With Ofcom's support, UK citizens could soon look forward to new services on Freeview focused on their communities and meeting local tastes and interests – making a powerful contribution to citizen participation and community development in the coming decade.



Austin Mitchell MP
February 2010

ULTV/CMA CONSULTATION RESPONSE

OFCOM DRAFT ANNUAL PLAN 2010/11

Opening statement

1. ULTV/CMA calls upon Ofcom to prioritise actions to support and develop the local and community media sector in 2010/2011.
2. In particular, ULTV/CMA proposes that Ofcom fully consult on the enabling policy options to develop local and community TV throughout the UK and to ensure that dominant spectrum holders are not free to exploit a 'gatekeeper' status in the supply of spectrum in local markets following the completion of digital TV switchover ("DSO").
3. ULTV/CMA welcomes the opportunity to respond to this consultation and to set out a number of other concerns in relation to Ofcom's current policies or proposals to, inter alia:
 - auction some spectrum in the so-called 'white spaces' and appoint a band manager with control of the remainder without regulations in place to protect local and community TV users; and
 - approve a flat-rate 'poll tax' for VOD service providers regardless of size or turnover.
4. ULTV/CMA understands it is within Ofcom's power to reserve spectrum for local and community TV. In this submission, ULTV/CMA outline proposals for Ofcom to licence new **Community Multiplexes** – digital terrestrial television ("DTT" or "Freeview") multiplexes carrying a range of TV, radio and/or text services designed to meet the tastes and interests of viewers within a defined locality.¹ Under this proposal, Community Multiplexes would operate on a not-for-profit basis in 'white space' spectrum specially planned and reserved by Ofcom.
5. Ofcom will be aware that 2010 is the European Year of Social Inclusion. ULTV/CMA looks to Ofcom to implement the spirit of the resolutions on community media approved by the European Parliament (September 2008) and Council of Ministers (February 2009) which recognise that community radio and TV are "*an effective means of strengthening cultural and linguistic diversity, social inclusion and local identity, as well as media pluralism.*"

Introduction

6. Both ULTV and the CMA recognise the contribution which community media can make to social inclusion, neighbourhood renewal, citizens' participation, local democracy and lifelong learning.
7. ULTV/CMA is grateful for the opportunity to respond to Ofcom's consultation on its proposed Annual Plan for 2010/11 ("Annual Plan").²
8. In evidence to the House of Commons Culture, Media and Sport Committee on 24 November 2009, Ofcom Chief Executive, Ed Richards, described community radio as:

¹ The Freeview brand is owned by DTV Services Limited but is used in this submission to refer to all current and future DTT in the UK

² <http://www.ofcom.org.uk/consult/condocs/draftannplan1011/draftannplan1011.pdf>

“...one of the best things that the Government enabled...and that we have done over the last few years. It has been far more successful than anybody anticipated and the demand for more of it is definitely out there, there is no doubt about it.”³

9. ULTV/CMA notes the important role played by Ofcom in the development of community radio. ULTV/CMA regards community TV as the next step in building a thriving community media sector in the UK. ULTV/CMA anticipates that, in about five years from now, Ofcom senior management will be describing community TV as one of the greatest media success stories of the decade. However, ULTV/CMA believes it is necessary to ‘bust’ the myth, sometimes expressed, that communities are able to run their own radio stations but not TV channels.
10. With some notable exceptions, community TV has generally failed to take hold in the UK. Many campaigners argue this is the result of suitable spectrum not being made available (limited analogue spectrum was identified by the Independent Television Commission but generally resulted in very poor or no reception by typical viewers). ULTV/CMA believes it is important for Ofcom to learn from past mistakes and to ensure that access to ‘good’ spectrum is reserved for community TV in the run up to the completion of DSO.
11. Given that Ofcom recognises the value and importance of community media, ULTV/CMA is disappointed that it is not given a significantly higher profile in its Annual Plan.
12. The purpose of this submission is to encourage Ofcom to prioritise the development of community media in all forms throughout 2010/11. In particular, ULTV/CMA wishes to see Ofcom now take decisive action to ensure that the government’s desire “to see *local TV thrive*” is fully realised.⁴ This submission includes some detailed proposals with this objective.

What is community TV?

13. ULTV/CMA generally uses the terms ‘community TV’ and ‘local TV’ interchangeably within this submission. This is deliberate even though, elsewhere, the two terms might be used in different contexts.
14. ULTV/CMA argues that a good ‘local TV’ service, regardless of who owns it, should demonstrate a strong commitment to training, provide meaningful opportunities for the community served to participate in programme-making and to make airtime available to a wide range of organisations (including community groups and independent producers) to air their own programming of local interest.
15. ULTV/CMA expects local TV channels to provide compelling programming covering, by way of example, local news and current affairs, history, the environment, religion, sport, arts, social issues, ethnic programming, non-English language programmes and children’s/youth programming. ULTV/CMA expects different organisations (private, public and third sector) to often partner in the provision of local TV services.

³ Quoted from uncorrected transcript of oral evidence:

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcmcomeds/uc43-i/uc4302.htm>

⁴ Department for Culture, Media and Sport/Department for Business, Innovation and Skills (June 2009), *Digital Britain Final Report*, Crown Copyright: London

16. Examples of local and community TV in the UK today range from NvTv (cross-community service for Belfast), MATV (targeting South Asians in Leicester), York TV (set up in association with CSV Community Service Volunteers) and Channel 7 (a cable channel supported by The Grimsby Institute of Further and Higher Education).
17. There is no point denying that the phrase 'community TV' can sometimes conjure up images of 'home made TV' as featured in the film *Waynes World* (not surprisingly Mike Myers' early career included local TV). ULTV/CMA finds the suggestion that 'community TV' means 'low quality TV' extremely insulting and a denial of the talent and ability that exists outside of an often London-centric TV industry. ULTV/CMA believes that developments in technology and the widespread take-up of video editing have made the production of high quality TV affordable and achievable within local communities.
18. The notion that communities are not capable of producing high quality TV is, in the view of ULTV/CMA, a gross misjudgement. The business models will differ from area-to-area but, ULTV/CMA argues, the demand for compelling local content (and the desire by communities themselves to produce this content) should not be summarily dismissed. Policy makers have a responsibility to fully assess and review the policy options to help ensure community TV achieves its full potential in the coming decade.

Parliamentary support for local TV

19. Following DSO, there is expected to be some 'spare' geographic interleaved ("GI" or "interleaved") spectrum suitable for local TV in many parts of the UK – also sometimes described as 'white spaces'.⁵ In some ways GI frequencies are similar to the 'spare' VHF-FM frequencies used for community radio. GI spectrum uses frequencies that have been allocated to deliver the six existing Freeview multiplexes across the UK but which can be re-used to deliver further DTT services in certain locations.
20. At present, the majority of 'spare' GI frequencies either sit idle or are used for low-powered radio microphones and broadcast links. ULTV/CMA expects many groups to wish to use GI spectrum to deliver new local Freeview services for their own communities. Some GI frequencies are much more suitable for new DTT multiplexes than others – it is important to identify frequencies which do not interfere with other Freeview services (and are free of incoming interference), which can be used at a medium-to-high power levels and which are 'in group' with the frequencies local rooftop TV aerials are also designed to receive.
21. It is apparent that support for protecting spectrum for local TV exists amongst many MPs at Westminster across the political spectrum. In the 2007/2008 Parliamentary session, Ian Stewart MP from the All-Party Parliamentary Community Media Group sponsored early day motion 1013 ("Local Public Service Television") which attracted 156 open signatures from MPs. In the subsequent Parliamentary session, Austin Mitchell, chair of the All-Party Parliamentary Media Group, sponsored early day motion 1815 ("Local Television") which attracted 102 signatures in a shorter timeframe. Listed below are the 195 MPs who openly signed at least one of these two recent EDMs.

MPs who openly signed EDM 1013 and/or EDM 1815

⁵ This is because UHF (ultra high frequency) spectrum is used on an interleaved basis by the main Freeview multiplexes and the same frequencies can be re-used in some locations for further Freeview multiplexes or other services.

1	Abbott, Diane
2	Ainger, Nick
3	Ainsworth, Peter
4	Anderson, Janet
5	Atkinson, Peter
6	Baker, Norman
7	Barron, Kevin
8	Battle, John
9	Begg, Anne
10	Berry, Roger
11	Betts, Clive
12	Blackman-Woods, Roberta
13	Blunkett, David
14	Borrow, David S
15	Bottomley, Peter
16	Brady, Graham
17	Brake, Tom
18	Breed, Colin
19	Brooke, Annette
20	Brown, Lyn
21	Brown, Russell
22	Browne, Jeremy
23	Bruce, Malcolm
24	Burt, Lorely
25	Cable, Vincent
26	Cairns, David
27	Campbell, Gregory
28	Campbell, Ronnie
29	Carmichael, Alistair
30	Caton, Martin
31	Cawsey, Ian
32	Clark, Katy
33	Clelland, David
34	Cohen, Harry
35	Connarty, Michael
36	Cook, Frank
37	Corbyn, Jeremy
38	Crausby, David
39	Cruddas, Jon
40	Cryer, Ann
41	Davidson, Ian
42	Davies, Dai
43	Dean, Janet
44	Devine, Jim
45	Dismore, Andrew
46	Dobbin, Jim
47	Dobson, Frank
48	Dodds, Nigel
49	Donaldson, Jeffrey
50	Doran, Frank
51	Drew, David
52	Durkan, Mark
53	Efford, Clive
54	Ennis, Jeff
55	Etherington, Bill
56	Evans, Nigel
57	Farron, Timothy
58	Field, Mark
59	Fisher, Mark
60	Foster, Don
61	Foster, Michael Jabez
62	Francis, Hywel
63	Galloway, George
64	Gerrard, Neil
65	Gibson, Ian
66	Gidley, Sandra
67	Gilroy, Linda
68	Godsiff, Roger
69	Goldsworthy, Julia

70	Gray, James
71	Grogan, John
72	Gummer, John
73	Hall, Patrick
74	Hamilton, David
75	Hamilton, Fabian
76	Hancock, Mike
77	Harris, Evan
78	Harvey, Nick
79	Havard, Dai
80	Hemming, John
81	Hepburn, Stephen
82	Heppell, John
83	Hermon, Lady
84	Heyes, David
85	Hodgson, Sharon
86	Holloway, Adam
87	Holmes, Paul
88	Hood, Jim
89	Hopkins, Kelvin
90	Hosie, Stewart
91	Howarth, David
92	Hoyle, Lindsay
93	Hughes, Simon
94	Huhne, Chris
95	Humble, Joan
96	Hunter, Mark
97	Iddon, Brian
98	Illsley, Eric
99	Jackson, Glenda
100	Jenkins, Brian
101	Jones, Lynne
102	Keeble, Sally
103	Keetch, Paul
104	Kennedy, Charles
105	Kramer, Susan
106	Lamb, Norman
107	Laxton, Bob
108	Lazarowicz, Mark
109	Leech, John
110	Lepper, David
111	Lloyd, Tony
112	Llwyd, Elfyn
113	Love, Andrew
114	MacShane, Denis
115	Mahmood, Khalid
116	Mann, John
117	Marsden, Gordon
118	Marshall-Andrews, Robert
119	Martlew, Eric
120	Mason, John
121	McCafferty, Chris
122	McCrea, Dr William
123	McDonnell, Alasdair
124	McDonnell, John
125	McGrady, Eddie
126	McIsaac, Shona
127	Meacher, Michael
128	Meale, Alan
129	Michael, Alun
130	Miller, Andrew
131	Mitchell, Austin
132	Moffat, Anne
133	Moore, Michael
134	Morgan, Julie
135	Mudie, George
136	Mulholland, Greg
137	Mullin, Chris
138	Mundell, David

139	Naysmith, Doug
140	Oaten, Mark
141	O'Hara, Edward
142	Oler, Bill
143	Opik, Lembit
144	Osborne, Sandra
145	Owen, Albert
146	Prentice, Gordon
147	Prosser, Gwyn
148	Pugh, John
149	Purchase, Ken
150	Reed, Andy
151	Reid, Alan
152	Rennie, Willie
153	Riordan, Linda
154	Robertson, John
155	Robinson, Peter
156	Rogerson, Daniel
157	Rooney, Terry
158	Roy, Lindsay
159	Russell, Bob
160	Salter, Martin
161	Sanders, Adrian
162	Sarwar, Mohammad
163	Scott, Lee
164	Short, Clare
165	Simpson, Alan
166	Simpson, David
167	Smith, Geraldine
168	Smith, John P
169	Smith, Robert
170	Spink, Bob
171	Stewart, Ian
172	Strang, Gavin
173	Stringer, Graham
174	Swinson, Jo
175	Taylor, Dari
176	Taylor, David
177	Taylor, Matthew
178	Thurso, John
179	Todd, Mark
180	Truswell, Paul
181	Turner, Desmond
182	Vis, Rudi
183	Walley, Joan
184	Walter, Robert
185	Webb, Steve
186	Widdecombe, Ann
187	Williams, Betty
188	Williams, Mark
189	Williams, Roger
190	Williams, Stephen
191	Willis, Phil
192	Willott, Jenny
193	Wood, Mike
194	Wright, Anthony D
195	Younger-Ross, Richard

22. ULTV/CMA is concerned that Ofcom does not underestimate the widespread desire within Parliament for community TV to take hold across the UK. To date, ULTV/CMA has accepted statements made by Ofcom personnel that they are willing to examine and discuss the policy options for interleaved spectrum further. ULTV/CMA awaits this dialogue and will decide what further action is appropriate, with Parliamentary colleagues, in light of the outcome of these discussions.

Could broadband replace Freeview?

