



The Future Licensing of DAB Digital Radio

Statement

Publication date: **18 July 2006**

Contents

Section		Page
1	Executive Summary	2
2	Introduction	5
3	Licensing process and criteria	7
4	Licence areas and licensing timetable	23

Section 1

Executive Summary

- 1.1 In the statement on *Radio - Licensing Policy for VHF Band III, Sub-band 3*, published on 21 December 2005 (www.ofcom.org.uk/consult/condocs/vhf/statement/), Ofcom announced its decision, subject to the outcome of the Regional Radio Conference (RRC) on international spectrum usage in May/June 2006 and the vacating of the spectrum by existing users, to allocate this spectrum for further national and local DAB radio multiplexes.
- 1.2 In the accompanying consultation document, *The Future Licensing of DAB Digital Radio* (www.ofcom.org.uk/consult/condocs/dab/), Ofcom set out proposals regarding how it would apply the various statutory criteria to which it is required to have regard when assessing applications for radio multiplex licences, the proposed licensing process to be followed, the areas that would be covered by each licence, and a proposed timetable for the advertisement of the local and national radio multiplex licences.
- 1.3 Ofcom received 36 responses to this consultation document, of which five were confidential. The non-confidential responses can be viewed at: www.ofcom.org.uk/consult/condocs/dab/responses/
- 1.4 This statement sets out Ofcom's conclusions following the consultation.

Licensing process and criteria

- 1.5 In the consultation document, Ofcom proposed to focus on the proposed extent of population, rather than geographical, coverage in evaluating applications with regard to the coverage area criterion for awarding national and local radio multiplex licences. Having considered all of the responses on this issue, Ofcom has concluded that, as originally proposed, it will focus on population, rather than geographical, coverage.
- 1.6 Ofcom noted in the consultation document that the total achievable coverage area of the second national radio multiplex may be affected by the outcome of the RRC, for example in relation to the extent of coverage that is possible on the south and south east coasts of England. The RRC has now confirmed that some restrictions will indeed apply to the coverage that realistically can be achieved by the further national radio multiplex in the coastal areas of Suffolk, Essex and Sussex, and in much of the county of Kent – the exact nature of the restrictions will be determined by Ofcom and set out in the notice of advertisement for the licence. It has also been confirmed that the second national radio multiplex licence will not be able to cover Northern Ireland or western parts of Wales until analogue TV services in the Republic of Ireland are switched off, as these services currently use the frequencies required for DAB in Northern Ireland and western Wales.
- 1.7 In the consultation document, Ofcom proposed that a national radio multiplex licensee should provide coverage which is at least equivalent to that committed to by the holder of the existing national radio multiplex licence (i.e. coverage of 85% of the adult population of Great Britain within three years of launch). In light of the coverage restrictions in Great Britain that will apply to the further national radio multiplex licence, as indicated above, there will need to be some scaling of the 85% to reflect the maximum potential coverage of Great Britain for the further national radio multiplex. Full details of this will be included in the guidance provided as part of

the notice of advertisement of the licence. When spectrum becomes available in Northern Ireland, Ofcom believes that coverage which is at least equivalent to that committed to by the holder of the existing local radio multiplex licence for Northern Ireland, SCORE Digital, is a reasonable minimum expectation for the second national radio multiplex licence. SCORE Digital committed to providing coverage of approximately 89% of the adult population of the 'primary protected area' (PPA) of the Northern Ireland local radio multiplex licence.

- 1.8 For the consideration of the applications for the second national radio multiplex licence, Ofcom will consider its duties under section 47 of the Broadcasting Act 1996 ("the 1996 Act") in the light of its general duties set out in section 3 of the Communications Act 2003 ("the CA 2003"). Accordingly, in applying the criteria included within section 47, Ofcom will have regard to the capacity of the proposed programme services to appeal to a variety of tastes and interests. This will be taken to mean that the proposed line-up of services on the second national radio multiplex should appeal to tastes and interests that are distinct from those catered for by services on the existing national radio multiplex. Only the existing national digital sound programme services (i.e. those provided on the existing national radio multiplex) will be taken into account when assessing applications in this respect. Ofcom's decision on the licensing of a further national radio multiplex necessarily will be based on a consideration of all the relevant criteria as set out in section 47, as required by the statute.
- 1.9 Any change to the legislation regarding radio multiplex licence renewals is a matter for Government rather than Ofcom, but Ofcom does not believe that to date a compelling case has been made for the legislation to be changed.
- 1.10 While recognising that the provision of local content on non-simulcast digital programme services can represent a significant cost, Ofcom continues to believe that, as catering for local tastes and interests is one of the criteria to which it must have regard when awarding a local radio multiplex licence, and in light of the importance placed upon localness by listeners, the amount of local material provided on a local radio multiplex properly should be a matter to which it should have regard when considering a request to vary a local radio multiplex licence.
- 1.11 Local radio multiplex licensees wishing to apply for a variation to their licence relating to the characteristics of the digital sound programme services will be required to 'write their own' programme service description (where relevant), and to set out the reasons it is considered that the application satisfies one or more of the relevant statutory criteria. A consultation document on how Ofcom might apply these statutory criteria will follow at a later date.
- 1.12 In considering any future applications for variations to the line-up of digital sound programme services on a national radio multiplex, Ofcom will consider its duties under section 54(6A) of the 1996 Act in the light of its general duties set out in section 3 of the CA 2003. Accordingly, in applying the criterion in section 54(6A), Ofcom will have regard to the capacity of the proposed programme services to appeal to a variety of tastes and interests. This will be taken to mean that a variation is unlikely to be approved unless the line-up of programme services on a national radio multiplex continue to appeal to tastes and interests that are distinct from those catered for by the digital sound programme services on any other national radio multiplex. This approach reflects Ofcom's intention to maintain the integrity of the licence award process, and to ensure as far as possible that the digital sound programme services carried on (all) national radio multiplex licences continue to

appeal to a variety of tastes and interests throughout the period for which the multiplex licences are in force.

- 1.13 The current order specifying that no percentage of multiplex revenue shall be payable by the holder of a national radio multiplex licence advertised during its period in force does not expire until 31 December 2006. Accordingly, it is likely that no percentage of multiplex revenue will be payable by the holder of the second national radio multiplex licence, as Ofcom intends to advertise the licence before the end of 2006. However, if the second national radio multiplex licence is not advertised until after the order has expired, and a new order specifying that no percentage shall be payable is not passed, Ofcom will be required to set a percentage, which may be zero, subject to the consent of the Secretary of State for Culture, Media and Sport.

