



**DIGITAL 3 AND 4 LTD**

**RESPONSE TO OFCOM CONSULTATION  
ON SWITCHOVER-RELATED CHANGES  
TO DTT LICENCES**

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# OFCOM CONSULTATION ON SWITCHOVER CHANGES TO DTT LICENCES

## RESPONSE FROM DIGITAL 3AND4 LTD

### INTRODUCTION

Digital 3and4 Ltd is the holder of the Licence for Multiplex 2. The Company is jointly owned by ITV and Channel 4 and was formed in 1997 specifically for the purpose of holding and operating the Multiplex Licence.

The Broadcasting Act 1996 provided that the licence for Multiplex 2 could only be held by such a jointly owned entity and it granted capacity on the multiplex 48.5% to ITV; 48.5% to Channel 4 and 3% to Teletext.

Digital 3and4 operates as an Agency Company for its shareholders, each of which has licence commitments by virtue of the DRLs and through DTPS licences held for individual services carried on the multiplex. We believe that it is in the interests of all the connected parties – including Ofcom – that across the various licences there is effective co-ordination and that duplication is minimised whilst also ensuring consistency of the conditions.

Some of the provisions in the draft Variation do not appear to reflect the particular nature of Multiplex 2, the way that it operates and the existing agreements with Ofcom in relation to administrative procedures all of which we believe it would be sensible to retain. For example, it is recognised that Digital 3 and 4 has no multiplex revenue and reporting on this is provided individually by the shareholders.

In relation to the proposals for communication with viewers Digital 3 and 4 recognises the need for all parties to address the issue of rescanning and we are keen to contribute to a co-ordinated approach. However, we believe that the best and most appropriate way to achieve this is via Digital UK rather than through individual multiplex or programme licences.

In recognition of the need for all parties to make a significant contribution to achieving switchover, ITV, Channel 4 and other broadcasters established Digital UK to ensure a co-ordinated focus on communications objectives. Therefore, as the body specifically designed for this purpose, Digital UK is uniquely equipped for providing viewers with the necessary information about, for example, rescanning on behalf of its broadcast members. As active members of Digital UK, ITV and Channel 4 will ensure that the necessary communications take place in the most effective, co-ordinated manner to ensure that viewers receive focussed and targeted messages.

### ***Condition 2: Provision of television multiplex service***

*Question 1: is the proposed new condition 2(3) of the multiplex licences necessary, appropriate and proportionate? If not, please explain why and propose alternative wording.*

Although this is potentially a duplication of the requirements in the Channel 3 and Channel 4 DRLs we accept the need to reflect the broad coverage and timetable requirements in the Multiplex Licence.

However, we presume that the reference in condition 2(3) to “the Table in Part 9 of the Annex” should in fact refer to “Part 10 of the Annex” and that the reference to “Part 10” should be to “Part 11”.

We are concerned that Parts 10 and 11 of the Annex do not adequately represent the current lack of certainty about the detail of the frequency plan. Although Part 11 contains a statement about revision as the planning and international co-ordination process progresses we believe that it would be reasonable for the licence to make it clear that there are still many matters to resolve which are outside the control of Digital 3and4 and that the multiplex licensee will not be held responsible if resolution of any of those issues create a delay to the programme or adversely affects coverage.

It should also be made explicitly clear that changes to the Licence to reflect the detail of the final plan will be automatic as that plan unfolds and is confirmed by JPP.

### Cooperation and coordination with other parties

Question 2: Are the proposed new provisions relating to cooperation and coordination with other parties concerning DSO, and contained in the annexes to the multiplex licences, necessary, appropriate and proportionate? If not, please explain why and propose alternative wording

Digital 3and4 recognises the need for co-operation and co-ordination with other parties hence ITV and Channel 4 were prime movers in the establishment of Digital UK and are both active Board and full voting members of that organisation.

