

UK Broadband Limited

Response to Ofcom's consultation of 9 June 2009 on
Freedom4's Application for Licence Variation

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Schedule 1: Confidential Submissions

1 Introduction

- 1.1 UK Broadband Limited (“**UKB**”) welcomes the opportunity to respond to the Consultation. UKB is a wholly owned subsidiary of PCCW (Hong Kong).
- 1.2 UKB is, as stated in the Ofcom Consultation of 9 June 2009 on Freedom4’s Application for Licence Variation (the “**Consultation**”), a licence holder of 3.5GHz spectrum. Given UKB’s experience as a holder of a 3.5GHz licence, UKB considers that it is well placed to provide informed comment for this Consultation.
- 1.3 UKB considers that the liberalisation of the licence terms for licensees in the 3.4GHz to 3.8GHz spectrum range is essential to the successful roll-out of new services and wireless broadband infrastructure, consistent with the objectives of the Digital Britain Report.
- 1.4 UKB is taking this opportunity to give Ofcom advance notice that, it will be soon submitting a variation request in order to change its current spectrum mask constraints to bring them into line with the EC Decision of 2008/411/EC and those variations requested by Freedom4. However, UKB considers that Ofcom, as part of its determination of Freedom4’s Request, should consider mandating that the requested variations will automatically apply to all licences in the 3.4GHz – 3.8GHz spectrum bands.

2 Executive Summary

- 2.1 UKB has no objection, in principle, to the proposed variation of the Freedom4 licence, subject to certain safeguards. UKB considers that all licensees in the 3.4GHz – 3.8 GHz bands should be considered to be in the same class (the “**Spectrum Class**”) and that therefore they should have similar licence conditions.
- 2.2 UKB supports the principle of liberalising licences by removing unnecessary restrictions from the spectrum licences.
- 2.3 UKB considers these changes are a pre-requisite to the introduction of commercially viable new services using this Spectrum Class. UKB will need similar changes to its licence in the near future to be able to launch its planned wireless broadband related services.
- 2.4 The introduction of introduction of new services utilising this spectrum range can be expected to lead to consumers benefitting from greater choices of services being offered and from the increased roll-out of wireless broadband, especially to deprived urban areas, providing competition to the existing mobile operators.
- 2.5 However, the full benefits would only occur were there to be a level playing field between the competitors within this Spectrum Class. Should there be differing licence conditions and in particular where these conditions effectively impose a cost differential on certain licensees (for example, due to different technical requirements) then this

would lead to a distorted market and reduce the benefit experienced by consumers. Potentially these additional costs would impede or prevent the roll-out of wireless broadband networks and services by the other licensees.

- 2.6 Therefore, UKB considers that it is paramount that Ofcom takes a non-discriminatory approach so that it can ensure that a level playing field will exist between operators within this Spectrum Class. This necessitates that Ofcom, in considering Freedom4's application, also considers whether such changes could be introduced to all licences for the Spectrum Class. It further necessitates Ofcom imposing similar rules on OOB for all licences. This is because the applicable OOB rules have significant cost implications for deployment of networks and having different rules would significantly distort the market and reduce competition for these areas. It should be noted that disadvantaged urban communities do not currently have access to broadband services and they are expected to be key beneficiaries from the new WIMAX infrastructure and services.
- 2.7 It is not clear to UKB, whether Ofcom has undertaken a broader technical analysis of the implications of agreeing to such licence changes for all licences for this Spectrum Class but UKB considers that this should be undertaken prior to agreeing to the changes.
- 2.8 UKB would hope that Ofcom, having concluded a broader analysis, would be able to introduce identical changes to all licensees within the Spectrum Class at the same time as for Freedom4 or failing that, shortly thereafter. Such an approach would ensure that a level playing field existed for all operators within the sector, reduce the administrative burden on Ofcom (in having to consider further licence variation requests from the other operators) and maximise the consumer benefit. This would also be consistent with the views of the Independent spectrum broker ("ISB") and endorsed by the Government in the Digital Britain Report,
- 2.9 In any event, UKB will shortly apply for a licence variation that includes a request that Ofcom authorise UKB to connect terminals complying with European Standards (EN 302 326 and EN 302 623) onto its network.
- 2.10 In conclusion, UKB supports the further liberalisation of the spectrum use but considers that it should not come at the expense of having a level playing field.

3 General Regulatory Policy and Principles:

- 3.1 UKB welcomes and supports Ofcom policy of spectrum liberalisation. UKB wishes to emphasise the application of certain provisions of Section 4 of the Communications Act 2003 (the "Act") in relation to the proposed limits for Out-of-Band emissions for:
- base-stations;
 - high power fixed terminals; and
 - mobile terminals.
- 3.2 UKB considers that in accordance with these Section 4 duties, Ofcom should be working to ensure that all licensees are able to procure and deploy ETSI compliant equipment for their networks. This would reduce the cost of network roll-out and aid the harmonisation

of standards across Europe. However, the current licence restrictions do not allow all the licensees in this Spectrum Class to deploy such ETSI compliant equipment.