Licence areas and licensing timetable

- 1.14 The second national radio multiplex licence will be advertised as soon as possible – Ofcom intends that this will be before the end of 2006. The spectrum which will be used for the second national radio multiplex licence will be vacated by the end of 2007, thus enabling the service to launch any time from the beginning of 2008.
- 1.15 The new local radio multiplex licences will be advertised in descending order of population coverage, with a few exceptions to reflect the level of interest expressed by prospective applicants in their responses to the consultation document, so as to bring the maximum benefit to the largest number of people as soon as possible.
- 1.16 The first twelve local radio multiplex licences to be advertised, from late 2006 onwards, will be those designed to cover: Hertfordshire, Bedfordshire & Buckinghamshire; Derbyshire; Wrexham & Chester; Herefordshire & Worcestershire; Northamptonshire; Oxfordshire; Gloucestershire; York & Scarborough; Pembrokeshire & Carmarthenshire; Guildford; Reigate & Crawley, and; Lincolnshire. While Ofcom would like to be able to include licences for North Wales and in Northern Ireland in this first tranche, given the demand expressed by consultation respondents, the frequencies which would need to be used by these licences are currently used for analogue television in the Republic of Ireland and so will not become available for use in the UK until analogue TV switch-off in Ireland. In the meantime, Ofcom will investigate possible alternative frequencies for these areas, and will also look for a frequency for a local radio multiplex licence for Suffolk (for which spectrum in VHF Band III presently allocated for T-DAB is not available).
- 1.17 Additional local and regional multiplexes in areas already served by local digital radio may be able to be licensed in a few areas after the programme of local fill-in has been completed.

Section 2

Introduction

- 2.1 In the statement on *Radio - Licensing Policy for VHF Band III, Sub-band 3*, published on 21 December 2005 (www.ofcom.org.uk/consult/condocs/vhf/statement/), Ofcom announced its decision regarding how it intends to allocate this spectrum.
- 2.2 That decision, subject to the outcome of the Regional Radio Conference (RRC) on international spectrum usage in May/June 2006 and the vacating of the spectrum by existing users, was to allocate:
- 2.2.1 three frequency blocks to provide additional local multiplexes with the aim of filling in the gaps between existing local digital radio multiplexes, so that every area of the country has the opportunity to be served by a local digital radio multiplex
- 2.2.2 one frequency block to provide an additional national radio multiplex.
- 2.3 In the accompanying consultation document, *The Future Licensing of DAB Digital Radio* (www.ofcom.org.uk/consult/condocs/dab/), Ofcom set out proposals regarding how it would apply the various statutory criteria to which it is required to have regard when assessing applications for radio multiplex licences, the proposed licensing process to be followed, the areas that would be covered by each licence, and a proposed timetable for the advertisement of the local and national radio multiplex licences.
- 2.4 The consultation document posed five specific questions, as follows:
- Do you agree with the general process by which Ofcom proposes to license new national and local radio multiplexes?*
- What are your views regarding the ways in which Ofcom proposes to interpret the statutory criteria which must be considered when awarding national and local radio multiplex licences?*
- Do you agree that the proposed ten local multiplex areas to be licensed first are the right priority areas?*
- What are your views on the potential viability of the smaller areas on the proposed licensing timetable?*
- What are your views on the potential viability and level of demand for the proposed second (or third) local multiplexes in existing licensed areas? Would you prefer any such licences to be advertised before, at the same time as, or after the local multiplex licences in areas which currently do not have such a licence?*
- 2.5 Ofcom received 36 responses to this consultation document, of which five were confidential. The non-confidential responses can be viewed at: www.ofcom.org.uk/consult/condocs/dab/responses/
- 2.6 Almost all respondents were in general agreement with the broad proposal to license further national and local DAB multiplexes, although two operators of small

commercial radio stations (CN Radio and Tindle Radio), for whom DAB currently offers less opportunities, appear to remain sceptical about the platform. A variety of views were expressed regarding the proposed application of the statutory criteria set out in the consultation document and the proposed licensing timetable, while some respondents raised issues regarding aspects of the legislative framework for radio multiplex licensing which were not specifically being consulted upon (e.g. the provisions in the Broadcasting Act 1996 ("the 1996 Act") regarding the renewal of radio multiplex licences).

- 2.7 This statement sets out Ofcom's conclusions following the consultation document.

Section 3

Licensing process and criteria

Statutory licensing requirements

- 3.1 The consultation document set out the specific criteria to be applied when awarding national and local radio multiplex licences, which are contained within sections 47 and 51 respectively of the 1996 Act, and proposals for the way in which Ofcom intends to apply each of these various criteria.
- 3.2 For national radio multiplex licences, Ofcom is required to have regard to the extent to which, taking into account the matters specified below, the award of the licence to each applicant would be calculated to promote the development of digital sound broadcasting in the UK (otherwise than by satellite). These matters are:
- the extent of the coverage area proposed to be achieved by the applicant;
 - the timetables proposed by the applicant for achieving the stated coverage (i.e. transmission roll-out) and for the commencement of broadcasting of the services proposed;
 - the ability of the applicant to establish the proposed service and to maintain it throughout the licence period;
 - the capacity of the digital sound programme services proposed to be included in the service to appeal to a variety of tastes and interests;
 - any proposals by the applicant for promoting or assisting the take-up of receivers;
 - whether, in contracting or offering to contract with persons providing digital sound programme services or digital additional services, the applicant has acted in a manner calculated to ensure fair and effective competition in the provision of such services.
- 3.3 For local radio multiplex licences, in deciding on licence awards, Ofcom is required to take into account the following matters:
- the extent of the coverage area proposed to be achieved by the applicant;
 - the timetables proposed by the applicant for achieving the stated coverage (i.e. transmission roll-out) and for the commencement of broadcasting of the services proposed;
 - the ability of the applicant to establish the proposed service and to maintain it throughout the licence period;
 - the extent to which the digital sound programme services (other than BBC services) proposed to be included in the service would cater for local tastes and interests, general or particular;
 - the extent to which any such digital sound programme services would broaden the range of programmes available in the area by way of local digital sound programme services, and the extent to which they would cater for tastes and interests different from those already catered for by local digital sound programme services provided for that area or locality;
 - the extent to which there is local demand or support for the proposed service;

- whether, in contracting or offering to contract with persons providing digital sound programme services or digital additional services, the applicant has acted in a manner calculated to ensure fair and effective competition in the provision of such services.
- 3.4 Ofcom is also required to invite public comment on the applications it receives for radio multiplex licences, and to take into account any such comments received when deciding upon licence awards.

Application of the statutory criteria

- 3.5 As was stated in the consultation document, Ofcom recognises that the business models for DAB digital radio multiplexes are different from those for local FM or AM radio stations, and these differences will be taken into account in applying those statutory criteria which are common to both licensing processes. Likewise, Ofcom recognises the difference in scale between a national and a local radio multiplex, and will be cognisant of this difference when awarding the new radio multiplex licences.