Digital UK was created in order to perform the co-ordination role for Switchover and therefore we feel it important that nothing in the Multiplex Licences could have the effect (however unintentional) of diluting that role. Therefore, Digital 3and4 proposes that the licence should make it clear that the primary role of co-ordination rests with Digital UK and no other body nor individual organisation. We are happy to accept an obligation to use reasonable endeavours to co-operate with Digital UK however, since ITV and Channel 4 are already subject to obligations of co-operation in their DRLs we are not clear why extension ( and possible duplication) of this obligation should be necessary.

If Ofcom is minded to retain this condition in the licence we would urge that paragraph 17 of Part 2 of the Annex should read:

“The Licensee shall use reasonable endeavours to co-operate with **reasonable requests** made by:

- (a) other Ofcom licensees
- (b) Government
- (c) Digital UK; and
- (d) With such other parties, as necessary, or as notified to him by OFCOM,

in the administration, organisation or implementation of Digital switchover in the United Kingdom ***provided that such requests relate directly to obligations on the Licensee in the Licence and that such requests do not oblige the Licensee to breach any other terms of the Licence.***”

## Annual report and Information relating to Digital Switchover

Question 3: Are the suggested new provisions concerning an Annual Report and Information relating to Digital Switchover contained in the annexes to the multiplex licences, necessary, appropriate and proportionate? If not, please explain why and propose alternative wording.

Digital 3and 4 believes that the requirement as written would generate a high level of unnecessary duplication across Digital UK, Digital 3and4 and ITV and Channel 4. In order to minimise the likelihood of this we propose the following:

- **Digital UK's annual report** should be the source of reporting on the overall co-ordination and implementation of the communications programme and other areas under its remit
- **Digital 3and4** should report on the infrastructure rollout as it will be common to all services on the multiplex including the Qualifying Services
- **Channel 4 and ITV** should report separately on matters particular to them that are not covered in either of the other two reports.

We believe that it is premature to expect a meaningful report on Switchover from Digital 3and4 in December 2006. At that stage detailed planning – some of it led by Ofcom – will be continuing and it will be impossible to make detailed statements about plans and/or funding. We propose, therefore, that the first full report should be provided by December 2007 by which time there will be a finalised plan in place with a detailed timetable and the international co-ordination process should be reaching a conclusion. The report to be provided at the end of 2006 will, therefore, inevitably be summary in nature due to where we are in the overall process.

## Communications with viewers

Question 4: Are the proposed new provisions relating to an obligation to inform viewers about rescanning and other viewer actions required by switchover contained in the annexes of the multiplex licences, necessary, appropriate and proportionate? If not, please explain why and propose alternative wording.

Whilst we recognise the need for communication with viewers regarding rescanning, we believe this is most effectively fulfilled by Digital UK, who will have already established the most appropriate means of communication with the different communities and do not believe that it is appropriate to place an obligation on multiplex licensees to inform viewers about rescanning.

If the expectation is that information about rescanning would be addressed to viewer screens via DTT services, Ofcom should note Digital 3and 4 has no direct influence over the content of the services on the multiplex and therefore it would be impossible for Digital 3 and 4 to ensure compliance with any such obligation.

The Regional Rollout Plan for Switchover is based on granularity at the level of main transmitters. (Ofcom has received from Digital UK a confidential copy of version B13 of that plan). It is difficult to see how it would be technically feasible to carry onscreen messages to the required level of granularity such that only the potentially

affected viewers received such messages at the appropriate point in the switchover process.

Digital UK is developing a sophisticated communication programme for informing viewers on a regional and sub regional basis about all aspects of the Switchover programme, an integral part of which will be information about rescanning. We believe that is the appropriate, and only suitable, vehicle for information on rescanning. Indeed, highlighting this issue within Digital UK information packs will make them relevant to households that have already adopted DTT to whom much of the other content may be largely irrelevant.