- 3.3 UKB, therefore, request that Ofcom address this issue, either by means of a decision that applies to all licensees in the Spectrum Class or pursuant to any individual licence variation request made by a licensee in the Spectrum Class.

4 Comments on particular paragraphs of the Ofcom Consultation

Paragraph 2.6 of the Consultation

- 4.1 *"It should be noted that following consultation in June 2007 we granted a variation request from the 3.5GHz operator UK Broadband, the technical aspects of which were similar to Freedom4's request".*

- 4.2 UKB makes the point that the UKB Licence Variation is similar to the Freedom4 Request in the sense that it would allow Freedom4 to provide wireless services on a nomadic and mobile basis. However, it is clear that some key technical aspects of the Freedom4 Request differ from and go beyond the UKB Licence Variation, including but not limited to the following: The terminal specification mask is derived from the Standard EN302 623 for mobile terminals and is much less restrictive than UKB' licence. .

- 4.3 It should further be clarified and taken into account that UKB and Freedom4 did not start with the same licence conditions, in particular with respect to the OBB.

- 4.4 Therefore, even if the proposed variations were identical to the changes granted to UKB, there would still remain significant differences between the resulting Freedom4 licence and UKB's licence.

Paragraphs 5.20 and 5.21 of the Consultation:

- 4.5 Paragraph 5.20 *"In considering the conditions for limiting out-of-block emissions, we note that Freedom4 has a guardband at either end of its spectrum blocks which, although not a part of Freedom4's licensed spectrum, may be taken into account when calculating how the limits should be applied. The proposals below for Freedom4's situation are therefore a specific arrangement in this band which are without prejudice to future consideration by Ofcom of any other bands or services in the setting of emission".*

- 4.6 Paragraph 5.21 *"Limits for out-of-block emissions have been specified for central stations by Decision 2008/411/EC ("the Decision"). Freedom4 has requested to retain the block edge mask contained in the technical conditions of its current licence. It maintains that it has current equipment coordinated and deployed in the band that would not meet the Decision's mask and that the cost of replacing these would be prohibitive".*

- 4.7 UKB makes the point that by allowing Freedom4 to retain the block edge mask under its current licence, Freedom4 would have a considerable cost advantage over both UKB and any other operators of the Spectrum Class that have to comply with the terms of the 2008/411/EC Block Edge Mask. It is not clear to UKB, whether Ofcom has undertaken an analysis of the implications of agreeing not to vary this part of Freedom4's licence in respect of distortions in the market and potential competitive advantages to Freedom4. Therefore, UKB considers that Ofcom's preliminary intention to apply a without prejudice

specific arrangement to Freedom4 as to allowing Freedom4 to retain the block edge mask under its current licence, should be given further consideration.

- 4.8 Furthermore, as recommended by the Independent spectrum broker (“ISB”) and endorsed by the Government in the Digital Britain Report, Ofcom needs to take a comprehensive approach when making decisions on spectrum management. In our view, this means that Ofcom should apply its decisions to all the existing markets players in the Spectrum Class rather than taking individual decisions benefiting one player. At the very least, it should take into consideration the other players in what the EC Decision of 2008/411/EC classes as a band, albeit that it proceed to draw a distinction between 2.4-2.6GHz and 3.4-3.8GHz.

Paragraph 6.23 of the Consultation:

- 4.9 “... we do not envisage a situation where existing market players would be prevented from competing with Freedom4 and where the entry of a new service provider could lead to weaker competition and diminished consumer benefits. On the contrary, we consider that making the licence variation would be beneficial and assist the promotion of competition”.

- 4.10 As mentioned in this Response, UKB considers that it could be *prevented* from effectively competing with Freedom4 should Freedom4 licence be varied as proposed by Ofcom, without being required to not comply with the EC Decision. Even if Freedom4 does have the EC Decision OOB requirements imposed upon it, until such time as UKB is granted similar variations to those sought by the Freedom4 Variation Request, there would be a distortion in the market. This distortion would place UKB at a significant disadvantage which would likely result in less investment by UKB in broadband infrastructure and services.

Paragraph 6.28 states of the Consultation:

- 4.11 “We consider that undue discrimination can only arise where different treatment is given to persons in similar circumstances, or where the same treatment is given to persons in different circumstances, and there is lack of objective justification for the treatment given. In this case, we consider that there are sufficient differences in the circumstances of Freedom4 and the 2G and 3G operators to justify the existence of different licence conditions”.

- 4.12 UKB agrees with Ofcom that there are sufficient differences in the circumstances of Freedom4 and the 2G and 3G operators, to justify the existence of different licence conditions amongst them. However, UKB considers that such different licence conditions, would not be justified between Freedom4 and UKB, and would therefore be discriminatory, as UKB and Freedom4, occupy neighbouring bands.