Extent of proposed coverage area

- 3.6 In the consultation document, Ofcom proposed to focus on the proposed extent of population, rather than geographical, coverage in evaluating applications with regard to this criterion. There was widespread support among respondents for Ofcom's proposal. Arqiva, BT, Digital One, National Grid Wireless and a confidential respondent all stated the view that Ofcom should take into account the 'quality' of coverage as well as the extent of population coverage, with Digital One suggesting that due weight should be given to the extent of coverage at higher field strengths consistent with 'indoor' portable mobile coverage. The confidential respondent suggested that higher field strengths should be required in built-up areas where significant listening will be indoors and lower field strengths permitted where most reception is outdoor, notably in vehicles. Virgin Radio and another confidential respondent both expressed the view that there comes a point when increased coverage becomes marginal when balanced against other criteria, and thus Ofcom should only favour an applicant if its proposed coverage is materially greater than that of other applicants. This, the respondents believe, will encourage applicants to achieve maximum cost-efficient coverage whilst ensuring that they do not propose transmission solutions which are financially unsustainable.
- 3.7 In light of the responses to the consultation document, when assessing applications for radio multiplex licences with regard to the extent of the coverage area proposed to be achieved by an applicant, Ofcom intends to focus on the proposed extent of population coverage. This will be balanced against the financial implications of establishing the required transmitter network. Ofcom will also take account of the signal strengths proposed to be achieved, consistent with different reception criteria.
- 3.8 Ofcom noted in the consultation document that the total achievable coverage area of the second national radio multiplex may be affected by the outcome of the RRC, for example in relation to the extent of coverage that is possible on the south and south east coasts of England. The RRC has now confirmed that some restrictions will indeed apply to the coverage that realistically can be achieved by the further national radio multiplex in the coastal areas of Suffolk, Essex and Sussex, and in much of the county of Kent – the exact nature of the restrictions will be determined by Ofcom and set out in the notice of advertisement for the licence. It has also been confirmed that the second national radio multiplex licence will not be able to cover Northern Ireland or western parts of Wales until analogue TV services in the Republic of Ireland are

switched off, as these services currently use the frequencies required for DAB in Northern Ireland and western Wales.

- 3.9 In the consultation document, Ofcom proposed that a national radio multiplex licensee should provide coverage which is at least equivalent to that committed to by the holder of the existing national radio multiplex licence (i.e. coverage of 85% of the adult population of Great Britain within three years of launch). There was widespread agreement among respondents with this proposal.
- 3.10 In light of the coverage restrictions in Great Britain that will apply to the further national radio multiplex licence, as indicated above, there will need to be some scaling of the 85% to reflect the maximum potential coverage of Great Britain for the further national radio multiplex. Full details of this will be included in the guidance provided as part of the notice of advertisement of the licence. When spectrum becomes available in Northern Ireland, Ofcom believes that coverage which is at least equivalent to that committed to by the holder of the existing local radio multiplex licence for Northern Ireland, SCORE Digital, is a reasonable minimum expectation for the second national radio multiplex licence. SCORE Digital committed to providing coverage of approximately 89% of the adult population of the 'primary protected area' (PPA) of the Northern Ireland local radio multiplex licence.

Timetables for coverage roll-out and commencement of services

- 3.11 In relation to this statutory criterion, the consultation document suggested that Ofcom may be required to balance one applicant proposing greater eventual coverage but with a comparatively slow roll-out against another intending to commence broadcasting sooner but ultimately to fewer people, and sought views from stakeholders on whether Ofcom should seek to favour one of these possible scenarios over the other.
- 3.12 A number of respondents who addressed this issue suggested that Ofcom should favour applicants proposing a speedier roll-out, although UBC expressed the view that "the level of eventual coverage and the speed with which that coverage level can be achieved are equally important", while the Minister for Culture, Welsh Language and Sport, responding on behalf of the Welsh Assembly, stated that "priority should be given to applicants proposing greater coverage over applicants proposing a faster roll-out, if such a choice must be made." In view of the responses to this issue, Ofcom intends that the extent to which the speed of roll-out or greater eventual coverage will be taken into account will depend on the characteristics of the licence being advertised and the applications submitted for it. Ofcom is also mindful of the fact that the digital switchover (DSO) programme for television broadcasting may consume considerable engineering resource over the next few years – the same resource that may be required to deploy new DAB networks – and therefore the potential benefits or otherwise of this situation will be taken into account when considering applications for the new radio multiplex licences against this particular criterion.

Ability to establish and maintain the proposed service

- 3.13 Ofcom proposed in the consultation document that, in applying its statutory obligations under this criterion, it should satisfy itself that an applicant has access to sufficient financial resources, and appropriate human and technical resources, to maintain the proposed service and, more particularly, that it should be assured that an applicant has made a well-reasoned calculation of the expected levels of costs

and revenue, such that the service will be maintained while delivering its licence commitments.

- 3.14 Phonographic Performance Limited (PPL) requested that radio multiplex licence applicants should be required to submit proper costings for the music that they propose to play and provide details of the DRM (digital rights management) systems they intend to use. Ofcom notes this response and anticipates that all applicants will wish to include such information in their financial proposals.
- 3.15 Channel 4 agreed with the statement in the consultation document that, in view of the importance of the second national radio multiplex in further developing the DAB platform as a whole, it is important that the national services provided on the second national radio multiplex should be of a quality and a range to sustain and grow the DAB platform. This consideration will also be of relevance to other criteria, notably the capacity of the services to appeal to a variety of tastes and interests (see also paragraph 3.16) and the promotion of receiver take-up (see also paragraph 3.18). Digital One wished Ofcom to clarify whether it expects the business plans submitted by applicants for the second national radio multiplex licence to be limited to the 12-year licence period, as the licence is not eligible to be renewed and the spectrum might be allocated for use by a different technology or user group. The exact nature of a business plan is of course not for Ofcom to determine; it is for applicants to decide how best to address the criterion that Ofcom is required to have regard to; i.e. the ability of an applicant to establish the proposed service and to maintain it throughout the licence period. The matter of radio multiplex licence renewal is addressed at paragraphs 3.33-3.36 of this statement.

Appeal to a variety of tastes and interests (national licences)/Cater for local tastes and interests (local licences)

- 3.16 In the consultation document, Ofcom noted that this criterion relates only to digital sound programme services – additional services and, in respect of local licences only, BBC programme services are expressly excluded. A couple of respondents (BT and a confidential respondent) expressed the view that digital additional services (e.g. data) should be taken into account. Having considered the responses in light of the statutory criterion, Ofcom believes that proposals for additional services properly should be taken into account in relation to how the provision of any such services on a national radio multiplex would promote or assist the take-up of receivers (see paragraph 3.18), and also in relation to its overarching duty to have regard to the extent to which the award of a national radio multiplex licence would be calculated to promote the development of the DAB platform. In respect of national radio multiplex licences in particular, Ofcom proposed in the consultation document also to consider its more general statutory duties. The responses in respect of this issue, and Ofcom's conclusions, are discussed at paragraphs 3.25-3.31.