Digital UK is planning to develop the technical pages on its website to include information about rescanning and other viewer actions. Some of the detail required to make such information relevant to all households can only sensibly be communicated in this way. It should also be noted that a large proportion of current set top boxes will automatically perform rescans in response to changes in the transmission characteristics of the DTT services. However, manufacturers have adopted different protocols for the rescanning process and a website is the only practical way to present all the likely permutations. Headline information and prompts to use the website will be given via the planned door drops to each household.

As stated above we are more than happy to commit to co-operation with Digital UK on these matters. We believe that it is crucial to avoid viewer confusion by ensuring that viewers receive a single co-ordinated message. This is one of the primary functions of Digital UK and that is where the task will best be done.

We propose therefore that the wording of paragraph 19 of Part 9 of the Annex should be changed as follows:

***“(1) The Licensee shall use his reasonable endeavours to ensure that viewers of the Licensed Service are informed about:***

- (a) changes in frequencies associated with Digital Switchover which necessitate a rescan of set top boxes and how a rescan can be completed; and***
- (b) other viewer actions required by Digital Switchover which directly relate to obligations contained in this Licence which are notified to the Licensee by Ofcom***

***(2) The Licensee shall agree in writing with Ofcom, at least eighteen months before the Relevant Digital Switchover Date, a plan to fulfil the obligations required under paragraph 19(1) above***

***(3) For the avoidance of doubt, the duties in 19(1) may be discharged by the Licensee himself or on behalf of the Licensee by Digital UK and/or other suitable third party/ies.”***

## **Digital Switchover Date and timetable**

Question 5: Are the suggested new provisions relating to the Digital Switchover Date and regional timetable contained in the annexes to the multiplex licences necessary, appropriate and proportionate? If not, please explain why and propose alternative wording

As stated above we believe that the current drafting does not sufficiently explain the unconfirmed nature of the timetable and dates. We are relatively happy about the time windows used for each region but they should be accompanied by a clear statement that the timetable for each region will be confirmed as Switchover approaches for each region. Although the transmitter engineering programme has contingency built in up front, there are still extreme circumstances which could lead to delays and consequent need to retune (and possibly re-order) parts of the programme.

As Ofcom is aware, there are a number of domestic and international transitional issues which will restrict the ability of the UK to use the full RRC agreed power levels on certain frequencies until other actions have been completed, e.g. Switchover of adjacent UK regions, analogue transmissions ceasing in neighbouring countries. Although these restrictions are currently predicted to affect COMMS multiplexes it is not inconceivable that during the course of the Switchover programme PSBs will also suffer some restrictions. Therefore we believe that if the detail in Table 3 is retained in the Licence at this stage a sentence should be added to the end of Paragraph 21 of Part 10 of the Annex as follows:

***“Should Ofcom advise that broadcasting of the Licensed Service from any of the transmission sites must be temporarily restricted to a level below the Power detailed in Table 3 beyond the Relevant Digital Switchover Date in Table 2, the Licensee will still be regarded as having met its obligations under the Licence in relation to Switchover Dates.”***

## **Digital terrestrial broadcasting stations and WTA licensing**

Question 6: Is it necessary, appropriate and proportionate to include in the annexes of the multiplex licences the new, proposed conditions setting out details of broadcasting stations? Please comment on the draft wording if you consider it could be improved.

NOTE TO HOLDERS OF MULTIPLEX LICENCES A, C AND D. Please read para. 3.29 carefully and note Ofcom's decision that if the commercial multiplex operators wish to adopt any sites above the current 80 they must commit unconditionally to doing so in writing by the closing deadline for this consultation.

Please note that Part 5 of the Annex lists the Fremont Point transmitter which was removed from the licence due to recognition by Ofcom that the 1996 Broadcasting Act was not extended to the Channel Islands.

As regards the details set out in Part 11 of the Annex we believe that it should be made clearer that the detail regarding frequencies and (to a lesser extent) power levels is tentative and **definitely** subject to change.