23. In the past, it was sometimes argued spectrum may not be required for community TV because cable TV would provide an effective substitute. Today, some people point to broadband as the new technology 'just around the corner' which will make terrestrial distribution unnecessary.
24. There are good reasons to suggest broadband delivery will play an important role in complementing existing TV platforms in the coming decade. However, it could be argued that if policy makers truly regarded broadband as an effective substitute to spectrum they would not be reserving 70 per cent of the UHF frequencies previously used by analogue TV to roll-out Freeview. Similarly, if the internet were viewed by the market as a more suitable distribution platform than Freeview then the cost of Freeview multiplex capacity would be sharply depreciating.
25. The fundamental question for Ofcom is what platform is most likely to enable community programme-makers to reach the largest audience, maximising the reach and impact for their programmes and, therefore, the viability of their services?
26. Enders Analysis recently forecast that by 2020, the share of video on demand ("VOD") viewing via TV sets or on computers will only grow to between 5 and 10 per cent of all viewing *"and more likely towards the lower end"*.⁶
27. Ofcom's second statutory review of public service broadcasting suggested that the ability of free-to-air ("FTA") broadcasters to invest in original UK production depends on their audience share and related advertising income.⁷ Fluctuations in audience share can have a material impact on revenue.
28. In a local market, it might be expected that advertisers may not purchase airtime on the basis of traditional minute-by-minute data but, rather, a perception that their advertising will be 'easy to find' and reach a substantial audience by being readily available when a typical viewer switches on their TV sets (including kitchen / bedroom sets).
29. Freeview is rapidly becoming a near-universal TV platform. According to Ofcom, **over two-thirds** (71.2 per cent) of all UK homes now have a Freeview device connected to at least one TV set. The penetration in areas with Freeview coverage might be close to 100 per cent as this figure includes the 27 per cent of the UK population which was still unable to receive a Freeview signal around the time the data was collated.⁸

⁶ Sweney, Mark (18/12/09) writing at guardian.co.uk, *TV advertising will survive the rise of on-demand viewing, says report*. <http://www.guardian.co.uk/media/2009/dec/18/tv-advertising-survive-on-demand>

⁷ Ofcom (April 2008), *Ofcom's Second Public Service Broadcasting Review Phase One: The Digital Opportunity*, Consultation, London: Ofcom: http://www.ofcom.org.uk/consult/condocs/psb2_1/consultation.pdf

⁸ Freeview is by far the largest TV platform in the UK, ahead of satellite which is in approx. 37.5 per cent of homes and cable which is in approx. 12.2 per cent of homes. Those with no digital TV (i.e. analogue terrestrial only) now stand at approx. 10.2 per cent of UK homes. Source: Ofcom (September 2009), *The Communications Market: Digital Progress Report, Digital TV, Q2, 2009*, London: Ofcom: http://www.ofcom.org.uk/research/tv/reports/dtv/dtu_2009_02/q22009.pdf

30. Ofcom has yet to produce any reasonable evidence to suggest that broadband is an economically viable platform to support a substantial quantity of high quality original local production. Broadband-delivered TV might be regarded as most suitable for content that was originally made for other platforms, has wide geographic appeal and/or can be viewed many times over an extended period. This is in contrast to local TV where material might be expected to have a narrow geographic appeal and could rapidly lose its attractiveness after as little as 24 hours (due to local issues developing).
31. Ironically, the argument that broadband will increasingly reduce the value of Freeview carriage contradicts one of the principal arguments sometimes used by Ofcom for not supporting reserved access to Freeview for community TV – that it would be a significant intervention because it would deny others access to highly-valued Freeview capacity. If and when broadband overtakes Freeview as the UK's number 1 TV platform, this simply means that the opportunity cost of assigning Freeview capacity to community TV will further diminish.
32. ULTV/CMA believes that access to local information and community programming on television should be universal as a matter of public policy, not post-code lottery. ULTV/CMA argues that it would not be equitable if, in some areas, constituents are able to see community representatives engaged in debate and discussion free-of-charge without any subscription but, in other areas, they are not.
33. It can be argued that those who struggle with reading and writing gain nearly all of their information from television. There is reason to believe that the functionally illiterate are amongst the least likely groups to use the internet as a resource for local information. The unemployed and those on low incomes are also disproportionately less likely to have a home internet connection.
34. Around 37 per cent of all UK households do not currently subscribe to home broadband. Over a fifth of the UK population (21 per cent) have still never used the internet at all.⁹ These 'late adapters' include some of those most resistant to new technology and, potentially, could be amongst those who would most benefit from local TV providing news and information about where they live and local services.
35. Ofcom data suggests widespread public demand for local TV but with the greatest demand from low income sub-groups, the over-65's and those with minimal interest in digital technology. In the latter category, a remarkable 50 per cent of the entire group rate "*local TV on Freeview*" as their preferred new spectrum application.¹⁰ ULTV/CMA argues that one of the most appropriate mediums to promote education, training, employment opportunities and other public services in any given area is a local terrestrial TV service.
36. There are a whole package of measures which Ofcom has a responsibility to consider when reviewing how best to develop local TV services. For example, if Ofcom were to recommend government give priority on the electronic programme guide ("EPG") to local TV, this could be worth tens of millions of pounds in annual revenue and provide a shot in the arm to a future new local TV network centre.

Ofcom policy on community TV

⁹ Office for National Statistics (August 2009), *National Statistics Omnibus Survey*. Crown Copyright: London <http://www.statistics.gov.uk/cci/nugget.asp?ID=8>

¹⁰ Ofcom (November 2007), *Digital Dividend Review Market Research 2007 Executive Summary*, London: Ofcom: <http://www.ofcom.org.uk/radiocomms/ddr/documents/research07/summary.pdf>

37. To many, listening to arguments against community TV creates a sense of déjà vu. Many of the same arguments were used to object to reserving spectrum for community radio:- there is limited demand; it should be left to the internet; it will be low quality; there are better uses for this spectrum.
38. In December 2007 Ofcom announced its plan to auction about 25 interleaved frequencies “*suitable but not reserved for local television*” in a largely unregulated, service-neutral, manner (additional frequencies may also be auctioned subject to Ofcom receiving “*credible*” evidence of demand). Ofcom proposed that the whole of the remainder of the interleaved spectrum would be granted to one monopoly band manager via a beauty contest. This band manager would be regulated to have responsibilities towards PMSE but not community TV (the “PMSE band manager”).¹¹
39. Ofcom’s Head of Public and Political Relations, Adam Higgitt, wrote to MPs who signed early day motion 1013 in 2008 to reject the call for spectrum to be reserved for local and community TV:

“It is open to local operators now to prepare their plans to access the spectrum directly via the auction of geographic-interleaved packages or to seek capacity on a digital terrestrial multiplex as a commercial transaction with a multiplex operator.”

The dangers of a spectrum gatekeeper

40. Imagine if Ofcom had proposed that community radio groups should be forced to acquire FM spectrum at auction or through commercial negotiations with another spectrum holder. To the amazement of many (including many MPs), this is exactly what Ofcom is currently proposing for community TV on Freeview.
41. Ofcom’s stated policy is that no spectrum should be protected for community TV use. If a community TV user is to gain access to spectrum they must seek to out-bid all other parties at auction or in the market. This could well mean community TV users are bidding against parties whose business models are based on operating as a spectrum gatekeeper i.e. determining who may access ‘their’ spectrum with a view to extracting a premium rent.
42. To be clear, Ofcom’s current stated policy is:
- (i) to sell the spectrum it regards as most suitable for community TV to the highest bidder able and willing to pay an up-front lump sum;
 - (ii) to grant community TV users no rights of access to any spectrum but, rather, to require them to negotiate with a spectrum gatekeeper in what Ofcom describes as a “*commercial transaction*”; and
 - (iii) to impose no licence conditions (public service conditions or price controls) on a spectrum gatekeeper to prevent them from exploiting their monopoly market power in the supply of local spectrum to local and community TV and radio.
43. Ofcom policy is, therefore, that a community be denied all of the benefits of local TV channel if a local TV group cannot afford to pay the premium rent demanded by a dominant spectrum gatekeeper. ULTV/CMA notes Ofcom appears to be aware of the risks of this approach, stating in its own local media discussion document that:

¹¹ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement/>

“the ongoing costs of paying the multiplex operator for capacity could be significantly higher than for an operator with access to...spectrum”¹²

44. ULTV/CMA rejects auctions of spectrum packages with no positive usage conditions as an appropriate means to develop community TV.
45. ULTV/CMA regards the primary purpose of a community TV channel not to maximise profits but, rather, to maximise value to society. There are good reasons to suggest that community TV users are unlikely to generally have access to capital markets to outbid prospective spectrum gatekeepers if and when Ofcom undertakes its planned auctions of G1 spectrum across much of the UK.
46. No country, anywhere in the democratic world, argues that local TV and radio broadcasters should be denied access to the leading distribution platforms unless they can out-bid national broadcasters, gatekeepers or speculators. If the UK were to adopt such a policy the UK's local and community radio sector might be expected to rapidly cease to exist.
47. ULTV/CMA maintains that dominant spectrum gatekeepers must not be permitted to hold community TV service providers to ransom. If this were to happen, the result would be a likely transfer in value from UK citizens to private companies as spectrum is withheld from local and community media groups until a monopoly rent is extracted.
48. Ofcom has suggested that public bodies might subsidise local TV operators' acquisition of Freeview multiplex capacity in the market. As well as raising state aid concerns, ULTV/CMA regards this proposal as perverse. Instead of the price paid for multiplex capacity representing opportunity cost (i.e. the next highest value use), a local TV provider might be required to pay a spectacular premium, in order to 'prise' capacity from an incumbent holder. Any windfall gain arising from the state's decision to 'buy back' multiplex capacity previously awarded by Ofcom may not be regarded as an efficient use of public funds by taxpayers.
49. It is clear to ULTV/CMA that the public body with a primary statutory duty to protect and enhance public service broadcasting in local and regional markets is Ofcom – not local authorities or other public sector organisations.
50. It is reasonable to assume there will not be a competitive functioning market in the supply of local multiplex capacity to community TV groups. It seems obvious to ULTV/CMA that an under-regulated spectrum gatekeeper is not the most effective model for securing the public interest. It could be argued that under-regulated monopolies are rarely in the public interest but least of all when the monopolist is granted the power to hold society to ransom over such public policy objectives as the provision of informed democracy and active citizenship.
51. To date, Ofcom has conducted two auctions of G1 spectrum both of which only attracted a single applicant (one in Manchester and one in Cardiff). In both Manchester and Cardiff there are known active community radio groups who are likely to have been discouraged by (and in practice boycotted) Ofcom's cash auction process. Neither licence contains any requirement to even use the spectrum, let alone protect community TV users from gatekeepers seeking to exploit their monopoly status.

¹² Ofcom (September 2009), *Local and Regional Media in the UK, Discussion document*, London: Ofcom: <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>

52. At least one party (operating a spectrum gatekeeper business model) has made it known to others that they did not participate in the first two GI spectrum auctions because they considered it to be politically unacceptable to be seen to be challenging incumbent local TV operators. Ofcom itself let it be known that it would consider re-writing the rules for later auctions after assessing the outcome of the Manchester and Cardiff awards. ULTV/CMA trusts this will now happen through a full and open review procedure and not just a superficial consultation confirming Ofcom's original policy.
53. ULTV/CMA expects Ofcom to ensure GI spectrum is awarded to providers with a commitment to serve local communities and for the awards process to discourage (and not favour) rent-seeking companies targeting supernormal profits.

Historical examples of 'gatekeeper' status

54. Ofcom cannot credibly argue that the abuse of market power is an implausible outcome of its current policy for the award of GI spectrum.
55. Ofcom is aware that historically both terrestrial digital audio broadcasting ("DAB") and Freeview multiplex operators have made substantial (some might say disproportionate) profits at the expense of the services they carry. Their status as dominant gatekeepers has contributed to carriage costs being higher than many would expect if rents had been subjected to more effective regulatory controls.
56. The view that the gatekeeper model is detrimental to the public interest appears to be held by at least one senior policy adviser. In his review of radio commissioned by government, former senior radio executive John Myers recommended:

*"Ban any broadcaster being the 'gatekeeper' of a local, regional or national DAB multiplex, or consider the introduction of an effective pricing policy that ensures the cost of equivalent access to DAB is the same rate as FM or lower by 2015, in order to ensure plurality of services."*¹³

57. Ofcom is fully aware that the 'gatekeeper' model for DAB has allowed larger operators who control spectrum to profit from this status, sometimes at the expense of smaller operators. Ofcom states:

*"Many larger radio operators own both multiplex licences and digital stations, allowing them to offset the losses related to running their channels, to the extent that running the multiplexes is profitable. However, this is not generally the case for the smaller operators."*¹⁴

58. Furthermore, Ofcom has itself acknowledged that the market for Freeview multiplex capacity may be ineffective. According to Ofcom:

*"...the rate at which capacity has been made available has been lumpy.... Respondents who disagreed with our analysis of this market did not, in our opinion, introduce compelling evidence that...markets are operating efficiently."*¹⁵

¹³ Myers, John (April 2009), *An Independent Review of the Rules Governing Local Content on Commercial Radio*: http://www.culture.gov.uk/images/publications/An_Independent_Review_of_the_Rules_Governing_Local_Content_on_Commercial_Radio.pdf

¹⁴Source: Ofcom (December 2004), *Radio – Preparing for the future Phase 1 developing a new framework*, Consultation, London: Ofcom: http://www.ofcom.org.uk/consult/condocs/radio_review/radio_review2/radio_review.pdf

¹⁵ Ofcom (June 2007), *Future pricing of spectrum used for terrestrial broadcasting*, Statement, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/futurepricing/statement/statement.pdf>

59. On 18 February 2009, ITV plc announced the sale by ITV Network Limited (90.1 per cent controlled by ITV plc) of its 70 per cent beneficial shareholding in JFMG Limited.¹⁶ JFMG is a company which issues spectrum licenses for programme-making and special events ("PMSE") on behalf of Ofcom. The sale netted ITV plc £1m. The inevitable question is why a company with a spectrum gatekeeper business model. Arqiva (which controls the only two Freeview multiplexes not owned by a public service broadcaster) would wish to pay over £1m to acquire JFMG, a company with a modest contract with Ofcom due to expire in 2010?
60. Some have inevitably speculated that, by owning JFMG, Arqiva assumes it is well placed to apply to become the new PMSE band manager.
61. ULTV/CMA urges Ofcom not to bury its head in the sand and to recognise the reality that interleaved spectrum is likely to be attractive to those with an interest in acting as spectrum gatekeepers. Failure to put in place an effective licensing regime for community TV on the basis that the market will, left to its own devices, always serve the public interest would, in the view of ULTV/CMA, be grossly naive and irresponsible.
62. There is a strong prospect many available interleaved frequencies will be aggregated to create quasi-UK multiplexes and/or left idle to restrict supply. ULTV/CMA believes that local Freeview multiplexes are likely to often be natural monopolies and must therefore be subjected to effective regulatory oversight. ULTV/CMA cannot see any circumstances in which community TV operators could benefit from being forced to negotiate with under-regulated dominant spectrum holders in the local market-place.