Broadening the range of local digital sound programme services (local licences)

- 3.17 The consultation document highlighted that this criterion requires Ofcom to consider the extent to which the line-up of programme services proposed by an applicant for a local radio multiplex licence would broaden the range of local digital sound programme services available in the area. Consequently, BBC radio services, national digital sound programme services and analogue services are excluded from consideration. However, as the vast majority of the local licences that will be advertised will be the first such licences in their respective areas, it was proposed that Ofcom would wish to assess the extent to which an applicant's proposed bouquet of services offers an inherent breadth of programming on the single

multiplex (i.e. the extent to which the proposed programme services cater for a variety of tastes and interests). There were no comments submitted in response to the consultation document which relate specifically to this criterion, and thus Ofcom will adopt the proposals set out in the consultation document, which will be included in guidance published as part of each local radio multiplex licence advertisement.

Promotion of digital take-up (national licences)

- 3.18 In determining the extent to which an applicant for a national radio multiplex licence would promote or assist the acquisition of digital radio receivers, Ofcom proposed to take account of any proposals suggested by the applicant and any evidence that these proposals may come to fruition. It was suggested that these may include both on-air and off-air activities such as, inter alia, activities involving retailers and equipment manufacturers, advertising and editorial coverage in other media, and the nature of the digital sound programme services and digital additional services proposed. In response, Virgin Radio suggested that the plans of the successful applicant for a national radio multiplex licence should include a "cross-industry and consumer strategy to communicate the benefits, attraction and opportunities of DAB digital radio", while National Grid Wireless recommended the establishment of "a not-for-profit joint marketing vehicle comprising the new and existing national commercial licensees and the BBC to promote public take-up of DAB". Ofcom welcomes the fact that stakeholders are already considering how the licensing of a second national radio multiplex could help further to develop the DAB platform.

Local demand or support (local licences)

- 3.19 As was stated in the consultation document, Ofcom recognises that, unlike with applicants for local analogue licences, an applicant for a local radio multiplex licence is unlikely to be able easily to generate direct support for itself as an entity, as it is merely a 'packager' of programme services. Instead, it will be the individual programme services themselves, and possibly their providers if these are identified, which will attract support. However, as Ofcom has made clear in relation to analogue commercial radio licensing, Ofcom believes that evidence of local demand, as demonstrated by formal audience research or analysis, is a more meaningful and cogent measure than evidence of local support as demonstrated by letters or petitions.
- 3.20 Channel 4 sought confirmation that the practice of seeking evidence of support from "worthy individuals" would not increase an applicant's chances of being awarded a licence. As set out in paragraph 3.4, the 1996 Act requires Ofcom to invite public comment on the applications it receives for radio multiplex licences, and to take into account any such comments it receives when deciding upon licence awards. However, any such evidence of support will be considered in the context of Ofcom's stated approach regarding the application of this particular statutory criterion, as set out above.

Fair and effective competition

- 3.21 This criterion, which is relevant to applications for both national and local radio multiplex licences, requires Ofcom to assess whether, in contracting or offering to contract with programme and additional service providers, an applicant has acted in a manner calculated to ensure fair and effective competition in the provision of those services. To this end, it was proposed in the consultation document that applicants should formulate fair and transparent policies for negotiations with potential programme and additional service providers, and maintain full records of any

contacts and discussions which take place, in whatever form, prior to and during the application process. It was further proposed that Ofcom would wish to consider the extent to which negotiations with potential service providers, regardless of their relationship to the multiplex licence applicant, are fair and the terms of any contract for service provision are fair and non-discriminatory.

- 3.22 There was general agreement with Ofcom's proposals as to how it will assess applications for local and national radio multiplex licences in relation to this particular criterion. Channel 4 sought clarity as to what standard documentation Ofcom will require as part of the application procedure. Ofcom's view is that applicants should formulate fair and non-discriminatory policies for negotiations with potential programme and additional service providers, and maintain full records of any contacts and discussions which take place, in whatever form, prior to and during the application process. Ofcom recognises that the form and nature of these negotiations, and therefore the records of them, will vary, and thus there will be no standard documentation that applicants will be expected to submit.
- 3.23 A confidential respondent asked whether Ofcom had a view regarding multiplex operators contracting with their own shareholders, or offering first options or other preferential opportunities for access to multiplex capacity to their equity participants. Ofcom proposed in the consultation document that it would consider the extent to which negotiations with potential service providers, regardless of their relationship to the multiplex licence applicant, are fair and non-discriminatory and the terms of any contract for service provision are fair and non-discriminatory. Ofcom's position is that it would not look unfavourably on multiplex operators who contract with their own shareholders as long as these points were addressed.
- 3.24 Three respondents (Virgin Radio, Fresh Radio and Lincs FM) all expressed concern that multiplex licensees and their shareholders should not be permitted to 'crowd out' willing service providers by providing all of the programme services themselves. Lincs FM further suggested that Ofcom should take a view as to what is the maximum fair profit margin for a multiplex operator to charge, and to ensure that all multiplex operators do not make excess profit from service providers. Ofcom believes that the combination of statutory ownership rules and the requirement for Ofcom to consider whether an applicant for a radio multiplex licence has acted in a manner calculated to ensure fair and effective competition are sufficient safeguards to ensure that prospective service providers are treated fairly and have an opportunity to contract with a prospective multiplex licensee. Ofcom also notes that while existing local analogue commercial radio services have no automatic right of carriage on a local radio multiplex, the provision of such services is likely to enhance the overall capacity of a multiplex service to cater for local tastes and interests (s51(2)(d) of the 1996 Act), and therefore that this may provide an incentive for radio multiplex licence applicants to propose local services as part of their overall bouquet. Lastly, Ofcom does not consider that it would be appropriate to introduce price controls for radio multiplex capacity without first undertaking a market review or competition investigation to determine whether there is a competition problem for which such measures are an appropriate remedy.

Ofcom's other statutory duties

- 3.25 Ofcom's general statutory duties are set out in section 3 of the Communications Act 2003 (the CA 2003), and include, in particular, the principal duty to further the interests of citizens and consumers in relation to communications matters and of consumers in relevant markets, where appropriate by promoting competition. By virtue of this duty, Ofcom must secure, among other things, the "availability

throughout the UK of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests”.