Apart from amendments arising from ongoing international co-ordination discussions, the broadcasters working through Digital UK will be making recommendations to Ofcom about allocation of frequencies to individual multiplexes in order to ease the viewer experience at switchover and facilitate the engineering changes. We believe that this is clearly understood by Ofcom and the licensees but could mislead third parties reading the licences. We believe that it would be more appropriate to remove the details of broadcasting stations from the licences at this early stage and only

insert them as the Frequency Plan for each region is locked down. Following that, it would be sensible to make the position explicitly clear by, for example, stipulating that the schedules will be revised annually from now until the completion of the process in 2013 with the agreement of Ofcom and Digital 3and4.

We also note that a number of sites outside the existing analogue network have been included in Table 3. Digital 3and4 has not yet agreed to adopt those sites – for which design work and costing is underway – so we must reserve our position in respect of them. Also, Ofcom will be aware that the stations at Baghilt, Holywell and Flint have been removed from the latest iteration of the Frequency Plan.

## **Wireless Telegraphy Act Licensing**

The consultation paper (page 15) records Ofcom's intention to change the holders of the Wireless Telegraphy Act licences at switchover issuing new WTA licences to the multiplex operators and no longer licensing the transmission providers.

There are arguments in favour of this given the onset of spectrum pricing and trading albeit that such a move will increase the regulatory burden on the multiplex providers. However, Digital 3and4 is not quite clear how this change will be accomplished without a change to the approach in Section 1 of the Wireless Telegraphy Act 1949 (mirrored in Section 8 of the proposed new Wireless Telegraphy Act) which sets out the obligation to hold a WTA licence. If Ofcom proposes to use other powers – for instance the powers of exemption under Section 1(1) of the Act (Section 8(3) of the new Act) it would be helpful for stakeholders, particularly the multiplex holders, to be consulted about Ofcom's proposals in this area.

Of far greater concern to Digital 3and4, however, is the possibility that by moving the WTA licences from the transmission providers to the multiplex operators, the multiplex operators will become subject to a regime of licence compliance which provides for criminal sanctions for activities which are not carried out in accordance with the licence (Sections 1(1) and 14(1)(a) of the Wireless Telegraphy Act 1949) (mirrored in Section 8(1) and 35(1) of the proposed new Wireless Telegraphy Act).

This is a real concern since in most circumstances the multiplex operators would only be able to comply if their transmission providers also complied. In other words, under the proposed transfer of the licence holding obligation the multiplex operators may be asked to accept a situation in which they run the risk of criminal liability for acts of third party transmission providers with whom they will only have a contractual relationship. However tightly such a contractual relationship is drawn, contractual remedies against a third party may not be adequate in circumstances where criminal sanctions are envisaged in statute, since there is at least a risk that contractual obligations might not be enforceable in full or in a timely manner such as to enable a multiplex operator to avoid criminal liability. It is also not clear to us that the provisions of Sections 172 and 174 of the Communications Act 2003 (Sections 39 and 41 of the proposed new Wireless Telegraphy Act), which provide for the process which must be conducted by Ofcom in advance of prosecution and which regulate the procedure for prosecution itself are a complete or adequate answer to this problem, particularly if the multiplex operator is not able to secure a transmission provider's compliance with the Wireless Telegraphy Act Licence.

Ofcom's proposal to transfer the WTA licence holding obligation is an issue of concern to Digital 3and4 and is a matter on which, (as an absolute minimum), additional clarification is essential before this is progressed or finalised in particular

as to Ofcom's policy in relation to prosecutions of WTA Licence holders where a third party contractor has put a multiplex operator in breach of the Act.

## **DTPS, DTAS and DSPS LICENCES**

### **Cooperation and coordination with other parties**

Question 7: Are the proposed new provisions relating to cooperation and coordination with other parties concerning DSO, and contained in the annexes to the DTT service licences, necessary, appropriate and proportionate? If not, please explain why and propose alternative wording.