Ex-post regulation not an effective substitute for ex ante regulation

63. Policy makers have the option to mix 'ex ante' and 'ex post' regulation to seek to protect the interests of citizens and consumers. Ex ante regulation is generally regarded as the most appropriate intervention where a socially undesirable outcome can be anticipated. Ex post regulation is intended to address specific concerns of market abuse by a particular party.
64. ULTV/CMA strongly argues that Ofcom cannot purely rely upon ex post regulation to protect the interests of prospective future community TV providers. It would be extraordinarily complex to investigate allegations of abuse by local spectrum gatekeepers. Investigations could last many years. There may also be no straightforward remedy, not least given the potential for protracted litigation if any regulator were to seek to retrospectively impose conditions which Ofcom rejected at the time of the original licence award and/or nullify contracts once entered into.
65. If Ofcom seeks to rely upon ex post regulation to address potential abuses of market power which are wholly predictable, the result could be many years of paralysis in which spectrum gatekeepers appeal to regulators and/or the courts for the right to deny spectrum to groups unwilling to pay a premium rent in line with Ofcom's stated policy at the time of the original spectrum award.
66. It is difficult to see how it would be practical to impose positive usage conditions on a Freeview multiplex post-licence award in order to mitigate any damage caused by Ofcom's original policy failure. In the view of ULTV/CMA, ex post regulation is not a

¹⁶ ITV plc announcement to London Stock Exchange (18/02/09) "ITV Network Limited sells shareholding in JFMG Limited": <http://www.itvplc.com/investors/regulatoryannouncements/?page=7&id=16357>

proportionate, targeted or practical alternative to Ofcom implementing effective ex ante regulation to protect the public interest.

67. There are a number of examples of interventions in the communications sector based not upon actual evidence of any abuse of market power but, rather, an assessment that future abuses are a risk. One example is Ofcom's decision to impose regulatory controls on the prices an interleaved spectrum band manager can charge to PMSE users. Despite an open awards process, Ofcom has recognised it would not be in the public interest to allow the winning party to have unfettered freedom to exploit their market dominance in the supply of spectrum to PMSE users.
68. An example of the difficulty of ex post regulation is demonstrated by Ofcom's investigation of the pay-TV market. To date, this investigation has taken over three years.¹⁷ This suggests that ex post regulation can be extremely time consuming, challenging and expensive – even when there is only one company being investigated.
69. Regulatory intervention seems an obvious necessity, to ULTV/CMA, to protect against the risk of market power being abused by spectrum gatekeepers. It is therefore inexplicable to ULTV/CMA why Ofcom would seek to promote ex post regulation rather than protect local and community TV users at the time of the original licence award.
70. ULTV/CMA understands that Ofcom's regulatory principles commit it to:

“intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve”.¹⁸

71. ULTV/CMA firmly believes that, in the case of GI spectrum, the rational solution is to protect spectrum for local TV as a condition of the original licence award. Whilst all interventions have an element of risk attached to them, it may be far easier to relax regulation if and when considered desirable in the future than to place faith in 'fixing' under-regulation post licence award.

Competition in the market for FTA services

72. ULTV/CMA believes it has especially good reason to be wary of reliance upon ex post regulation in the area of wholesale digital TV platforms.
73. The Competition Commission has previously acknowledged concerns about the lack of an effective functioning market for capacity on UK-wide Freeview multiplexes stating:

“...ITV controls a significant portion of DTT capacity. Access to this platform is regulated, although some concern has been expressed to us as to whether current regulation sufficiently enables competition and non-discriminatory access to capacity.... there appears to be little spare capacity to be made available over the next few years....”¹⁹

74. Ofcom itself long been aware of the concern that Freeview's commercial multiplex owners may possess market power. In its 2007/8 Annual Plan Ofcom committed to complete its review of **“wholesale digital TV platforms”** and **“the rules which**

¹⁷ Ofcom states: “We opened our investigation into pay TV in early 2007...” Source: Ofcom (September 2008), *Pay TV second consultation*, Access to premium content, Consultation, London: Ofcom: http://www.ofcom.org.uk/consult/condocs/second_paytv/condoc.pdf

¹⁸ Ofcom: *Ofcom's Regulatory Principles*, London: Ofcom: <http://www.ofcom.org.uk/about/sdrp>

¹⁹ Competition Commission (2007), *Acquisition by British Sky Broadcasting plc of 17.9 per cent of the shares in ITV plc – Report sent to Secretary of State (BERR)*, London: Competition Commission: http://www.of.gov.uk/shared_of/press_release_attachments/SkyITV.pdf

promote fair and effective competition in relation to terrestrial multiplexes". Following lobbying from commercial interests, Ofcom placed both reviews on hold and now appears to have abandoned them altogether.

75. It is understandable if Ofcom seeks to focus its scarce resources on issues it considers to be of the most pressing priority. However, it is difficult to have confidence that Ofcom will support and encourage decisive action to address future concerns regarding the supply of multiplex capacity given that an investigation it started three years ago into the supply of capacity on existing Freeview multiplexes has still not been completed.
76. Given the track record of Ofcom and other competition authorities in allowing DAB and Freeview spectrum gatekeepers to make substantial profits at the expense of service providers, it may not be realistic to expect a spectrum gatekeeper seeking to acquire GI spectrum to be unduly concerned about the theoretical prospect of ex post regulation.
77. ULTV/CMA believes consideration should be given to an active competition policy to ensure that new Freeview multiplexes (in both interleaved and cleared spectrum) are controlled by new entrants and not incumbents who may be incentivised to out-bid other parties to maintain their existing dominant-hold on capacity, restrict supply and maintain high prices. ULTV/CMA would be concerned if any existing Freeview multiplex operators were also permitted to apply to become the PMSE band manager, given the incentive this could give them to withhold spectrum from Freeview use (to restrict the supply of capacity they do not control) and other potentially serious abuses of market power.

Regulating the PMSE band manager to protect all community users of spectrum

78. ULTV/CMA would urge Ofcom to review the success of the community radio licensing regime which, in its first two years, has produced hundreds of applications. In many cases these included applications supported by small voluntary groups, charities and publicly funded bodies. Similar groups may well be interested in applying for (or otherwise supporting) local TV licences, including potentially using some of the smaller relay sites where viewers can only expect to receive 3 of the 6 Freeview multiplexes following DSO.
79. Ofcom has decided to appoint a (profit-maximising) PMSE band manager with responsibility for the allocation and assignment of the vast majority of the interleaved spectrum. Under Ofcom's proposal, the PMSE band manager would have responsibilities to make spectrum available for PMSE but not community TV.
80. Ofcom itself stated in its July 2008 band manager consultation:

*"The objective of requiring FRND (regulated) terms for PMSE users' access to the spectrum awarded is to avoid the opportunities for a single, dominant band manager to assign spectrum inefficiently and generate excess profits and instead to provide an appropriate incentive to encourage spectrum access to be supplied in conditions that more closely reflect those that would be expected in a competitive market."*²⁰

²⁰ Ofcom (July 2008), *Digital Dividend Review: band manager award, Consultation on detailed award design*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/bandmgr/condoc.pdf>

81. It is difficult to understand why Ofcom should argue that a “*single, dominant band manager*” should be subjected to regulation to protect PMSE users but not community TV users. Ofcom’s proposal to require community TV users to negotiate with an unregulated band manager to gain access to much of the interleaved spectrum risks precipitating a severe market failure.
82. ULTV/CMA finds it difficult to see how a PMSE band manager would be incentivised to release spectrum for community TV, even if it wished to do so, if Ofcom reserves the right to take this spectrum off a band manager at any time to release directly to the market.
83. ULTV/CMA would be concerned if the PMSE band manager is permitted to also hold other GI frequencies released to the market by Ofcom, thereby enhancing its dominant hold over even further GI spectrum.
84. ULTV/CMA trusts Ofcom will fully take on board the comments received to its 2008 band manager consultation and address all concerns that have been raised prior to reaching any policy conclusions.

The benefits of local and community TV

85. Television is the principal medium for the dissemination of mainstream local news and information throughout the democratic world. Ofcom is aware that the vast majority of news is consumed via television. Ofcom surveys shows that, when asked which source of news is used most often, radio comes third at 11 per cent, a long way behind television at 65 per cent and also behind newspapers at 14 per cent.²¹
86. ULTV/CMA has never regarded a sound-bite in a news report as necessarily always being the most effective means to hold local politicians to account on television. English viewers have now lost their entitlement to receive regional debate, discussion or other non-news programming on ITV1. Community TV could help meet this democratic deficit – enabling citizens to participate in local ‘question time’ programmes with their own councillors and MPs. Community TV could also raise awareness of local public services, the arts, sport, culture, rural issues, events and activities in the community.
87. Community TV may be regarded as a merit good. There is no reasonable methodology to place a monetary value on such public benefits as educated citizens, informed democracy, cultural understanding, access and inclusion and quality of life. As Ofcom itself notes:

“Many of the potential benefits of local services are social benefits that are unlikely to be taken into account by the market: social cohesion, democratic engagement, better-informed and more active citizens.”²²

88. Third sector organisations are commonly regarded as part of the fabric of modern society – often trusted by their users because they are neither state nor market. Community TV could be expected to provide an important voice for voluntary organisations to communicate with the communities they serve – explaining their activities and appealing for wider support.

²¹ Ofcom (June 2007), *New News, Future News – The challenges for television news after Digital Switch-over*, Discussion document London: Ofcom: <http://www.ofcom.org.uk/research/tv/reports/newnews/newnews.pdf>

²² Ofcom (December 2006), *Digital local: Options for the future of local video content and interactive services*, London: Ofcom: http://www.ofcom.org.uk/tv/psb_review/digital_local/digital_local.pdf

89. Crucially, community TV could open up programme-making opportunities, providing the benefits and transferable skills which local volunteers and trainees can gain from engagement with the broadcast and production process. Those who sometimes feel marginalised in society – older people, the disabled, young people and ethnic groups – could gain the opportunity to participate constructively in their communities and express their views and opinions.
90. There is considerable evidence the disengaged can be attracted to make a positive contribution to society as a result of involvement in media, gaining skills they can take with them into their working and social lives. ULTV/CMA looks to community TV on Freeview to guarantee a diversity of voices and perspectives available to virtually all citizens free-to-air without the necessity to subscribe to pay-TV or broadband.
91. ULTV/CMA believes that a network of local and community TV services would be capable of providing a local voice that fulfils all the main objectives of public service broadcasting – informing ourselves, reflecting cultural identity, increasing knowledge and supporting tolerance and understanding. By providing opportunities for training, employment, local advertising, public service information and citizen participation community TV could empower viewers, not only enabling them to feel part of the media but encouraging them to be more involved in their own communities.
92. An important question for policy makers is what will make the greatest incremental contribution to the public welfare:- one new UK-wide channel (in addition to the 30+ UK channels already on Freeview) or at least one ‘ring fenced’ local channel covering community news and events, encouraging community production and providing an outlet for community advertising.

Viability of local and community TV

93. Ofcom has produced data which shows TV advertising spend per head of population is £110 per annum in the US, compared to just £58 per head of population in the UK.²³ ULTV/CMA notes the primary difference between the US and the UK is that the US has local TV whilst, in most of the UK, there is no local TV choice available to advertisers (ITV1, UTV and STV have a virtual monopoly in the sale of terrestrial TV in local advertising markets and direct local advertisers receive no protection from contract rights renewal).
94. ULTV/CMA does not believe it is beyond the wit of humankind to devise a local TV schedule that, as part of a network, is sustainable with the support of the community it serves and, via guaranteed Freeview capacity, achieves real reach and impact.
95. ULTV/CMA believes it is pure ignorance for some to suggest that local TV may not be viable when:
 - many universities around the UK have professional studio facilities;
 - compelling programmes can now be made with low-cost hand held cameras and laptop editors;
 - there are substantial numbers of media/journalism graduates seeking work placements and employment in the industry every year;
 - ethnic, religious, linguistic, cultural, lesbian/gay/bisexual/transgender (“LGBT”), student, armed forces, children/youth, senior citizen, sporting, rural, voluntary/support and charitable groups across the community have

²³ Figure 60: Ofcom (September 2009), *Local and Regional Media in the UK, Discussion document*, London: Ofcom: <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>

been seen to be eager to participate in community radio and can be expected to be equally able and willing to participate in community TV producing programming on the environment, education, arts culture, sport, crime, health, gardening, history, countryside, farming and many other issues;

- existing local media groups are likely to wish to partner with community TV – the BBC has entered into a memorandum of understanding with the Community Media Association and many local newspapers can be expected to seek to play a lead role in the provision of news, advertising and other services;
- local authorities and public service providers have a statutory duty to communicate with local citizens and could benefit from ‘advertorial’ within teleshopping windows; and
- smaller independent advertisers are generally crowded out of TV advertising and could be expected to benefit from a low-cost opportunity to advertise on a terrestrial TV channel targeting a local audience.

96. ULTV/CMA understands why it may be difficult for some traditional media analysts, perhaps more used to working with city banks, to fully grasp the business model for community TV. This is likely to be for a variety of reasons. However, it may at least partly reflect a failure on the part of some city analysts to comprehend the motivation of many ordinary citizens willing and able to contribute to their local communities out of a sense of public duty.

97. ULTV/CMA finds much of the business modelling commissioned by Ofcom puzzling – not least because it appears to show community TV providers unnecessarily fixing costs above anticipated income in order to generate a loss. One study produced by Ofcom assumed costs per annum for a single local TV service of around £2.5m – up to five times the costs of an earlier study. It is noteworthy that members of ULTV/CMA were given no opportunity to input into this business modelling.²⁴

98. ULTV/CMA believes that community TV providers may on occasions attract modest public funding from existing local, region/nation, UK and European schemes. Ofcom appears to admit it has not taken this into consideration when reaching a judgement against reserved spectrum for community TV saying:

“We have...restricted our analysis to local TV run on a (pure) commercial basis. Community radio has set out a template for not-for-profit local services which are able attract funding from a range of sources...and could provide a template for non-commercial local TV services in the future.”²⁵

99. The robust footprint of Freeview and prestige of terrestrial TV advertising suggest local TV might expect to attract significantly higher revenue than a typical community radio station (from both public and private sector partners). One of the many advantages of community TV is that it could lead to a more efficient use of resources – including for third sector groups seeking to maximise the impact of the services they provide.