- 3.26 For the consideration of applications for the second national radio multiplex licence, the consultation document proposed that Ofcom's duties under section 47 of the 1996 Act should be carried out in light of its general duties in section 3 of the CA 2003, and therefore that in applying the criteria included within section 47, Ofcom should have regard to the capacity of the proposed programme services to appeal to a variety of tastes and interests. It was further proposed that this would be taken to mean that any proposed line-up of services on the second national radio multiplex should appeal to tastes and interests that are distinct from those catered for by services on the existing national radio multiplex, although this would not necessarily preclude consideration of programme services which may compete for audience or revenue with those on the existing national radio multiplex. Ofcom also expressed the view that consideration of the services on the existing national radio multiplex would not be the determinative factor in its decision on the award of the second national radio multiplex licence. This is on the basis that, as section 3 states that, in carrying out its functions, Ofcom has a duty to further the interests of citizens and consumers by securing various matters, the duty in section 3 is therefore an additional consideration for Ofcom in carrying out its functions in section 47 of the 1996 Act and, as applications are considered in the round, cannot be the determinative factor for the success or failure of an application.
- 3.27 The consultation document also sought views on whether Ofcom should take into account any other types of radio service, in addition to the digital sound programme services provided on the existing national radio multiplex, when considering the distinctiveness of the proposed programme services on the second national radio multiplex. An initial view was expressed that it would be appropriate for local digital sound programme services which have achieved ‘quasi-national’ coverage by virtue of being provided on a number of local radio multiplexes to be taken into account, and views on what should constitute ‘quasi-national’ coverage – e.g. achievement of a specified level of population coverage, or carriage on a specified threshold number of local multiplexes – were invited.
- 3.28 There was general agreement from those respondents who addressed the issue, including prospective applicants for a second national radio multiplex licence, that the services provided under that licence should be distinct from those provided by Digital One on the existing national radio multiplex. However, a confidential respondent requested that further clarification be provided regarding the nature of the distinctiveness being sought, while Channel 4 submitted that Ofcom could be acting ultra vires if it adopts the proposal set out in the consultation document on the basis that Ofcom should only consider the provisions of the 1996 Act.
- 3.29 Ofcom considers that it is able to have regard to its section 3 duties when applying the section 47 criteria. As indicated above, this consideration would not be the determinative factor in Ofcom's decision on the award of the second national radio multiplex licence.
- 3.30 On the matter of which existing services should be taken into account when considering the extent to which the new services on the second national radio multiplex would broaden listener choice, there was a mixed reaction regarding whether 'quasi-national' services should be so considered. For the same reasons as set out at paragraph 3.28 above, Channel 4 considered that Ofcom should not take account of quasi-national services and in any event, considered that to take account

of them would lead to uncertainty because of the relative ease with which Channel 4 said multiplex operators can vary their programme services. A confidential respondent's response was along very similar lines, although it added that if Ofcom does decide to take local DAB services into account, then only those with a composite coverage of at least 20m adults should be considered. Virgin Radio considered that only those services on the existing national radio multiplex should be taken into account, as "the sheer scale and number of services available on other digital platforms ... would make comparative analysis impossible". Respondents in agreement with the proposal in the consultation document included Chrysalis, Digital One, UBC, and a confidential respondent, with their suggestions for what should constitute 'quasi-national' ranging from services which reach more than 30% of the UK population (UBC) to services which reach more than 50% of the UK population (Digital One and a confidential respondent). Adopting the latter definition would mean that, when considering the distinctiveness of the services offered by applicants for the second national radio multiplex licence, as things currently stand Ofcom would take into account the following seven services in addition to those provided by Digital One – The Arrow, Capital Disney, Classic Gold, Kerrang, Kiss, Smash Hits and XFM.

- 3.31 Ofcom has considered carefully the matter of whether 'quasi-national' services should be taken into account when considering the distinctiveness of the proposed new services on the second national radio multiplex in light of the consultation responses. Ofcom recognises that the majority of 'quasi-national' services have obligations to provide content of relevance to each of the local areas served by the local multiplexes upon which they are carried, and also that the relative fluidity of the programme service line-ups provided by local radio multiplex operators potentially could result in regulatory uncertainty. Ofcom also notes that taking 'quasi-national' services into account could mean that the proportion of the population which currently does not receive a particular 'quasi-national' service (which would be 50% for a service with 50% population coverage, or 70% for a service with 30% population coverage) potentially would continue not to receive it. This is because an applicant for the second national radio multiplex licence may not want to include such a service in its proposed line-up of programme services if Ofcom takes 'quasi-national' services into account in the context of broadening choice. Ofcom does not consider that such an outcome would be in the best interests of citizen-consumers. For the reasons outlined above, Ofcom has concluded that it would not be appropriate to take into account any programme services other than those provided on the existing national radio multiplex when considering the distinctiveness of the services proposed to be provided on the second national radio multiplex.

Application procedure

- 3.32 It was proposed in the consultation document to adopt the same basic licensing process for multiplex licensing as is currently used for FM commercial radio licensing. Therefore, each multiplex licence advertisement would be free-standing, and would contain information specifically tailored to that licence as well as more general background about the licensing process and Ofcom's procedures; generic notes of guidance and application forms would not be published. It was further proposed that applications, and application fees, should be submitted electronically, and that the non-confidential parts of the former would be published on the Ofcom website for public scrutiny. Finally, in relation to the timescale for licence advertisements and awards, it was proposed that the closing-date for applications generally would be three months after the date of advertisement, and that the timing of the licence awards would depend largely upon the number of applications submitted, although Ofcom expects that most licence awards would be decided within three months of the closing-date. There was very little comment regarding the proposed application

procedure set out in the consultation document, and thus this procedure will represent Ofcom's policy henceforth. The planned timetable for the advertisement of the new radio multiplex licences is set out in Section 4 of this document.

Radio multiplex licence renewals

- 3.33 Section 58 of the 1996 Act sets out that any radio multiplex licence granted before 1 October 2002 is eligible to be renewed, on one occasion only, for a period of twelve years beginning on the date when it would otherwise expire, while any radio multiplex licence granted between 1 October 2002 and 1 October 2006 is eligible to be renewed, on one occasion only, for a further period of eight years beginning on the date when it would otherwise expire. This means that licences granted after 1 October 2006 (i.e. all of those which Ofcom proposes to award) are not eligible to be renewed.¹
- 3.34 Three respondents wished to express their concern at the lack of a potential renewal for the second national radio multiplex licence. The CA 2003 extended by four years (from October 2002 to October 2006) the period during which radio multiplex licences granted in that period could be renewed, but allowed for only eight-year renewals during this extended period, compared with the twelve-year renewals for all licences granted pre-October 2002. The decision to extend the period of eligibility for renewals in 2003 was in recognition of the fact that, at that time, DAB take-up had not progressed as far as had been anticipated, and that radio multiplex licences were more likely to attract viable applications if they were eligible to be renewed. However, the fact that licences granted during the extended period were offered only an eight-year renewal, rather than the twelve-year renewal offered previously, recognised that the still nascent nature of the DAB platform had to be balanced against Ofcom's duties relating to ensuring the optimal use of spectrum.
- 3.35 In response, Channel 4 argues that, as no radio multiplex licences have been granted since August 2003 (the last radio multiplex licence to be granted was in fact that for Plymouth/Cornwall, which was granted to South West Digital Radio in November 2004), three years of the additional period of eligibility for renewal introduced by the CA 2003 has effectively been "wasted", and further contends that as DAB take-up is still lower than expected, the operator of the second national radio multiplex will have a major role in helping to develop the platform (a role which is explicitly required by the provisions of the 1996 Act). It therefore argues that there are strong public policy grounds, compounded by the hiatus in licensing, for Ofcom to press the Department for Culture, Media and Sport (DCMS) for an extension of the renewal provisions for at least another three years. Chrysalis asks for a two-year extension to the period during which any radio multiplex licences granted are eligible to be renewed, but neither respondent specifies the duration of the renewal period that they would wish to see permitted. All three respondents who addressed this issue also argue that the lack of provision for renewal potentially could affect the quality of the applications and the level of investment applicants are willing to make (the confidential respondent on this issue estimates that the operating costs of the second national radio multiplex could be well over £100m over the 12-year licence period), and would place the second national radio multiplex at a significant competitive disadvantage to Digital One (whose licence, if renewed, will run until 2023). However, evidence from other respondents suggests that costs could be significantly lower than those suggested by the confidential respondent. Ofcom also notes that the majority of radio multiplexes are currently in operating profit, well within their 12-year licence period.