Paragraph 6.31

- 4.13 “As mentioned in Section 4, we have a statutory duty (in section 9(7) of the Wireless Telegraphy Act 2006) to ensure that licence conditions are objectively justified in relation to networks and services to which they relate, non-discriminatory, proportionate and transparent. We consider that this obligation is ongoing and must be assessed against the state of technology development at the time and market”.

- 4.14 UKB considers that Ofcom would thereby need to objectively justify any material difference between Freedom4 and UKB licence conditions or, otherwise, to implement the necessary measures and changes in UKB's licence to ensure that both players are on the same regulatory footing.

Paragraph 6.32

- 4.15 *"Ofcom must comply with UK obligations under European law or international agreements where use of spectrum has been harmonised. As explained in Section 5, the European Commission Decision 2008/411/EC has set parameters for the harmonisation of BWA in this band. We consider that to grant the variation would be consistent with the Decision".*

- 4.16 UKB welcomes the above approach and is of the view that no obligations ought to remain in UKB's licence that would put it in breach of the EC Decision, EU Law or any international agreements on use of Spectrum.

Third paragraph of Table A1/ Variation Options / Issue 1 – Permitting mobility / Benefits Cos:

- 4.17 *"Allows Freedom4 parity to compete with other mobile broadband services including UK Broadband".*

- 4.18 We consider that the statement above is incorrect, as the Freedom4 Request is more favourable than the terms included in UKB's Licence Variation. Granting Freedom4's Request, without imposing the OOB requirements applicable to UKB, would effectively give Freedom4 an unfair competitive advantage over UKB thereby distorting the market. UKB therefore considers that from a regulatory and legal perspective, the variations sought by Freedom4 should be extended to UKB and others in the Spectrum Class.

5 Response to Consultation Questions

Are there any reasonable grounds why Ofcom should not grant Freedom4's request to vary its licence as soon as practicable? If so, please explain your reasoning for this.

- 5.1 Subject to certain safeguards below and the importance of avoiding a distortion of competition within the Spectrum Class, UKB is supportive of the changes requested by Freedom4 that form the bullet points of paragraph 5.4 of the Consultation.
- 5.2 UKB considers that Ofcom should agree to those changes in the Freedom4 Request which, in accordance with its obligations of non-discrimination, transparency and consistency, should be applied on an equal basis to UKB or any other market player in the Spectrum Class.
- 5.3 UKB considers that restrictions on spectrum mask in UK spectrum licences should be replaced by the standards that have been agreed to by international standard bodies such as ETSI and on which the major equipment manufacturers are basing their latest range of devices. UKB will shortly apply for a license variation requesting that Ofcom authorise UKB to connect terminals complying with European Standards (EN 302 326 and EN 302 623) onto its network. This would make the spectrum licences intrinsically

more flexible and allow the licensees to comply with the European standards, without thereby being in breach of their individual licence obligations.

- 5.4 Varying the entire Spectrum Class at the same time as Freedom4's variation becoming effective, would be consistent with Ofcom's stated liberalisation policy and duties under the Act and would prevent the likely market distortion which would otherwise occur.
- 5.5 UKB considers that unless all current licensees in the relevant Spectrum Class as Freedom4 have the same variations made to their licences, then such regulatory discrepancy would provide Freedom4 with an unfair commercial advantage over the other licence holders (including UKB) and thereby distorting the relevant market.
- 5.6 Furthermore and most importantly, UKB are concerned that Ofcom might not impose until 2012, the out of block emissions mask ("**OOB**") as regards base stations that are set out in EC Decision of 2008/411/EC. Whilst EC Decision of 2008/411/EC does not require the EU OOB standards to apply until 2012 for operators in the 3.6GHz to 3.8GHz range, it does not preclude Ofcom from applying these standards at the same time as they become applicable to those operating in the 3.4GHz to 3.6GHz band.
- 5.7 Until such time as those EU OOB standards are applied to Freedom4, there would be a significant distortion in the market for the Spectrum Class. For example, UKB's costs in rolling out a large scale deployment of innovative microcell networks would be far greater than those on Freedom4 in deploying a similar network. Granting Freedom4 an advantage in the initial stage of the deployment of new services could lead to an entrenched distortion of the market in favour of Freedom4. UKB also notes that Decision 2008/411/EC permits more relaxed base-station limits by mutual agreement between adjacent operators. By allowing Freedom4 a relaxed set of limits until 2012, it removes any commercial incentive for Freedom4 to agree mitigation measures with UKB. Freedom4 already has lower limits, and therefore it does not need to negotiate and agree these with UKB.
- 5.8 The above is consistent with the recommendations of the Independent spectrum broker ("ISB") and endorsed by the Government in the Digital Britain Report, that Ofcom needs to take a comprehensive approach when making decisions on spectrum management. In our view, this means that Ofcom should apply its decisions to all the existing markets players in the Spectrum Class rather than taking individual decisions benefiting one player.