²⁴ “Total fixed costs are likely to be around £2.5m for any big-city channel.” The estimated fixed cost-base of £2.5m per annum compares to an estimated operational cost for a news-led local TV service of under £0.5m per annum in a previous study commissioned by Ofcom from Spectrum Strategy Consultants (now Value Partners). Sources: Oliver & Ohlbaum Associates (January 2009), *The Sustainability of local commercial TV: Prospects for big city and community local TV channels*, A report for Ofcom, London: Oliver & Ohlbaum Associates Limited and Spectrum Strategy Consultants (November 2005), *The economics of delivering local digital audio-visual and interactive services*, London: Spectrum Strategy Consultants: http://www.ofcom.org.uk/consult/condocs/psb2_phase2/statement/annex4.pdf and <http://www.culture.gov.uk/images/publications/051118PLocaldigitalserviceseconomicanalysis10866final.pdf>

²⁵ Ofcom (September 2009), *Local and Regional Media in the UK*, Discussion document, London: Ofcom: <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>

100. In its first PSB Review (September 2004), Ofcom concluded:

“City TV services supplemented by broader coverage (at, say, region or county level) in more rural areas...may prove to be the most effective models.”²⁶

101. Despite this conclusion Ofcom has consistently failed to consult on a viable channel map for local or community TV even at “region or county level”. Many find it difficult to understand why Ofcom has chosen to emphasise evidence which shows small towns may struggle to sustain a stand-alone local TV channel on a pure commercial basis when there are so many alternative models for the development of both quasi-regional and smaller-scale community TV services.

102. Independent businesses may find it difficult to achieve their full potential without a more level advertising playing field with their ‘national’ brand rivals. It seems highly inequitable to ULTV/CMA for not one single channel (out of 30+ on Freeview) to offer realistic affordable advertising solutions to local businesses seeking to enhance their own profitability.

Understanding Ofcom’s opposition to reserved spectrum for community TV

103. ULTV/CMA has made a conscientious effort to seek to understand Ofcom’s objections to reserving access to spectrum for local TV.

104. Ofcom has sought to argue that spectrum is likely to be a relatively insignificant cost for community TV operators. However, Ofcom frequently seeks to argue the exact opposite, suggesting the internet is a more suitable distribution platform for carriage because it liberates community providers from the relatively high costs of spectrum.

105. In May 2007, Carmel McLaughlin, at that time working for Ofcom, wrote to a local TV licence holder:

*“Our modelling suggests that spectrum costs will **almost certainly be small** relative to the costs of producing content.”²⁷ (our emphasis)*

106. This “modelling” appears to be contradicted in Ofcom’s policy statement, which says:

*“...our modelling suggests that the quality of content which could be offered over the DTT platform may be limited (when compared to what may be possible over other platforms). **This is because broadcasting on this platform is costly (hence reducing the available funds for content).**”²⁸ (our emphasis)*

107. Ofcom further claims:

*“....These factors combined with the costs of delivering content via the DTT platform (**which in turn reflect the scarcity and value of this spectrum**) suggest that the business model for delivering local content in this way is likely to face difficulties.... These challenges may be less severe on*

²⁶ Ofcom (September 2004), *Ofcom review of public service television broadcasting – Phase 2 - Meeting the digital challenge*, Consultation, London: Ofcom: http://www.ofcom.org.uk/consult/condocs/psb2/psb2/psb_phase2.pdf

²⁷ Full email correspondence available to Ofcom upon request

²⁸ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement/>

alternative platforms, such as the Internet, as one of the key costs faced when broadcasting on the DTT platform, namely the cost of DTT capacity and/or spectrum, would be avoided.” (our emphasis)

108. Ofcom is clear that it regards the “**scarcity and value**” of spectrum as too high to be met by community TV providers. Ofcom cannot have it both ways. Either the cost of spectrum is relatively significant for community TV operators, or it is relatively insignificant. It cannot be both at the same time.

Opportunity cost of reserving spectrum for community TV

109. Ofcom states:

“...there is insufficient evidence to suggest that intervention in the DDR award is justified. ...The relatively significant opportunity costs of such an intervention, at around £400m, lend weight to this assessment...”²⁹

110. Ofcom estimates that reserving interleaved spectrum for local TV would generate an opportunity cost of somewhere between £30m and £400m over 20 years.³⁰ Clearly, there is a significant difference in value between £30m and £400m suggesting a wide margin of error is built into Ofcom’s assessment. It might be argued that such a wide margin makes Ofcom’s analysis bordering on meaningless. Even so, the calculation is itself irrefutably flawed.
111. In estimating the cost of reserving spectrum for local TV, Ofcom has assumed that an entire 8 MHz channel would be reserved at the largest Freeview transmitter sites solely for local TV use. Ofcom also appeared to assume that there would be no alternative frequencies released for additional Freeview applications at these sites. However, an 8 MHz channel is potentially capable of offering up to 10 standard definition video streams – not all of which may be required solely for the provision of local TV programming. Furthermore, Ofcom has said that in many parts of the UK it expects there to be more than one 8 MHz frequency suitable for a new Freeview multiplex.
112. On the one hand Ofcom claims it cannot justify reserving spectrum for community TV due to the very high value of this spectrum (an opportunity cost of “*around £400m*”). On the other hand, Ofcom contradicts itself suggesting the value of spectrum is relatively “*small*” and re-assuring MPs and others there is little or no interest in the spectrum most suitable for local TV. The two arguments cannot both be true.
113. Independent assessment, commissioned by Ofcom from Analysis Mason, suggested that the vast majority of the interleaved spectrum which Ofcom plans to grant to a single PMSE band manager has no material opportunity cost valuation attached to it. Ofcom has proposed no administered incentive pricing (spectrum tax) payments apply to this spectrum for at least the first three years of the new band manager’s tenure.³¹ This is spectrum which could deliver dozens (or even hundreds) of community TV services assuming Ofcom adopts a constructive and supportive policy.

Ofcom’s pre-determined spectrum policy

²⁹ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement>

³⁰ Ibid

³¹ Analysis Mason (May 2009), *Opportunity cost calculations for spectrum proposed for award to a band manager with obligations to PMSE*, London: Analysis Mason Limited: <http://www.ofcom.org.uk/consult/condocs/bandmanager09/userguide.pdf>

114. In its 2004/2005 strategic review of spectrum management, Ofcom set out the underlying principles it intended to follow when formulating policy on the allocation and assignment of spectrum. It is notable that Ofcom stated:

“Ofcom is generally not in favour of spectrum allocation and assignment being used as a mechanism to achieve social policy.”³²

115. The view that spectrum allocation and assignment should not be used “as a mechanism to achieve social policy” is not to be found in statute. Indeed, this view substantially contradicts the explicit intentions of Parliament when formulating the Communications Act 2003.³³

116. It is difficult to see how Parliament could have been much clearer in its desire to see Ofcom allocate and assign spectrum with the direct intention of achieving socially desirable outcomes. Ofcom’s statutory duties require it to have regard for, inter alia:³⁴

- the desirability of promoting the fulfillment of the purposes of public service television broadcasting in the United Kingdom;
- the desirability of promoting competition in relevant markets;
- the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- the needs of persons with disabilities, of the elderly and of those on low incomes;
- the desirability of preventing crime and disorder;
- the opinions of consumers in relevant markets and of members of the public generally;
- the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas.

117. None of these duties are restricted to the five principal broadcast networks granted formal ‘public service’ status.³⁵ Ofcom has a much wider duty – to promote “*the fulfillment of the purposes of public service television*”.

118. During the passage of the Communications Act the Government explicitly stated that Ofcom would be required to encourage local TV as part of its core duties to citizens. In rejecting Lord Thomson of Monifeith’s proposed amendments on 6 May 2003 Baroness Blackstone responded for the Government:

“Ofcom already has a number of general duties that one would expect to encourage the development of local TV... I am confident that that will happen. Ofcom’s duty in Clause 3(1) is to further the interests of

³² Ofcom (June 2005), *Spectrum Framework Review – This document sets out how we will manage radio spectrum*, Statement, London: Ofcom. http://www.ofcom.org.uk/consult/condocs/sfr/sfr/sfr_statement/ In a related presentation Ofcom proposed that around 72 per cent of spectrum be the subject of trading and liberalisation by 2010: <http://www.ofcom.org.uk/consult/condocs/sfr/sfr2/>

³³ In addition, Professor Martin Cave recognised the need for spectrum to be reserved for public purposes in his review of radio spectrum management in which he wrote: “*The review recognises therefore the need for Ministers to retain a strategic power of direction over Ofcom in order to reserve spectrum allocations for identified uses or users to fulfill public policy goals... Most importantly, the Government has powers to ensure that all current and future public service broadcasting channels remain available to all households, if necessary, by reserving digital multiplex capacity for them.*”(our emphasis), Cave, Professor Martin (April 2002), *Review of Radio Spectrum Management, An independent review for Department of Trade and Industry and HM Treasury*, London: Crown Copyright: http://www.ofcom.org.uk/static/archive/ra/spectrum-review/2002review/1_whole_job.pdf

³⁴ Communications Act 2003

³⁵ i.e. the BBC, Channel 3, Channel 4, Channel 5 and S4C

*consumers and the community as a whole. Put in the context of Ofcom's duty in subsection (2)(c), to secure, "a wide range of television and radio services which . . . are both of high quality and calculated to appeal to a variety of tastes and interests" and **one can see the relevance of Ofcom supporting and encouraging the development of community TV and radio.*** (our emphasis)

119. The Government's expectation was that Ofcom would support the development of both community TV and radio. Labour Party policy has favoured community TV since 1995 when Graham Allen, then shadow Broadcasting Minister, told Parliament:

*"We will explore ways in which to empower the ITC to ensure a strong, local element in a modern, diverse and democratic media. We will ensure that the digital revolution can spawn many local channels."*³⁶

120. In March 2005, the then Broadcasting Minister, Lord McIntosh, told the Scottish Local TV Forum pointed to the potentially important role community TV could play in promoting the government's digital inclusion strategy:

"We envisage that local television will play a valuable role in keeping communities informed and in particular, help keep in touch those most socially isolated members of the community who may not have access, or are uneasy about using, new technology. Local television will also bring economic benefits to areas in terms of employment and training..."

121. Support for local and community TV cuts across all mainstream parties at Westminster. In the Adjournment Debate in the House of Commons on 24 April 2007, Ed Vaizey for the Conservatives, stated:

"I do not want locally auctioned channels to be block-bought and turned into gaming or shopping channels; there must be a system to ensure that local television continues."

122. It appears to ULTV/CMA that a major obstacle to the development of community TV in the UK is a desire within parts of Ofcom to fiercely oppose the allocation of spectrum *"as a mechanism to achieve social policy"* without due consideration for Ofcom's full statutory duties.

123. For the avoidance of doubt, ULTV/CMA considers that Ofcom's statutory duty to secure *"a wide range of television and radio services...calculated to appeal to a variety of tastes and interests"* requires active intervention in the selection of services available to viewers on the UK's main terrestrial TV platform – not simply allowing all incremental capacity and spectrum to be awarded to the highest cash bidder.

High risk of market failure

124. A UK-wide TV channel has the costs of programming, premises and personnel only once. A local TV network potentially has these costs multiplied many times. Local TV can be expected to generate new employment, training and production opportunities throughout the UK – but may not be the profit maximising user of spectrum.

³⁶ Source: *Hansard*, 1995

125. It is Ofcom's stated position that if a UK-wide TV channel bids £1 more for multiplex capacity than a network of local TV operators then there should be no local TV carried. Yet a cable or satellite channel seeking to increase its audience and revenue by obtaining Freeview capacity is likely to have far lower costs than a network of 50-100 local TV operators covering the UK.
126. The economies of scale enjoyed by UK-wide channels with a requirement to only offer one programme could mean that, in reality, they can out-bid local TV operators when competing for scarce multiplex capacity at many transmission sites.

The basis of Ofcom's spectrum policy

127. Economists frequently distinguish between the three factors of production – land, labour and capital; the latter two factors result from human inputs but land is a gift of nature. Many economists would agree natural resources should be regulated and protected including the creation of 'open spaces' for the public welfare.
128. If profit maximisation was used to determine all land use then Hyde Park might be expected to be transformed into a car-park as a more profitable use of land. The Lake District might be turned into a building site. Playing fields could become concrete towers. Ofcom would appear to have adopted an ideological view that there should be no spectrum reserved for community TV use – Ofcom says the profit motive should overrule the societal benefit of guaranteeing access to communities to spectrum.
129. In the real economy, land use is regulated through the planning system. This ensures the market value of a plot of land reflects the use of that site permitted by the state, irrespective of the value of alternative uses. A farmer is not expected to out-bid a property developer to gain access to land. The law protects different users. This is the complete opposite to Ofcom's current proposals whereby community TV operators must attempt to out-bid more profitable (and/or better-funded applications) before they can secure access to spectrum.
130. The auction process for GI spectrum proposed by Ofcom takes no account of broader social value and discourages participation by local consortia formed to deliver social gain. Whilst Ofcom claimed in its December 2007 policy statement that this was because alternative applications to community TV also delivered the prospect of social gain, Ofcom failed to acknowledge these other applications do not depend upon any of the frequencies likely to be considered most suitable for community TV.³⁷
131. Ofcom originally stated that its decision not to reserve spectrum for local and community TV was because it would be important to release this spectrum to the market on an "*application and technology neutral*" basis.³⁸ However, since then, Ofcom reversed its policy and decided to release spectrum in Manchester and Cardiff with conditions which specifically excluded "*the right to use the spectrum for services other than DTT*".³⁹ Ofcom's policy reversal appeared to undermine the entire basis of its original policy decision.
132. Whilst it is theoretically possible that some non-DTT applications could be interested in individual GI spectrum lots, Ofcom has offered no explanation why any of these

³⁷ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement>

³⁸ Ibid

³⁹ Ofcom (June 2008), *Digital Dividend Review: geographic interleaved awards 470 - 550 MHz and 630 - 790 MHz Consultation on detailed award design*, London: Ofcom <http://www.ofcom.org.uk/consult/condocs/ddrinterleaved/interleaved.pdf>

applications would be especially interested in the 'in group' frequencies which it recognises are likely to be most suitable for DTT.