¹ Dates incorrectly stated in the consultation document.

- 3.36 Any change to the legislation regarding radio multiplex licence renewals is a matter for Government rather than Ofcom. In any event, none of the respondents to the consultation document provided persuasive evidence to Ofcom to suggest that a twelve-year radio multiplex licence would not be a commercially viable proposition. Therefore, Ofcom does not believe that to date a compelling case has been made for the legislation to be changed. Ofcom also notes the increasing take-up of DAB receivers (now over three million), and the variety of platforms and thus potential for multiple revenue streams now available to individual service providers, which is likely to enhance their ability to operate commercially viable services on radio multiplexes.

Variations of radio multiplex licences

- 3.37 The consultation document also set out, for information, the statutory provisions which detail the matters to which Ofcom must have regard when considering requests to vary the line-up of programme services on a radio multiplex (note: these provisions do not relate to data services).
- 3.38 In the case of a national radio multiplex licence, Ofcom is not permitted to approve a proposed variation relating to the programme services provided under the licence if it appears that, by doing so, the capacity of those programme services to appeal to a variety of tastes and interests would be unacceptably diminished. If this is not the case, then Ofcom must approve the variation.
- 3.39 In the case of a local radio multiplex licence, Ofcom is able to approve a variation only if it satisfies one of the following three criteria:
- that the variation would not unacceptably narrow the range of programmes available by way of local digital sound programme services in the area;
 - that the variation would be conducive to the maintenance or promotion of fair and effective competition in the area; or
 - that there is evidence of a significant local demand or support for the change that would result from the variation.
- 3.40 In addition to these considerations, Ofcom must also satisfy itself that any proposed variation to a radio multiplex licence would be compliant with the ownership requirements for digital sound programme licences.
- 3.41 The consultation document indicated that, in line with the importance placed upon localness in radio by listeners (as demonstrated in research undertaken for the Radio Review) and Government (as manifested by the provisions of section 314 of the CA 2003 placing upon Ofcom a duty to maintain the local character of local analogue radio), particular account would be taken of any proposals significantly to reduce local content when considering whether a proposed variation to a local radio multiplex licence would unacceptably narrow the range of programmes in an area.

Local radio multiplex licences

- 3.42 Two respondents (Chrysalis and UBC) did not agree with the proposal to take particular account of any reductions in local content when considering whether a proposed variation to a local radio multiplex licence would satisfy the statutory criteria, stating that Ofcom had no statutory duty to protect localness on the DAB platform, and that the provision of local material (which Chrysalis describes as "one of the most expensive aspects of providing a digital radio service") should be left to the market to decide. While recognising that the provision of local content on non-

simulcast digital programme services can indeed represent a significant cost, Ofcom continues to believe that, as catering for local tastes and interests is one of the criteria to which it must have regard when awarding a local radio multiplex licence, and for the reasons set out in paragraph 3.41 and the consultation document, the amount of local material provided on a local radio multiplex properly should be a matter to which it should have regard when considering a request to vary a local radio multiplex licence.

3.43 As was set out in the consultation document, when applying for a variation to a local radio multiplex licence, an applicant is asked to indicate which of the three aforementioned criteria they believe is satisfied in relation to their application, and to provide evidence in support of their belief. Licensees are able, if they so wish, to ask for their application to be considered under two or even all three of the criteria. Ofcom considers that it would be of benefit to multiplex licensees for more detail about this process to be provided, and thus this statement offers such guidance. A consultation document on how Ofcom might apply the relevant statutory criteria will follow at a later date. When submitting a request to vary a local radio multiplex licence, a multiplex licensee will be required to provide the following information:

- the exact nature of the variation being requested (e.g. if seeking to add a new programme service, is it a replacement for an existing service or a wholly new service? Are there any current licence obligations which the licensee wishes to have removed/varied?);
- if a new digital programme service is being proposed to be provided, the wording to describe the service, for inclusion in Part I of the Annex to the radio multiplex licence (this will be subject to Ofcom's agreement) – see paragraph 3.44 below;
- the statutory criterion, or criteria, in respect of which the licensee wishes the application for a variation to be considered; and
- the reason(s) why the licensee believes that its application satisfies the criterion, or criteria, it has previously identified.

3.44 Included within every local radio multiplex licence is an annex which lists the programme services to be provided on that multiplex. The service descriptions generally include a brief (usually no more than three lines) outline of the nature of the service, often supplemented by an indication of how much of the content is unique to that multiplex licence area. In the past, the legacy regulator took responsibility for drafting these descriptions, basing them upon information drawn from the licence application. However, Ofcom is of the view that responsibility for drafting these should rest predominantly with the multiplex licence holder (or, in the case of an application for a newly-advertised radio multiplex licence, the applicant), in conjunction with the provider of that service (if this is not the multiplex operator itself) – an approach which parallels Ofcom's policy of requiring applicants for analogue local commercial licences to 'write their own Format'. However, as is equally true in analogue local commercial radio licensing, Ofcom feels that it is appropriate for it to reserve the right to seek clarification and, if appropriate, make drafting changes, in order to avoid ambiguity or misunderstanding. This will always be undertaken in consultation with the applicant/licensee. For entirely new programme services to be provided on a local radio multiplex licence (either as part of an application for a variation, or as part of an application for a new radio multiplex licence), Ofcom will require details of how much (if any) output will be uniquely local to the licence area concerned, and when this is likely to be scheduled. In the case of a service that includes music, sample tracks will also be required to help Ofcom better understand the nature of the service being proposed – these will of course not be included as part of the service description in the licence.