We believe strongly that the obligations on the various parties involved in the switchover process need to be allocated appropriately to avoid duplication and to ensure as far as possible that viewers receive a co-ordinated and focussed set of communications. In order to achieve that, co-operation and co-ordination between the parties is essential and we suggest, therefore, that an obligation to co-operate should be included in the DTT service licences as follows:

***“The Licensee shall use reasonable endeavours to co-operate with reasonable requests made by:***

- (e) other Ofcom licensees (in particular the holder of the television multiplex service licence which carries the Licensed Service/s)***
- (f) Government***
- (g) Digital UK; and***
- (h) With other such parties, as necessary, or as notified to him by Ofcom,***

***in the administration, organisation or implementation of Digital Switchover in the United Kingdom provided that such requests relate directly to obligations on the Licensee in the Licence and that such requests do not oblige the Licensee to breach any other terms of the Licence.”***

### **Communications with viewers**

Question 8: Are the proposed new provisions relating to an obligation to inform viewers/listeners about rescanning contained in the annexes of the DTT service licences necessary, appropriate and proportionate? If not, please explain why and propose alternative wording

Digital 3and4 does not believe that it is necessary, appropriate or proportionate to place obligations on DTT service licensees to inform viewers about rescanning.

As stated above we believe that the most effective way to communicate on this matter is via Digital UK's website and door drops. DTT service licensees have no direct relationship with Digital UK so it would be inappropriate to include obligations in the service licences.

However, Ofcom should be reassured that Multiplex Licensees and programme providers will all have a common interest in ensuring that viewers can continue to receive the full range of available programming through Switchover and beyond.



They will therefore have a keen interest in ensuring that Digital UK's communications are as effective as possible. To that end, co-ordination and co-operation between the various parties will be of paramount importance and we suggest, therefore, that the DTT Service Licensees should include the following provision:

***The Licensee shall be free to provide information to viewers of the Licensed Service in relation to :***

- (a) changes in frequencies associated with Digital Switchover which necessitate a rescan of set top boxes and how a rescan can be completed; and***
- (b) other viewer actions required by Digital Switchover which directly relate to obligations contained in this Licence which are notified to the Licensee by Ofcom and provided that before communicating such information the Licensee must liaise with the Multiplex operator (or, if required by the Multiplex operator, Digital UK) to ensure the co-ordination of such communications in the interests of ensuring a clear message for consumers.***

## **OTHER MATTERS**

### **Code of Practice on changes to Existing Transmission and Reception Arrangements**

Clause 6 (2) of the draft Multiplex Licence places an absolute obligation on Digital 3and4 to comply with the above code.

The Code was developed to protect analogue services during the original rollout of DTT and is largely irrelevant to the circumstance where the whole process is about *switching off* analogue transmissions.

Ofcom has indicated that it intends to discuss amendments to the Code with broadcasters. Digital 3and 4 finds it difficult to understand how such a code can continue to have effect and would urge Ofcom to delete all references to the Code from the Multiplex licences.

Indeed we believe that the Code should be repealed in its entirety. A discussion between Ofcom and the Multiplex Licensees (advised by their transmission providers) should follow about the detail of the transmitter re-engineering programme with a view to agreeing appropriate procedures for protection of existing services.

### **Administrative and Financial Arrangements**

In the light of the legislative limitations on ownership of the Multiplex 2 licence, the specific nature of the shareholding of Digital 3and4 and the fact that Digital 3and4 operates as an agent for its shareholders Ofcom has agreed practical exemptions to some of the financial and administrative requirements of the licence. For example it has been agreed that Digital 3and 4 does not have any Multiplex Revenue and it is understood that some of the reporting obligations can be met by the individual submissions from the shareholders. We believe that it would be appropriate to reflect these exemptions in the Licence to avoid any future ambiguity.