133. ULTV/CMA does not consider that it is adequate for Ofcom to undertake a further superficial consultation or analysis – a comprehensive, open and transparent policy review is now called for. This review should take into account the prospect that socially-valuable applications such as mobile broadband and UK-wide DTT will be universally received post-DSO as a result of interventions widely supported by a cross-party consensus at Westminster. This further undermines any argument that intervention to reserve access to spectrum for local TV could hinder the development of other socially-valuable applications.

Criticism of Ofcom's approach to spectrum management

134. ULTV/CMA understands the desire within parts of Ofcom to experiment with a new ideology based upon leaving spectrum allocation and assignment primarily to the market. ULTV/CMA does not object in principle to a move towards increased use of market mechanisms subject to appropriate regulation and oversight of spectrum as a whole. However, criticism of Ofcom's approach to spectrum policy has come from some perhaps unlikely sources.
135. To inform the Digital Britain white paper, the government appointed an expert adviser to act as its Independent Spectrum Broker ("ISB"). The appointee, Kip Meek, is a former Ofcom Board member and Chairman of the Ingenious Consulting Network.
136. Kip Meek appeared to strongly criticise Ofcom at the Westminster eForum Keynote Seminar held in London on 26 January 2010:

*"In my view, the current institutions are not fully capable of good policy making with respect to spectrum... I think we in Ofcom were much too unambiguous about the benefits of trading and liberalisation and I think we need to look really hard at that and come up with a much more nuanced and sophisticated view on that specific set of issues."*⁴⁰

137. The view that Ofcom requires a "*much more sophisticated*" approach to spectrum policy is not restricted only to government advisers. Ofcom's own advisers appear to also hold severe reservations about its approach. Amit Nagpal, Partner for Strategy Management at Analysis Mason previously acted as a lead consultant to Ofcom during its digital dividend review. Amit Nagpal told the Westminster Eforum Keynote Seminar held in London on 26 January 2010 that it is necessary to "*start again*" and fully review more interventionist policy options for the lower cleared spectrum.

"I was just going to say in the same way as the Government has stood back a little bit and looked at 2.6 and 800 and thought – okay let's try and get a holistic picture of what we can do here. I think now that we are getting some views on where the 800 is going, I think it is right to step back a little bit and look at this block again and take a look and essentially look again and say, well what are the potential uses, what are the benefits, what benefits might come through in an auction price and what might not come through in an auction price that the wider social benefits and what is the right thing to do for the spectrum and it could be broadcasting, more and

⁴⁰ Quoted from uncorrected transcript of Westminster eForum and Westminster Media Forum keynote seminar: Progress of the digital switchover & next steps for the Digital Dividend Review, 26 January 2010

more and more television... it could be something else, but I think the right thing to do is step back and look again.”⁴¹

138. The government appears to have accepted the argument that Ofcom’s stated spectrum policy fails to protect the public interest.⁴² The Department for Business, Investment and Skills has been consulting on its own proposals for the upper cleared spectrum which fundamentally depart from Ofcom policy reached following over two years of research and consultation on the release of the digital dividend (described by Ofcom in 2007 as “*the most important decision we have ever made*”).⁴³

139. Ofcom’s approach to community TV appears to be directly at odds with the stated views of European policy makers, as well as much of the rest of the democratic world. The European Parliament resolution on community media in September 2008 called on all Member States:

*“to make television and radio frequency spectrum available...bearing in mind that the service provided by community media is **not to be assessed in terms of opportunity cost** of the cost of spectrum allocation but rather in the social value it represents” (our emphasis)⁴⁴*

140. The Council of Ministers called for reserved spectrum for community broadcasting in February 2009 in a resolution which endorsed “*allocating to community media, to the extent possible, a sufficient number of frequencies...*”⁴⁵

141. Concern regarding Ofcom’s policy on community TV has been expressed by MSPs as well as MPs. On 19 September 2006 Alex Neil MSP, Chair of the Culture and Enterprise Committee of the Scottish Parliament, wrote to the then Ofcom Chairman Lord Currie:

“I am writing to you to request that no decisions are made on the use of broadcast spectrum that exclude the introduction of Local TV channels with DTT roll out to reach all households in Scotland. Furthermore, spectrum should not be allocated or regulated so as to restrict or inhibit the introduction in future of new independent public channels from and for Scotland.”

142. In addition to senior governmental advisers, the list of those raising serious objections to Ofcom’s approach to spectrum management in relation to local TV now include:

- over 195 MPs (including senior members of all major parties at Westminster);
- the European Parliament; and
- the Council of Ministers.

Ofcom’s research findings

⁴¹ Ibid

⁴² “The Government sees the Independent Spectrum Broker’s proposals as a sound platform for further consultation and intends to Direct Ofcom to implement them.” Department for Business, Investment and Skills (October 2009), *Consultation on a Direction to Ofcom to Implement the Wireless Radio Spectrum Modernisation Programme*, London: Crown Copyright: <http://www.berr.gov.uk/files/file53061.pdf>

⁴³ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement>

⁴⁴ European Parliament Resolution of 25 September 2008 on Community Media in Europe: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:008E:0075:0079:EN:PDF>

⁴⁵ Declaration of the Committee of Ministers on the role of community media in promoting social cohesion and intercultural dialogue: <https://wcd.coe.int/ViewDoc.jsp?id=1409919>

143. Even if Ofcom places little weight on the views of external policy advisers, MPs, MSPs, MEPs and the Council of Ministers, ULTV/CMA would expect Ofcom to still show substantial interest in the the stated wishes of the UK public.
144. In Ofcom's own research for the digital dividend review, "*local TV on Freeview*" was the **number one** new application demanded by consumers, ahead of both "*extra SD channels*" and "*HD on Freeview*".⁴⁶

Importance to you personally of services that could use digital dividend spectrum⁴⁷

Order of popularity	Application	Mean average score out of 10
1	Local TV on Freeview	6.3
2	Extra SD channels on Freeview	6.2
3	Better mobile phone coverage and mobile broadband	5.9
4	Wireless home networks	5.7
5	HD on Freeview	5.6
6	Mobile TV	3.3

145. The citizen demand for local TV appeared to be further confirmed in the research conducted for Ofcom's 2008 PSB Review. This research showed that **86 per cent** of all adults would like more non-news programming about their region/area than is shown on the main channels.⁴⁸
146. ULTV/CMA has a number of serious concerns regarding Ofcom's research exercises. It is of particular surprise to ULTV/CMA that Ofcom appears to have **never** researched whether its policy of protecting no spectrum for local TV (instead auctioning all to the highest bidder) enjoys any level of public support.
147. ULTV/CMA notes that Ofcom's research strongly suggests overwhelming levels public demand for reserved spectrum for local TV. To quote from Ofcom's 2007 research:

*"The vast majority of participants opted for a future where **everyone** would have access to (at least) one service, as this was felt to be the fairest option."*⁴⁹ (our emphasis)

148. ULTV/CMA is further surprised that Ofcom appears to dismiss its own research evidence, partly by making reference to a potential reduction in demand for local and community TV in the future. Ofcom seeks to argue:

*"...other kinds of interest or faith based communities not tied to geographic scope might equally offer benefits to groups of viewers and might in time emerge. This might reduce the demand for local television."*⁵⁰

149. Ofcom has produced no credible evidence to suggest the demand for local and community TV is likely to diminish. Indeed, Ofcom's statement appears to suggest it is

⁴⁶ Ofcom (November 2007), Digital Dividend Review Market Research 2007 Executive Summary, London: Ofcom: <http://www.ofcom.org.uk/radiocomms/ddr/documents/research07/summary.pdf>

⁴⁷ Q8.3a "For each of these services please score each on a scale of 0 to 10, where 10 means extremely important and 0 means not at all important to you personally" (mean scores are shown). Source: Ipsos MORI survey 2007 Base: UK adults 1,049

⁴⁸ Ipsos MORI (April 2008), *The audience's view on the future of Public Service Broadcasting*, Q35, 2,260 interviews with all UK adults aged 16+, October – December 2007

⁴⁹ Ofcom (November 2007), *Digital Dividend Review Market Research 2007 Executive Summary*, Research Document, London: Ofcom: <http://www.ofcom.org.uk/radiocomms/ddr/documents/research07/summary.pdf>

⁵⁰ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement>

unaware that community TV might be expected to provide a wide range of community-of-interest content currently unavailable to DTT viewers.

150. The future of local and regional news was identified by Ofcom as a major priority in its second statutory review of public service broadcasting. Channel 3 licenses are currently due to expire in 2014. ULTV/CMA believes that spectrum for communities to operate their own TV services (providing a wide range programming) is vital on its own merits and should not be directly linked to the future of Channel 3 services in the run up to (or following) licence expiry.
151. Ofcom is aware that the current government has put forward proposals to pilot Independently Funded News Consortia ("IFNCs").⁵¹ Under this proposal, IFNCs would initially provide local/regional news on Channel 3 but would also be expected to seek multi-platform distribution and to aspire to develop sustainable brand offerings. IFNCs and the proposal to potentially part-fund them through the licence fee have proven controversial. However, it could severely undermine the long-term objectives set out by the government if dominant spectrum gatekeepers were to be free to deny access to spectrum to local news consortia members and their partners on cost-effective terms.
152. ULTV/CMA believes that community TV would offer innovative new methods of delivering local and regional content alongside the incumbent analogue broadcasters. Community TV would be able to enhance the plurality and diversity of broadcasting voices available to citizens. As Ofcom's own deliberative research concluded, public support for the current status quo is not unqualified:

*"Participants did not say that losing regional TV news would lead to any significant loss of local information... if forced to consider a scenario where only BBC local news existed there are not overwhelming concerns in terms of content. Participants say that the BBC could provide an adequate service. Even participants who prefer ITV news say that news content is largely the same across both channels... There was limited concern over bias. Many participants perceive the BBC as a trustworthy source for local news."*⁵²

153. ULTV/CMA recognises the value of competition and multiple provision in the supply of editorial and advertising in local and regional markets. However, it is important that Ofcom does not overlook the views of citizens, expressed in a number of research exercises, that existing regional TV programming may not fully deliver all of the benefits to be expected from plurality of provision. ULTV/CMA believes that businesses set up to deliver community-focused TV channels are likely to have an incentive to deliver quality programming and real choice for the viewer alongside (and where appropriate partnering with) other service providers.

154. Ofcom's first statutory review of public service broadcasting concluded:

"The English regions are often too large to be relevant to most viewers, who tend to live most of their day-to-day lives within at most 25 miles of their homes and be most interested in news and community issues within that range.... If there were ways of delivering cost effective TV services at

⁵¹ Department for Culture, Media and Sport, *The Government's response to the consultation on "Sustainable, independent and impartial news in the Nations, locally and in the regions"* http://www.culture.gov.uk/images/publications/Govtresponseto-consultation_on_sustainable_impartial_news_2009.pdf

⁵² Ofcom (July 2009), *Review of Local Media, Qualitative Findings, Research document*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/morr/reviewlocal.pdf>

this level, we believe they would be significantly more compelling than current regional provision.”⁵³

155. ULTV/CMA looks to Ofcom to use its reasonable endeavours to work with the sector to help turn its own stated vision into a reality.

Proposal for a new ‘multiplex’ for Northern Ireland

156. On 1 February 2010, the UK government entered into a memorandum of understanding with the Republic of Ireland government committing it to seek to obtain widespread coverage of the Republic of Ireland’s RTÉ services on Freeview in Northern Ireland (“NI”):

“Public service broadcasting supplied from both jurisdictions has a long recognised role to play throughout the island of Ireland in promoting cultural diversity, in providing educational programming, in objectively informing public opinion, in guaranteeing pluralism and in supplying quality entertainment.... In light of this, the Government.. will cooperate to help ensure...spectrum availability on relevant DTT multiplexes in Ireland and Northern Ireland for the Public Service Channels identified above.”⁵⁴

157. The UK government has indicated it intends to direct Ofcom to reserve spectrum to enable RTÉ One, RTÉ Two and TG4 to be available free-to-air to terrestrial viewers using all main transmitter sites in NI. There appears to be no obvious explanation why any such multiplex should not, subject to available capacity, also be used to deliver community TV in NI.
158. The government’s stated intention to reserve spectrum for a new Freeview multiplex in NI further demonstrates the widespread consensus that Freeview is seen as fundamental to the delivery of public service purposes. ULTV/CMA is pleased the government has recognised it would be absurd to require RTÉ to negotiate with a monopoly spectrum gatekeeper to seek to gain carriage for its services in NI. ULTV/CMA believes it is equally absurd to expect community TV services to have to negotiate with such a gatekeeper.
159. It seems likely that any new Freeview multiplex for NI would have the potential for ‘spare’ capacity which could be used to also deliver community TV (especially if Ofcom assists the UK government to ensure that TG4 can be carried in NI on one of the six existing Freeview multiplexes).
160. Ofcom is not yet able to confirm the extent to which it can identify GI spectrum suitable for new Freeview multiplexes in NI or any other part of the UK. However, ULTV/CMA welcomes the proposal to reserve some interleaved spectrum in NI for Freeview and expects Ofcom to do all it reasonably can to extend the benefit of reserved GI spectrum for relevant new channels serving public purposes across the UK.
161. ULTV/CMA is willing to seek to explore with MPs and government how any directive to reserve GI spectrum in NI for new Freeview services might at the same time be framed to develop new Freeview multiplexes serving local markets in other parts of the UK.

⁵³ Ofcom (September 2004), *Reshaping television for the UK’s nations, regions and localities - Ofcom review of public service television broadcasting – Phase 2*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/psb2/psb2/nations/nations.pdf>

⁵⁴ Department for Culture Media and Sport (February 2010): *Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland regarding the Digital Switchover and the provision of digital television services in Northern Ireland and Ireland*: <http://www.culture.gov.uk/images/publications/MoU-DCMS-DCENR.pdf>

Given Ofcom's statutory duties, ULTV/CMA hopes Ofcom would wish to reach a conclusion in favour of such an approach of its own accord.

Clarification of Ofcom's intent is now required

162. ULTV/CMA takes some comfort from announcements made by Ofcom suggesting a new policy may be imminent. Throughout 2009, Ofcom made a series of public statements which suggested it was committed to review its policy on spectrum allocation for community TV.