National radio multiplex licences

- 3.45 As noted above, in terms of national radio multiplex licences, the statute requires that Ofcom is not to vary such a licence if it appears that to do so would unacceptably diminish the capacity of the programme services provided under that licence to appeal to a variety of tastes and interests (section 54(6A) of the 1996 Act). In its response to the consultation document, Digital One argues that any requests for variations to the line-up of services on its own multiplex licence should be considered within the framework used to date (i.e. without reference to any other digital sound programme services), as "these are the pre-existing conditions under which Digital One's licence was awarded". Channel 4 argues that proposals for variations to the second national radio multiplex should be considered in the same way (i.e. only taking into account the services on that multiplex when assessing the capacity of the programme services to appeal to a variety of tastes and interests), but expresses concern that Ofcom's proposed intention to secure and maintain distinctiveness between the two national radio multiplexes will allow Digital One, prior to the award of the second national radio multiplex licence, to ensure that its line-up of services covers as broad a range of tastes and interests as possible, thus closing off potential competition.
- 3.46 Ofcom must consider any request for a licence variation on its merits, against the full range of criteria provided for in statute. Having had regard to this, Ofcom's intention is to consider any future proposals for variations to the line-up of programme services on the second national radio multiplex in a manner which is consistent with the basis on which the original licence award was made. This approach reflects Ofcom's intention to maintain the integrity of the licence award process, and in particular to ensure as far as possible that the digital sound programme services carried on (all) national radio multiplex licences continue to appeal to a variety of tastes and interests throughout the period for which the multiplex licences are in force. Ofcom intends to adopt the same approach for the existing national radio multiplex licence and any future ones. Accordingly, in applying the criterion in section 54(6A), Ofcom will have regard to the capacity of the proposed programme services to appeal to a variety of tastes and interests. This will be taken to mean that a variation is unlikely to be approved unless the line-up of programme services on a national radio multiplex continue to appeal to tastes and interests that are distinct from those catered for by the digital sound programme services on any other national radio multiplex.

Analogue licence renewal for digital broadcasters

- 3.47 Ofcom proposed in the consultation document to adopt the same definition as the Radio Authority for what should constitute a 'relevant' local radio multiplex for the purposes of determining whether a local analogue licence is eligible to be renewed under the provisions of section 104A of the Broadcasting Act 1990. This proposal said that a relevant local radio multiplex would be one with a 'primary protected area' (PPA) that would provide potential coverage in digital form to 25% or more of the adult population within the measured coverage area (MCA) of the analogue local licence in question. Ofcom is adopting this proposal in view of the fact that it received no comment. As was noted in the consultation document, each local radio multiplex licence advertisement will include a list of those local analogue licences which could qualify for licence renewal if providing a digital sound programme service on that multiplex.

Additional payments for national licences

- 3.48 Ofcom set out in the consultation document that, under section 46 of the 1996 Act, when advertising a national radio multiplex licence it is required to state, with the consent of the Secretary of State for Culture, Media and Sport, whether any percentage of multiplex revenue would be payable by the licensee and to specify that percentage. The Secretary of State may provide by order that no percentage should be specified. This is the case currently. Multiplex revenue is defined in the 1996 Act (see sections 56 and 57).
- 3.49 A few respondents commented on the additional payment provisions in the 1996 Act. Digital One requested that if the percentage is set at zero for the second national radio multiplex licence then the same zero percentage should continue to be applied to Digital One's licence. It also stated that, if the percentage specified for the second national radio multiplex licence was above zero, it would not be fair to revisit the percentage relating to its own licence as it was "awarded at a different time and in a very different market context". A confidential respondent and Channel 4 both urged Ofcom to recommend to DCMS that the percentage of multiplex revenue payable by the holder of the second national radio multiplex licence should be set at zero, while Chrysalis said that any uncertainty regarding this issue will act as a disincentive to investment.
- 3.50 As the current order specifying that no percentage of multiplex revenue shall be payable by the holder of a national radio multiplex licence advertised during its period in force does not expire until 31 December 2006 (see The Broadcasting (Percentage of National Radio Multiplex Revenue) Order 1998), it is likely that no percentage of multiplex revenue will be payable by the holder of the second national radio multiplex licence, as Ofcom fully intends to advertise the licence before the end of 2006. However, if the second national radio multiplex licence is not advertised until after the order has expired, Ofcom will set a percentage, which may be zero, subject to the consent of the Secretary of State. Prospective applicants should note that Ofcom is currently considering whether, and if so how, to apply administered incentive pricing (AIP) to the spectrum used for broadcasting, including the spectrum occupied by radio multiplex licences. Additional payments are essentially a proxy for full opportunity cost spectrum fees, designed to reflect the scarcity of spectrum used for national radio multiplex licences. A consultation document on the application of AIP to spectrum used for broadcasting will be published shortly.

The carrying of existing BBC services

- 3.51 As was set out in the consultation document, Ofcom is required, under section 49(1) of the 1996 Act, to reserve an appropriate amount of digital capacity on local multiplexes, when advertised, to enable each BBC local radio service in England, and BBC services in Scotland, Wales and Northern Ireland, to be received in digital form within a coverage area that so far as is reasonably practicable corresponds with the analogue coverage area for that service. The notice of advertisement of each local radio multiplex licence will specify the amount of capacity, if any, to be reserved for the BBC (i.e. as related to the number of BBC programme services to be accommodated) on that multiplex. Ofcom's current intention is that 128 kbits/sec will be reserved for each BBC local and 'national regional' service, in line with the capacity reserved in respect of every existing local radio multiplex. As noted in the consultation document, the BBC pays the multiplex operator for use of its digital capacity. It is also worth noting that the BBC may choose to negotiate a lower capacity than 128 kbits/sec, if it so wishes.

Other issues

- 3.52 O2 raised concerns about inter-modal competition between parties licensed under the Broadcasting Act 1996 via an award process and parties licensed under the Wireless Telegraphy Act 1949 in an auction process, both in relation to Ofcom's December 2005 statement on *Radio - Licensing Policy for VHF Band III, Sub-band 3* but also more generally. Ofcom has noted O2's points more generally, and deals with the points relating to the December 2005 statement below.

Effect of market entry by a firm with lower sunk costs

- 3.53 O2 noted that Ofcom had stated that where different spectrum is assigned using different mechanisms, in particular by beauty contest and by an auction, and where this different spectrum is used to provide competing services, that this would not necessarily lead to a distortion of competition. O2 noted that Ofcom reasoned that this was because standard economic theory suggests that distortions in competition are only likely to be caused by differences in the marginal costs faced by operators rather than sunk costs, such as auction fees.
- 3.54 In response, O2 said that an operator awarded spectrum through a beauty contest, whilst having identical marginal costs as an operator awarded spectrum by auction, would have lower average costs, because it enjoys lower sunk costs. This would mean that it would earn super-normal profits. O2 argued that it might be expected that these profits would be competed away in the outbound market via the "waterbed" effect. O2 stated that this waterbed effect would distort competition in that outbound market and other markets in the process.
- 3.55 Ofcom does not agree with O2 about the effect of entry by a firm with lower sunk costs. It is not clear to Ofcom what the mechanism is in the current context for there to be a waterbed effect. This effect can occur in two-sided markets where there are two sets of customers. However, in this context there appears to only be one set of customers. Moreover, in the scenario posited by O2, there would be no incentive to compete away any super-normal profits. As each operator has the same marginal cost, the additional profit that each would earn from an additional customer is the same. Therefore, the operator with the lower sunk costs is no more willing to offer lower prices to acquire customers than the operator with higher sunk costs. Super-normal profit would not therefore be competed away in the manner suggested by O2.²