163. In the conclusion to its statutory review of public service broadcasting, Ofcom stated:

*"We believe the potential for broadcasting spectrum to support local television should be kept open for further consideration."*⁵⁵

164. Then again in its discussion document, *Local and Regional Media in the UK*, Ofcom stated:

*"...spectrum could be reserved for local TV... The operator might be required to carry local TV."*⁵⁶

165. Ofcom continued:

*"Local television has the potential to deliver public purposes, whether through commercial or not-for-profit services. The success of community radio in particular shows that voluntary and community based local TV services may play an important role in the local media sector in the future."*⁵⁷

166. ULTV/CMA welcomes any commitment to keep local TV "open for further consideration". Ofcom might therefore appreciate why some ULTV/CMA members find it surprising that its Annual Plan fails to explicitly commit it to a full consultation on the enabling policy options to develop local and community TV. ULTV/CMA does not regard a cursory review as adequate – a comprehensive analysis and consultation is now called for.

167. In its Digital Britain white paper, the Government made clear its desire to see "local TV thrive" and said it awaited further analysis from Ofcom:

*"We will keep the issue of local TV under review..."*⁵⁸

168. ULTV/CMA requests urgent clarification from Ofcom on whether it is intending to fully assess and consult on the policy options to reserve interleaved spectrum for local TV. If not, ULTV/CMA needs to be aware so that it can consider (with colleagues inside and outside Parliament) what action may now be appropriate.

Ofcom has the powers it requires

⁵⁵ Ofcom (January 2009), *Ofcom's Second Public Service Broadcasting Review: Putting Viewers First* (statement), London: Ofcom: http://www.ofcom.org.uk/consult/condocs/psb2_phase2/statement/psb2statement.pdf

⁵⁶ Ofcom (September 2009), *Local and Regional Media in the UK*, Discussion document, London: Ofcom: <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>

⁵⁷ Ibid

⁵⁸ Department for Culture, Media and Sport/Department for Business, Innovation and Skills (June 2009), *Digital Britain Final Report*, London: Crown Copyright: <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>

169. In 2006, Ofcom issued a discussion document which stated that (secondary) legislation may be required to develop a new licensing regime for local TV:

"If spectrum were to be reserved for local services, a dedicated licensing regime would probably be required, with the Secretary of State for Culture Media and Sport issuing an order under 244 of the Communications Act 2003."

170. No reference was made to the requirement for new legislation in Ofcom's more recent discussion document on local media.⁵⁹ In a letter dated January 2010, Siôn Simon, the then Minister for Creative Industries, wrote:

"...you urge the Secretary of State to make an order under S.244 of the Communications Act. The aim of that provision was to apply the regulation of television services under the Broadcasting Act 1990 to local digital television services. However...Ofcom concluded some time ago...the existing regulatory provisions can be made to apply to local digital services without the Order."

171. The government appears to confirm that it has not considered issuing an Order under section 244 of the Communications Act 2003 because it has not been asked to do so by Ofcom who regard such an Order as unnecessary. There is little doubt that government looks to Ofcom for its expertise and guidance on developing local and community TV.⁶⁰
172. Ofcom has decided to protect access to interleaved spectrum for PMSE until at least 2018. ULTV/CMA therefore assumes Ofcom has all the powers it requires to reserve access to this same spectrum for local TV. Based on Ofcom's decision to reserve spectrum for PMSE, ULTV/CMA assumes that no new legislation is required to introduce new Community Multiplexes in interleaved spectrum as proposed in this submission (please see below).

Proposal for Channel 6 and Community Multiplex licences

173. In its second statutory review of public service broadcasting, Ofcom recommended that Channel 3 and Channel 5 licensees receive the benefit of reserved access to only one high definition ("HD") and one standard definition ("SD") video stream on Freeview, rather than multiple video streams as is presently the case (the reserved spectrum used to transmit channels such as Five USA). As Ofcom notes, this could free up capacity on a universal multiplex for a new local TV network available free-to-air to all citizens.⁶¹
174. In total, Ofcom has conducted five separate consultations under the banner of its two statutory reviews of public service broadcasting. There have also been a number of additional consultation documents, such as the 2007 consultation on a 'public service

⁵⁹ Ofcom (September 2009), *Local and Regional Media in the UK*, Discussion document, London: Ofcom: <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf>

⁶⁰ Ultimately, the Wireless Telegraphy Act 2006 gives the government the power to give "general or specific directions to Ofcom about the carrying out of their radio spectrum functions". The government also has the power to make an order under section 243 of the Communications Act 2003. Such an order may specify modifications to sections 7 to 16 and sections 18 and 19 of the Broadcasting Act 1996. The requirement to obtain a multiplex operator's consent for new service obligations under section 12(2) of the Broadcasting Act 1996 is something that falls within the category of modification measures that may be covered by such an order.

⁶¹ "...it would be possible to reserve capacity on a public service DTT multiplex which could be assigned to support local television services." Source: Ofcom (January 2009), *Ofcom's Second Public Service Broadcasting Review: Putting Viewers First* (statement), London: Ofcom: http://www.ofcom.org.uk/consult/condocs/psb2_phase2/statement/psb2statement.pdf

publisher' which Ofcom proposed in part to enhance opportunities for community production.⁶²

175. Both of Ofcom's statutory reviews of public service broadcasting called for further work on local TV. However, since being formed in 2003, Ofcom has not conducted a single dedicated consultation on the enabling policy options for local and community TV.
176. The 'pact' between analogue broadcasters and society historically rested upon the granting of UHF spectrum in return for public service programming commitments. In contrast, exactly the same UHF spectrum is gifted to the 'commercial' Freeview multiplexes but with few reciprocal public service commitments attached.
177. In line with its statutory duties, ULTV/CMA calls upon Ofcom to undertake a dedicated consultation on the enabling policy options to ensure that community TV can thrive in the coming decade. In particular, ULTV/CMA would like to see Ofcom set out its views on how best to rapidly:
 - develop '**Channel 6**' as a federal channel on a public service Freeview multiplex using 'add/drop' technology⁶³ – so that virtually all UK citizens receive at least one local/regional channel (in Scotland where GI spectrum is relatively plentiful this capacity may potentially be available for a new Scottish Network and/or BBC Alba); and
 - encourage further incremental and small-scale local/community TV channels where suitable spectrum is available by developing '**Community Multiplexes**' in the interleaved spectrum across the whole of the UK (this proposal is also broadly in line with the call from the Scottish Local TV Federation for a new '7th' Freeview multiplex approaching universal coverage in Scotland).
178. It is ultimately within the power of government to develop Channel 6 as a new local or regional 'franchise' with quasi public service status. However, the government may well wish to act upon the advice and recommendations it receives from Ofcom. Issues to be addressed in terms of detailed implementation include considering whether incremental capacity on a commercial Freeview multiplex might be reserved for any service displaced to enable Channel 6 to launch on a universal multiplex.⁶⁴
179. Whatever decisions the government reaches with regard to Channel 6 now or in the future, it is within the power of Ofcom to ensure that, wherever practical, every area of the UK is covered by at least one Community Multiplex. As explained below, ULTV/CMA views channels carried on dozens of Community Multiplexes throughout the UK as an important complement to (but not a substitute) for a 'Channel 6' local/regional TV network. Ofcom need not await a government decision on Channel 6 to proceed with planning and licensing Community Multiplexes.

⁶² Ofcom (January 2007), *A new approach to public service content in the digital media age – The potential role of the public service publisher*, Discussion paper, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/pspnewapproach/newapproach.pdf>

⁶³ 'Add/drop' refers to the technology required to insert a local TV channel on a UK-wide Freeview multiplex – a local TV service would be 'added' at a local transmitter site in place of a UK-wide service which would be 'dropped'

⁶⁴ Improvements in compression standards are not generally the result of ingenuity or risk by commercial multiplex operators but, rather, advances in technology which were not predicted at the time of the original licence award. ULTV/CMA believes Ofcom has a duty to capture the value of this incremental capacity for public service benefit (in line with the policy of successive governments over the past five decades to ensure spectrum is used to meet public service purposes). ULTV/CMA is concerned that Ofcom has granted its consent to Arqiva to auction 'incremental' capacity on the Freeview platform (in cooperation with the BBC) for private gain without consulting on alternative policy options to secure the public interest and Ofcom's statutory duties: http://www.ofcom.org.uk/tv/ifi/tvlicensing/letters/Consent_Arqiva.pdf

180. Subject to spectrum availability, ULTV/CMA would expect to see Community Multiplex licences issued at all major Freeview transmitter sites including (but not limited to) the 81 sites currently used by commercial operators and major relays. There may be arguments for aggregating some of the smaller sites with their neighbours – Ofcom would be able to test these arguments in comprehensive public research and consultation.

181. ULTV/CMA proposes that:

- Ofcom should assign at least one local (DVB-T) multiplex licence via a comparative selection process (a beauty contest) to the group which provides the most compelling commitments to maximise value to society (“Community Multiplexes”);
- Ofcom regulates Community Multiplexes to ensure they are operated on a not-for-profit basis and to prohibit a gatekeeper extracting monopoly rents;
- Ofcom further regulates Community Multiplexes to ensure that there is an appropriate mix of editorial services broadening choice for viewers in the locality and catering for local tastes and interests (including but not necessarily limited to community TV programming);
- the PMSE band manager has further obligations imposed on it to ensure spectrum is made available to community TV operators in all parts of the UK (including rural or less populated areas) on fair, reasonable and non-discriminatory (“FRND”) terms; and
- Ofcom advises on how further action may be appropriately taken to maximise the value of regulatory benefits (e.g. access to Freeview capacity, EPG priority, ‘must carry’ status on cable, access to BBC partnerships) for the benefit of new entrants meeting the purposes of public service broadcasting within local communities.

182. ULTV/CMA wishes to see as many areas of the UK covered by a Community Multiplex as reasonably possible. For technical reasons familiar to Ofcom, it is probable that the number of services that can be carried by Community Multiplexes would be substantially higher in some parts of the UK (e.g. Scotland) than others (e.g. Southern England).

183. Whilst Community Multiplexes would be non-profit-distributing, this need not be the case for all the services they carry. ULTV/CMA envisages that a range of local and non-local services would be carried on a Community Multiplex from a number of different service providers. Potential services may include:

- community TV channels in association with voluntary organisations, charitable groups, arts bodies, universities and/or other public service providers (in many cases likely to be run alongside or as part of local TV channels);
- local TV channels supported by local media groups or production companies (where a Community Multiplex covers more than one local authority area there may well be more than one local TV service reflecting this);
- new ‘nation/region’ TV channels for Scotland, Wales, Northern Ireland and/or the English regions;
- local sports, music or other themed channels;
- municipal / public sector information channels;
- new interactive / text services – including possibly dedicated local news video services in conjunction with local newspapers;

- minority language channels and/or ethnic services;
 - audio services – local radio stations (e.g. BBC local radio; commercial / community radio); and
 - further quasi-UK Freeview services where additional capacity is available to enhance societal purposes – e.g. Community Channel, Teachers TV, children/teens, factual, arts.
184. ULTV/CMA acknowledges that it may not always be technically possible to carry more than 1-2 high-quality video streams on a new Community Multiplex in all areas of the UK. In some areas there may simply be a local and/or community TV service, a local radio station and interactive text or news loops. A solution for each area would be tailored to local market requirements and to reflect local support and demand.
185. The above is intended to give a flavour of what could potentially be achieved where a Community Multiplex is licensed on a not-for-profit basis as a public good rather than to maximise profits on behalf of a spectrum gatekeeper.
186. There are at least some reasons to suggest that the undersupply of some genres of public service content could be addressed if Ofcom were to work with the government to open up the Freeview platform (existing UK-wide multiplexes as well as Community Multiplexes) to new market entrants. By way of example, despite a plethora of dedicated children's channels on digital satellite and cable, only children's channels from the incumbent analogue TV operators are available on Freeview. This lack of access to Freeview is almost certain to be a factor in the challenges facing digital TV children's channels seeking to invest further in new original UK content.
187. It would be for Ofcom to award a Community Multiplex licence to the consortium or group making the most convincing commitments to the community it is seeking to serve. As part of the awards process, Ofcom could seek to ensure that at least one programme service encourages citizens to gain access to spectrum to make their own programmes and participate in questioning decision makers about the issues that affect their lives.
188. It is difficult to conceive of circumstances in which a consortium made up of the types of service providers listed in paragraph 182 could participate in Ofcom's proposed local spectrum auctions. A coalition of service providers would have difficulty coming together to compete against spectrum gatekeepers. Each participant may have to approve and sign-off funding prior to the commencement of the auction process, making rapid decision making by a consortium especially difficult. In competition with a spectrum gatekeeper with access to capital markets, a consortium may not have the coordination ability, let alone up-front cash, to be successful. Furthermore, smaller consortium members would be in a weak negotiating position with larger consortium members. Smaller operators would be clearly disadvantaged if seeking to join a consortium dominated by other companies seeking to rent spectrum at a profit.
189. There are a number of methods of 'capturing' the value of any spectrum assigned to Community Multiplexes. The most obvious might be to impose licence conditions on operators to ensure they undertake reciprocal public service obligations. ULTV/CMA is not opposed in principle to the payment of administered incentive pricing (spectrum tax) by Community Multiplex operators subject to appropriate prior analysis and consultation.⁶⁵

⁶⁵ Reserving capacity for community TV would not be incompatible with Ofcom's proposal to impose spectrum tax on all existing Freeview multiplexes from the end of 2014. Indeed, four of the six existing Freeview multiplexes already have statutory requirements to carry channels directed by the government.

190. In theory, Ofcom could sub-contract the award of Community Multiplex licences to a third party (e.g. a new band manager or co-regulator). However, it is not immediately apparent to ULTV/CMA how this would be more efficient than Ofcom awarding licences directly to Community Multiplex operators assuming that relevant Ofcom staff are well informed, capable and sincerely committed to the process (as is widely felt to be the case with community radio licensing). As with community radio, Ofcom would not be obliged to award licences in the (unlikely) event that it is unsatisfied by the applicants in any particular area.
191. ULTV/CMA seeks a commitment from Ofcom it will ensure that, wherever practical, at least one 'good' GI frequency will be released to the market via a beauty parade to the group offering the most compelling commitments to meet local viewers' tastes and interests. ULTV/CMA is confident the opportunity cost of such an intervention would be small relative to the societal benefits. The details of such a policy could be consulted on by Ofcom in 2010 and implemented as soon as frequency planning is finalised.
192. CMA argues there would be clear benefits in ensuring that proceeds from a Community Multiplex are used to deliver social gain rather than simply distributed as dividends to shareholders.
193. If Ofcom is not willing to change its existing policy, then ULTV/CMA suggest Ofcom should set out compelling reasons why it believes that allowing a local gatekeeper to maximise profits at the expense of TV and radio services is preferable to allowing a not-for-profit Community Multiplex to recover its costs from service providers committed to public service purposes and enhancing societal value.

Benefits of a comparative selection process

194. Ofcom recognises that auctions may not always be the most appropriate mechanism to award spectrum. For example:
- Ofcom has successfully implemented a comparative selection process for the award of community radio licences and has publicly expressed its enthusiasm for this regime;
 - Ofcom has decided to use a beauty parade to appoint a new PMSE band manager; and
 - Ofcom specifically rejected an auction process for the award of DAB multiplex licences even though it argued it may be possible to design an auction process with public service conditions attached.⁶⁶
195. ULTV/CMA believes that, on balance, a beauty parade for the award of Community Multiplex licences is most likely to serve the public interest. This process would enable Ofcom to test and probe the proposals and researched produced by prospective operators. In the view of ULTV/CMA, a rigorous beauty parade would be most likely to ensure a Community Multiplex operator provides a range of services from different providers catering for the tastes and interests of viewers within the market served.

Other matters for consultation

196. ULTV/CMA expects third parties such as

⁶⁶ Ofcom (December 2005), *Radio - Licensing Policy for VHF Band III, Sub-band 3*, Statement, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/vhf/statement/band3statement.pdf>

- BARB (audience measurement);
- PPL, VPL, PRS, MCPS (music copyright bodies);
- DMOL (EPG provision);
- Virgin Media (cable carriage); and
- the BBC (e.g. prospective public service partnerships; low-cost access to Project Canvas electronic programme guide; listings in Radio Times)

to all act in a supportive and encouraging manner towards local TV service providers operating with explicit 'public service' commitments.

197. ULTV/CMA expects Ofcom to proceed with a full consultation on proposals for local TV including exploring:

- licensing areas;
- licensing procedures; and
- networking arrangements.

198. ULTV/CMA does not wish to see local TV operators face unreasonable obstacles to success. There may be little point local TV launching on Freeview if services are not listed in the EPG section most frequently used by viewers. Ofcom must rigorously enforce regulated access to the Freeview EPG to ensure that local TV services are easy to find (e.g. within the 'general entertainment' section) and not 'hidden' at the bottom of listings.

199. Many consumers are now suffering from a decision taken not to make automatic retuning part of the mandatory specification for 'digital tick' compliant Freeview receivers. As and when local TV services launch on Freeview there will need to be significant marketing activity to ensure viewers are aware of the requirement to re-tune their receivers. The industry (including the analogue incumbent broadcasters) and Freeview have benefited from public subsidy to promote re-tuning in the run-up to DSO. The industry (especially the BBC), Freeview and Digital UK could have a pivotal role to play in ongoing 'retune' marketing activity as demonstrated by the September 2009 'national retune day' and ongoing 'retune' marketing activity to support the Freeview HD roll-out.⁶⁷

200. ULTV/CMA argues that it would not be acceptable for many viewers to be unaware of new local services because of a lack of industry cooperation to market the existence of new Community Multiplexes. The promotion of the requirement to regularly re-tune receivers (and support and information on how to do so) is regarded by ULTV/CMA as an important use of the digital switchover support scheme and should be budgeted into future spend up to the end of the current licence fee settlement.

British Sign Language Broadcasting Trust

201. The British Sign Language Broadcasting Trust (BSLBT) was established in 2008 to increase the amount of sign-presented programming on UK television. It is funded by around 50-60 commercial television channels as a means of meeting their legal requirement to supply 'in vision' signed programming for users of British Sign Language.⁶⁸

202. Currently, the only terrestrial broadcast outlet for BSLBT programmes is Community Channel. However, Community Channel loses access to Freeview capacity at DSO.

⁶⁷ <http://www.dtg.org.uk/news/news.php?id=3529>

⁶⁸ <http://www.bslbt.co.uk>

203. It is likely that many within the deaf community will rely upon Freeview for TV reception following DSO. ULTV/CMA is extremely concerned that valuable public services, including BSBLT programming, are likely to be denied to Freeview viewers as a result of the decision by policy makers to allow new Freeview capacity (not controlled by designated public service broadcasters) to be sold to the highest cash bidder. This appears to be in contravention of the spirit of the original Broadcasting Act licence award in which multiplex operators gave commitments to make capacity available for a range of services with societal benefits in return for gifted access to public spectrum.
204. ULTV/CMA is concerned it would be of severe detriment to the deaf community if BSBLT programming does not continue to have a Freeview outlet post-DSO. ULTV/CMA would regard it as absurd to suggest that the BSBLT should be expected to buy capacity in the marketplace, paying a premium over which all other channels are willing to pay. This would be likely to further boost the supernormal profits of multiplex operators who already owe their existence to having been gifted public spectrum.
205. It is difficult for ULTV/CMA to understand why the government and Ofcom require TV broadcasters to set-aside funding to produce signed programming but then fail themselves to require multiplex operators using gifted public spectrum to set aside airtime (on the UK's number 1 TV platform that is often accessed by those on low incomes) in order to ensure this content is able to maximise its reach and impact.
206. ULTV/CMA understands that prospective local TV operators are in discussion with Community Channel and others about showing a range of public service orientated programming, including BSBLT content, on local TV channels on Freeview. ULTV/CMA welcomes these discussions and believes they even further enhance the overwhelming case for reserved access to spectrum for local TV.
207. ULTV/CMA expects many local TV providers, if and when licensed on Freeview, to wish to carry their own dedicated local programming for the deaf community in addition to BSBLT produced UK-wide content.

Existing local TV licensees

208. There are a small number of existing terrestrial local TV groups still licensed under the TV Restricted Service Licence ("RSL") regime initially put in place by Parliament in the Broadcasting Act 1996. These RSLs reflect a multimillion pound investment, made by both public and private sector partners, in seeking to deliver a new tier of local public service broadcasting. These operators often maintained their investment on the explicit understanding that government and Ofcom would make provision for a new tier of local TV on Freeview.
209. Ofcom originally promised to give RSL operators greater certainty about their future in 2006. Ofcom went on in its digital dividend review to commit to make replacement spectrum available (through an open tender process) by no later than 2009:

"In relation to interleaved spectrum, we expect to auction geographic packages in the Border, Granada, West Country and Wales regions by the end of 2008. We expect to award the package with PMSE obligations by

beauty contest to the same timetable. Auctions of the remaining geographic packages will follow in 2009.”⁶⁹

210. ULTV/CMA understands the legitimate reasons for the lengthy delay in the release of this spectrum. Indeed, ULTV/CMA hopes this delay will be used by Ofcom to review and change its policy approach. However, today, RSLs remain under the threat of closure. Operators are still no nearer to knowing whether they have an ongoing business. The situation might be regarded as farcical if it were not for the severe damage being caused to real local and community businesses and their supporters and investors. ULTV/CMA regards the current damage being caused to RSLs as unacceptable.
211. ULTV/CMA does not expect Ofcom to license RSLs indefinitely whilst it is engaged in ongoing spectrum planning. However, existing RSLs were promised a regulatory environment that would allow them to make investment decisions. They have a legitimate expectation that Ofcom will use its reasonable endeavours to enable them to move to digital transmission now, recognising that they are no longer viable as analogue services.
212. Ofcom’s overriding duty is to secure the optimal use of spectrum. Ofcom has the ability to vary RSL licences to enable existing services to launch digital multiplexes providing a portfolio of digital services meeting local tastes and interests. ULTV/CMA strongly believes that allowing RSLs to simply surrender their existing licences prior to a new licensing regime being finalised would not achieve any of Ofcom’s statutory duties to citizens and consumers.
213. It is not reasonable for Ofcom to suggest the model for community TV on Freeview is unproven when established groups who wish to demonstrate the model are denied the opportunity to do so. Ofcom has previously committed to make spectrum available for short-term RSL events and trials.⁷⁰ It is not clear whether Ofcom has taken any action to meet this commitment in practice.
214. ULTV/CMA notes Ofcom’s decision to seek to identify interleaved spectrum to enable HD services to roll-out on Freeview pre-DSO.⁷¹ ULTV/CMA similarly wishes to see community TV services benefit from early access to GI spectrum where available. ULTV/CMA would ideally wish to see opportunities for a range of medium-term trials of local TV on Freeview in the run up to a new licensing regime being implemented.

Unreasonable burden of VOD flat rate fees

215. ULTV/CMA is concerned by Ofcom’s decision to authorise a flat-rate ‘notification fee’ on VOD service providers of up to or around £2,000 per annum. ULTV/CMA recognises the need to cover the costs of VOD editorial regulation or co-regulation but believes there is no reasonable justification for a flat-rate ‘poll tax’ on service providers. It seems obvious to ULTV/CMA that such a poll tax is deeply unfair and could in effect mean smaller VOD services subsidise regulation for larger VOD services.

⁶⁹ Ofcom (December 2007), *Digital Dividend Review – A statement on our approach to awarding the digital dividend*, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/ddr/statement>

⁷⁰ Carmel McLaughlin, then Ofcom’s Head of TV Planning and Licensing, wrote to existing local TV operators in an email on 13 December 2007: “Short duration or event RSLs for digital transmission will also be available on request, subject to spectrum being available.” A similar statement is made on Ofcom’s website: <http://www.ofcom.org.uk/tv/ifi/tvlicensing/rts/>

⁷¹ Ofcom (December 2008), *Temporary assignment of UHF analogue interleaved frequencies*, Statement, London: Ofcom: <http://www.ofcom.org.uk/consult/condocs/interleaveduhf/statement/statement.pdf>

216. ULTV/CMA believes that all regulatory fee structures must be consulted on by Ofcom in compliance with regulatory best practice and not imposed without any adequate cost benefit analysis or Impact Assessment.
217. ULTV/CMA is concerned that Ofcom's proposed VOD poll tax has the potential to be extremely damaging to new entrants and smaller operators and may well discourage VOD service provision from these groups. This may be regarded as incompatible with Ofcom's statutory duties to citizens and consumers.
218. ULTV/CMA suggests Ofcom must assume that Parliament expects it to use its revenue raising powers responsibly and not to authorise or impose new 'taxes' in a manner that could unreasonably harm industry.
219. ULTV/CMA notes that Ofcom is now regulating VOD service providers without charging any additional fees to industry. ULTV/CMA calls for a full and open consultation on VOD regulatory charging options prior to any implementation of new fee structures.

Review of content regulations

220. ULTV/CMA welcomes Ofcom's proposal to prioritise a review of content regulation in 2010/11. There is a prospect it will be possible to gain a consensus across industry to simplify the Broadcasting Code and ensure regulation is retained at an appropriate level consistent with (and as required) by statute.
221. ULTV/CMA further welcomes Ofcom's proposal to review its Code on the Scheduling and Transmission of Advertisements ("COSTA"). ULTV/CMA recognises there is a view held by some that (except where justified by strong evidence) Ofcom should not generally impose advertising and sponsorship regulations on television broadcasters that are more onerous than that required under the European Union or UK law.
222. It is important that Ofcom recognises that local TV operators (where broadcasting on terrestrial and cable) cannot generally be received in other EU territories and therefore have no requirement to comply with the Audiovisual Media Services directive. There may be good reasons for Ofcom to exempt local TV operators from much if not all of the regulations set out in COSTA:
- Local TV operators compete in the market for local advertising with commercial and community radio stations which are not covered by COSTA. This creates confusion for local sales executives and businesses seeking to understand differing regulations – by way of example, it would be difficult to explain to a local business why a sponsor credit on local radio may include a brief promotional message but not on local TV.
 - The business model for local TV is likely to rely to a significant extent upon attracting a large number of relatively small advertisers. This is a very different business model to UK-wide TV channels where, often, the majority of revenue is achieved from a fairly small number of advertising agencies. Whilst there is an argument that UK-wide TV channels could sometimes increase their revenue by selling fewer minutes of advertising (as restricted supply might enable them to increase yields) this may not be the case for local TV. If a local TV channel is denied flexibility to sell up to 12 minutes per hour of spot advertising this could have a severe impact on its overall business.

- Local news programmes of around 20-30 minutes duration (or longer) could prove to be the 'flagship' programme on a local TV channel, providing a new reason for viewers to tune-in daily. Current rules on the number of advertisement breaks within news programming could prove detrimental to local advertisers and stations striving to deliver a viable local news-led service.
- COSTA already includes a limited exemption for local TV providers (to allow local services to provide 'advertorial' programming in teleshopping airtime). If Ofcom wishes to see local and community TV develop, it must not place unnecessary barriers in its path.

223. ULTV/CMA encourages Ofcom to engage in dialogue with ULTV, as the umbrella group for local and community TV operators, in the early stages of its review of COSTA. Given the challenges faced by local TV operators and Ofcom's stated desire to minimise the regulatory burden, Ofcom may wish to consider urgent implementation of these measures.

Securing optimal spectrum use

224. Ofcom's primary statutory duty is to achieve the optimal use of spectrum. ULTV/CMA believes it may be in the public interest to explore options to allow Freeview platform to expand further and, potentially, seek to ultimately move to a more efficient use of frequencies.

225. ULTV/CMA believes there may be a case for Ofcom imposing minimum coverage obligations, FRND conditions and other licence terms to protect the public interest on any new UK-wide DTT multiplexes which emerge in digital dividend spectrum.

226. ULTV/CMA notes the European Commission's statement that:

"Some of the important choices to be made in terms of EU priorities for the digital dividend are fundamentally of a political nature... Among the promising initiatives identified in the Commission study are... considering wider deployment of single Frequency Networks (SFNs)..."⁷²

227. ULTV/CMA anticipates Ofcom would wish to consult on the main options for encouraging the optimal use of spectrum for the development of Freeview in the medium to long term including the policy options for the use of the lower cleared band. ULTV/CMA calls on Ofcom to set out these options in a manner which allows MPs and others to comment and contribute to discussions on long-term strategy prior to any policy decisions on the release of digital dividend spectrum being finalised.

Community Radio

228. ULTV/CMA is grateful to Ofcom for the manner in which it has developed an effective licensing process for community radio.

229. The CMA, the representative body for community media in the UK, seeks to play a constructive role in issues relating to community media and the wider communications

⁷² Commission of the European Communities (28 October 2009), *Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Transforming the digital dividend into social benefits and economic growth*, Brussels: European Commission: http://rspg.groups.eu.int/_documents/documents/meeting/rspg20/rspg09_292.pdf

industry including digital inclusion, the future of public service broadcasting and development of non-traditional media platforms.

230. The government's Digital Britain white paper called for cost benefit analysis of the government's proposed digital radio upgrade prior to implementation:

*"The Government will also conduct a full cost benefit analysis of Digital Upgrade in radio including analysis of whether there is a case for assistance to specific groups, as there has been with Digital TV Switchover."*⁷³

231. It is likely Ofcom will wish to input into this analysis and the issues relevant to enabling the proposed upgrade process to be successful; encouraging fair and effective competition between services and technologies for the benefit of citizens and consumers.
232. One of the advantages of digital radio technology (and most especially modern variants such as DAB+) is that it creates new opportunities for incremental services targeting niche interests. However, the 'gatekeeper' business model raises many concerns. One of the advantages of DAB-based digital radio could be lost if many niche station operators are priced out of multiplex capacity, forcing them to consider other platforms.
233. Over the years, the primary incentive for commercial radio incumbents to obtain DAB carriage has been the rollover of their analogue radio licences. Freeing up new FM spectrum for community radio has been suggested by government as one of the benefits of the digital radio upgrade. However, this is still some time away. Where there is demand, ULTV/CMA calls upon Ofcom and the radio industry (including the BBC) to do all it can to identify further analogue FM frequencies for community radio. Where possible, Ofcom should also explore opportunities to improve coverage for existing stations. Tackling unlicensed (pirate) broadcasters must be a continuing high priority.
234. ULTV/CMA anticipates community radio developing in the short to medium term by securing access to Community Multiplexes (in G1 spectrum) on fair, regulated, terms. ULTV/CMA would be deeply concerned if the operators of local Freeview multiplexes were able to deny community radio services access to Freeview on FRND terms. As set out elsewhere in this submission, ULTV/CMA believes that at least one multiplex in a local market should, wherever practical, be licensed to serve the public interest and not the commercial interests of unregulated 'monopoly' spectrum gatekeepers.
235. Community radio stations primarily look to Ofcom to help them secure access to spectrum (primarily FM and G1 spectrum). However, it is important to recognise that community radio stations do not only provide radio. They also provide training, encourage participation and support community development.
236. ULTV/CMA recognises that, because it is still relatively young and embryonic, community radio may be seen by some as a 'nice to have' rather than an essential part of community development. ULTV/CMA believes that allowing community radio's development to stall would be a serious error of judgement. Ofcom's annual report on

⁷³ Department for Culture, Media and Sport/Department for Business, Innovation and Skills (June 2009), *Digital Britain Final Report*, London: Crown Copyright: <http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>

community radio suggests that it is extraordinarily inexpensive to the public purse, relying as it does primarily on volunteer and community inputs.⁷⁴

237. ULTV/CMA recognises that Ofcom plays a constructive role in supporting training events for community radio practitioners and providing advice alongside its other licensing responsibilities. The role of Ofcom staff in supporting community radio (and 'offshoots' such as student radio) is fully appreciated by ULTV/CMA.

Cost of Ofcom and licence fees

238. The annual cost of operating Ofcom, at circa £130m, is around 260 times the size of the current Community Radio Fund allocated by government. Indeed the Community Radio Fund is less than a quarter of the size of the remuneration paid to Ofcom's Board / Executive / Content committees. Whilst not suggesting a direct transfer from the Ofcom Board to 200 community radio stations, it does help bring into perspective the cost of Ofcom relative to the public funding granted by government to community radio.
239. ULTV/CMA recognises the importance of a well resourced regulator able to effectively implement its statutory duties. It is important that Ofcom (in line with the civil service) offers reasonable packages and working conditions to its staff and contractors and a cost-efficient service to citizens and consumers. It might be a productive exercise for Ofcom to discuss openly and directly with stakeholders the action it is taking to further drive further efficiencies and reduce the costs it imposes.
240. Now that Ofcom is more than half-a-decade old it may be appropriate to also consider whether its consultation, policy making and regulatory procedures can be streamlined and improved. To take one recent example, the government's decision to appoint an Independent Spectrum Broker demonstrates how one objective person adopting a common sense and pragmatic approach can produce a cogent set of proposals. Whilst not meeting universal approval, the Independent Spectrum Broker was seen by many to make a serious effort to engage with industry.
241. ULTV/CMA would request Ofcom use its reasonable endeavours to reduce costs to the community radio sector, in particular the cost of annual licence fees. It is not entirely clear to ULTV/CMA why community radio broadcasters should be required to pay an annual WTA licence fee of £250 in addition to a Broadcasting Act licence fee of £600. Whilst Ofcom may regard this as a modest amount to pay for high quality regulation, hard-pressed community radio groups would no doubt find a useful purpose for every pound saved through a reduction in regulatory fees.

Conclusion

242. Without Ofcom's licensing team working hard to identify, allocate and award FM spectrum for community radio then this new tier would never have seriously developed. ULTV/CMA believes that the notion intervention is essential to protect spectrum for community broadcasters in radio but not in TV does not stand up to objective scrutiny.
243. ULTV/CMA believes that in a free and fair society, at least one terrestrial TV channel should be a local channel representing the views and opinions of local people and providing a platform for local production and local advertising. All ULTV/CMA

⁷⁴ Ofcom (March 2009), *Community Radio: Annual Report of the Sector*, Statement, London: Ofcom: http://www.ofcom.org.uk/radio/ifi/rbl/commun_radio/cr_annualrpt/cr_annualrpt.pdf

proposals have been developed with a view to achieving a long-term sustainable voice for local communities.

244. ULTV/CMA believes that DSO provides a 'once-in-a-generation' opportunity to address market failure in local free-to-air content and to maximise the reach and impact of local and community TV services. ULTV/CMA strongly believes that reserving a limited amount of spectrum for community content should be viewed as a guaranteed protection for small independent production, citizen participation and media plurality in an imperfect market.
245. Local TV would also, for the first time, be able to offer choice to terrestrial TV advertisers in local markets (where ITV1 currently maintains its monopoly).
246. Ofcom's policy towards local TV has been the subject of widespread criticism and concern from MPs, community media practitioners and civil society groups. ULTV/CMA expects Ofcom to listen and respond to these concerns constructively.
247. It is sometimes argued that there are two options to deliver local TV – the Channel 6 proposal on the one hand or interleaved spectrum on the other. ULTV/CMA has consistently argued that it is not an either/or choice – both methods complement each other and could be made to work together to deliver a comprehensive UK-wide network of local and community TV stations serving the nations, regions and localities of the UK. Interleaved spectrum is within the gift of Ofcom and, ULTV/CMA argues, should be considered on its own merits independent of the Channel 6 proposal.
248. The views set out on local TV in this submission are substantially in line with the views expressed by ULTV/CMA and the All-Party Parliamentary Community Media Group when meeting with Ofcom representatives in the past. This written record is intended to assist Ofcom as it seeks to develop its policy. ULTV/CMA now looks to Ofcom to implement the full spirit of the resolutions on Community Media adopted by the European Parliament (September 2008) and Council of Ministers (February 2009).
249. Ofcom is proposing to sell some spectrum suitable for community TV which will not become available again for a generation (no less than 4 to 5 Parliaments). ULTV/CMA does not believe it is appropriate to place faith in under-regulated markets to deliver local TV on Freeview. ULTV/CMA does not wish to see local and community media operators denied access to public spectrum on reasonable (regulated) terms. ULTV/CMA firmly believes that no licensing authority sincerely concerned about the development of local and community media can reasonably allow unregulated spectrum gatekeepers to control the spectrum most suitable for local DTT multiplexes.
250. ULTV/CMA wishes to see local programming on Freeview and other TV distribution platforms produced by and for ethnic minority, religious, youth, student, LGBT, parent / guardian, unemployed / low income, sporting, senior citizen, farming, countryside, gardening, book-club, arts, deaf, disabled, academic and other third sector / voluntary groups and local organisations and producers. Regulated access to spectrum may not only benefit local and community organisations but also, potentially, regional press operators seeking to expand their businesses.
251. For the avoidance of doubt, ULTV/CMA does not wish to see dominant or monopoly spectrum gatekeepers permitted to deny citizen-groups or local companies access to spectrum suitable for local Freeview multiplexes on FRND terms. ULTV/CMA believes it would be absurd to require local TV to compete for spectrum in a cash auction against businesses with a spectrum gatekeeper model. ULTV/CMA instead wishes to see broadcasters (including but not limited to community TV, radio and/or text

services) able to gain access to capacity on Community Multiplexes on fair, regulated, terms.

252. ULTV/CMA looks to Ofcom to undertake full cost benefit analysis of the proposal for not-for-profit Community Multiplexes to be licensed serving the public interest rather than the interest of spectrum gatekeepers seeking to exercise dominant market power. It is the sincere hope of ULTV/CMA that the Ofcom Board will, having undertaken this analysis, wish to take action to protect access to spectrum for local communities of its own volition and in line with its statutory duties.
253. The Annual Plan appears to commit Ofcom to consult on packaging options for GI spectrum but makes no reference to fundamentally reviewing its 'market-led' approach to the GI spectrum most suitable for local DTT. ULTV/CMA believes it is important that MPs and others know whether or not Ofcom is now willing to fully assess and consult on reserving access to spectrum for Community Multiplexes as proposed in this submission. Ofcom itself appeared to call for its own policy to be reviewed in the conclusion to its second statutory review of public service broadcasting. However, since then, there has been no new policy developed for consultation.
254. Whilst there are many concerns regarding the operation of DAB multiplexes in practice, at least in theory Ofcom attempts to regulate them to ensure capacity is offered in perpetuity on FRND terms. At no point has Ofcom sought to argue that it would be in the public interest to allow DAB multiplex operators to be subjected to no effective regulation, as Ofcom appears to be proposing for local Freeview multiplexes.
255. Ofcom and the government already reserve spectrum for Freeview and a PMSE band manager. These are valuable regulatory assets which have **already** been granted by the state but which risk not being fully optimised for the delivery of public value.
256. Ofcom is aware that coordination failure (amongst other potential market failures) could make it difficult or impossible for local or community TV operators to gain access to UK-wide Freeview multiplex capacity. Ofcom's failure, to date, to even assess the dangers of allowing a spectrum gatekeeper to exploit their dominance in the supply of spectrum to local markets suggests that Ofcom's original policy on the award of interleaved spectrum may not be fit for purpose.
257. ULTV/CMA understands that concerns relating to the market power of spectrum gatekeepers have been made by advocates of local TV over an extensive period. ULTV/CMA feels confident Ofcom would not wish to be seen to be advocating unregulated spectrum monopolies resulting in inefficient outcomes which subvert the public interest. It would be likely to dismay many (including many concerned MPs) if Ofcom were to dismiss such concerns without any serious examination or in-depth analysis.
258. Under the proposals set out within this submission, every UK citizen could be guaranteed access to a new local public service channel, free-to-air, providing community information and discussion programming targeted at where they live. For all Freeview households, regardless of where they point their aerial or what type of TV receiver they use, digital switchover could mean a rich and diverse fountain of innovative new productions from their own part of the UK.
259. Historically, a number of new advances in broadcasting policy have been fiercely opposed by much of the prevailing establishment. ULTV/CMA trusts Ofcom will find the courage and conviction to implement a policy which could revolutionise democratic accountability, citizen engagement and local production throughout the UK.

260. With active Ofcom support, at least one local TV service, in virtually every part of the UK, could be part of the long term legacy of digital switchover. ULTV/CMA looks to Ofcom to enable this exciting vision to be realised.

ULTV/CMA

17 February 2010

Summary of proposed key priorities for Ofcom Annual Plan 2010/11

Local and community TV and citizen interests

- Trials – licence ongoing and new ‘RSLs’ in interleaved spectrum for Freeview trials and special events in the short to medium term
- Consult and act – consult on full range of enabling policy options for longer term and act to ensure no spectrum gatekeeper is able to deny local TV users access to spectrum on fair terms
- Plan – prepare to introduce Community Multiplexes accountable to Ofcom and public via beauty parade mechanisms
- Regulate – ensure community TV services fairly dealt with and listed in ‘general’ section at front of Freeview EPG
- British Sign Language – review with local TV sector how British Sign Language presented programming can be supported and enhanced on Freeview
- Advice – input where relevant on other issues including use of switchover support fund to assist and support ‘retune’ campaigns as new local services emerge
- Promote citizen interests – participate in media literacy and digital inclusion programmes

Regulatory burden

- COSTA – consider urgent measures to reduce regulatory impediments to success e.g. exempting local TV from parts of COSTA where appropriate
- VOD poll tax – scrap plans for ‘poll tax’ on VOD service providers, address concerns raised and consult fully on VOD editorial co-regulatory fee structures
- Licence fees – seek to streamline and reduce regulatory fees for community radio
- Efficiencies – explore options to reduce costs further and streamline structures

Optimal spectrum use and competition

- FM – seek to maximise coverage for new and existing community radio stations on FM and prioritise resources dedicated to tackling unlicensed FM stations
- DAB – input to digital radio upgrade to inform planning and consider benefits of regulated price controls
- UHF – comprehensive review of lower cleared spectrum, consultation on options to develop long-term spectral efficiencies for Freeview multiplexes
- Promote competition – review adopting active competition policy to open up Freeview platform and ensure that digital dividend spectrum for further multiplexes is assigned to new entrants with appropriate conditions attached (e.g. minimum coverage, FRND terms)

Further information

United for Local Television (ULTV) is an umbrella group representing a broad range of local TV practitioners and advocates from the private, public and voluntary sectors.

The **Community Media Association** (CMA) is the UK representative body for the community media sector and is committed to promoting access to the media for people and communities. It aims to enable people to establish and develop community based communications media for empowerment, cultural expression, information and entertainment. The CMA is an active member of both ULTV and **Public Voice**, a coalition campaigning for citizens' interests in communications policy.

The views expressed in this submission represent the consensus view of members of the ULTV and CMA management committees and may not reflect the views of any other individuals.

For further information please contact:

United for Local Television
Community Media Association

www.unitedforlocaltv.com
www.commedia.org.uk