Technology neutrality

- 3.56 O2 disputed in its response that licensing spectrum for a further national radio multiplex via the Broadcasting Act 1996, with the associated data services capacity provision, complied with the technology neutrality provisions of the Framework Directive.³ Article 8 requires Member States to ensure that in carrying out their regulatory tasks in the communications directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technology neutral. Recital 18 says that this

² As set out in its statement *Radio – Licensing Policy for VHF Band III, Sub-band 3*, Ofcom does not rule out the possibility that differences in spectrum allocation mechanisms could distort competition. Ofcom noted that if implemented, administered incentive pricing (AIP) for broadcast spectrum could mitigate any distortion that might arise. Ofcom is currently considering the potential application of AIP and will consult on this shortly.

³ Directive 2002/21/EC.

requirement does not preclude the taking of proportionate steps to promote certain specific services where this is justified.

- 3.57 Ofcom does not consider that licensing spectrum for a further national radio multiplex via the Broadcasting Act 1996, with the associated data services capacity provision, is contrary to the provisions of the Framework Directive identified by O2. O2 appears to be concerned that another operator would be able to acquire the data services capacity through a beauty contest and not have to incur any cost for this spectrum, and as such would be at an advantage compared to an operator that acquires spectrum through an auction where auction fees are payable. However, in the circumstances where the licence for the further national radio multiplex is awarded to a multiplex operator (who is not the same as the data service provider), then it is expected that the multiplex operator will charge a commercial fee to the service provider for the provision of the data services. The multiplex operator will be able to charge that service provider up to the service provider's willingness to pay, and its willingness to pay depends on the price of alternative substitute spectrum. The minimum that the multiplex operator would be willing to accept is the amount for which it could sell the data services capacity to a sound (as opposed to data) broadcasting provider.
- 3.58 In any event, Ofcom considers that allocation of the spectrum for a further national radio multiplex via the Broadcasting Act 1996 is a proportionate step to promote specific services where this is justified as set out in Recital 18. Ofcom set out in its statement on the allocation of spectrum in VHF Band III, sub-band 3, that there were sound public policy reasons for allocating the spectrum for a further national radio multiplex, including extending choice available to a greater number of listeners; meeting demand for a further national radio multiplex; and the introduction of competition in the provision of national radio multiplex services which would encourage further investment in the DAB platform leading to greater choice for service providers, advertisers and listeners.⁴ Ofcom considers that its ability to allow a radio multiplex operator to include data services on its platform, up to a limit deemed appropriate by Ofcom and subject to a statutory ceiling, contributes to these public policy considerations. Ofcom also considers that such services, including mobile television, will extend choice to consumers; will meet demand from consumers and from the suppliers of such services, such as BT⁵, and will promote further investment in the DAB platform.⁶ In this way, Ofcom considers that allocation of spectrum with its associated provision for data services will promote DAB where this is justified. As such, Ofcom considers that its decision to allocate the spectrum as set out is consistent with the Framework Directive.⁷

⁴ See paragraphs 5.16 - 5.19.

⁵ See BT press release *BT Movio pilot reveals consumer thirst for the UK's first broadcast digital TV to mobile service* dated 12 January 2006.

⁶ Ofcom recognises that DCMS noted recently in its consultation on increasing the data limit of radio multiplexes from 20% to 30% that this could have a potential impact on other existing or potential mobile TV operators insofar as this service proves to be attractive for customers but considered that on balance, increased choice will lead to better services for consumers. See http://www.culture.gov.uk/NR/rdonlyres/82BF8FF8-3266-4597-B6C5-C8002EACBFF2/0/ConsultationBroadcasting_radio.pdf at paragraph 11.

⁷ Ofcom notes that in its response O2 posit that without technology neutrality, competition could be distorted. As referred to above, Ofcom set out in its statement *Radio – Licensing Policy for VHF Band III, Sub-band 3* that it does not rule out the possibility that differences in spectrum allocation mechanisms could distort competition but that if implemented, AIP for broadcast spectrum could mitigate any distortion that might arise.

Competition safeguards

- 3.59 O2 refers to Ofcom's comments in its statement that DAB radio multiplex licences contain provisions requiring fair and effective competition and that these restrict the ability of multiplex operators to obtain any unfair advantage in the markets in which they operate. O2 disagrees, saying that section 47 of the Broadcasting Act 1996 only relates to whether the applicant for a national radio multiplex licence has conducted itself correctly during the bidding phase for a licence, not the forward looking conduct of a licensee in the market and that the licences "do not contain adequate competition safeguards". Ofcom does not agree that a national radio multiplex licence does not contain adequate competition safeguards.
- 3.60 Under section 54(1)(e) and (f) of the Broadcasting Act 1996, Ofcom has specific powers to include such conditions in the licence as appropriate for securing that in the terms on which a holder of the licence contracts or offers to contract for the broadcasting of digital sound programme services or digital additional services he does not show undue discrimination, and that the licensee does not in any agreement with a person providing digital sound programme services or digital additional services entitling that person to use a certain amount of capacity, restrict that person's freedom to make arrangements with another person to the use of that capacity.
- 3.61 In addition, Ofcom has powers under the Communications Act 2003 to include provisions in a radio multiplex licence to ensure fair and effective competition. The 2003 Act also contains provisions which say that before Ofcom exercises its Broadcasting Act powers for a competition purpose, it must consider whether a more appropriate way of proceeding would be under the Competition Act 1998. It is also a duty for Ofcom to carry out a review (at such intervals as it considers appropriate) of its powers exercised for competition purposes for the purposes of a broadcasting provision. Ofcom also has general powers to investigate anti-competitive behaviour under the Competition Act 1998. Ofcom is therefore satisfied that the scope of its powers are adequate to address the issue of multiplex operators obtaining any unfair advantage in the markets in which they operate.

Section 4

Licence areas and licensing timetable

- 4.1 The consultation document set out proposals for the areas to be covered by each of the new local radio multiplex licences, and a proposed timetable for advertising and awarding these licences and the planned new national radio multiplex licence. These proposals were subject to international agreement at the RRC in May-June 2006, and the vacating of the spectrum by existing users.

National radio multiplex licence

- 4.2 It was stated in the consultation document that it was Ofcom's intention to license the new national radio multiplex as soon as possible, so as to provide the maximum benefit to the greatest number of people, subject to international agreement on spectrum at the RRC in May-June 2006 and the vacating of the spectrum by existing users. It was also stated that this would be unlikely to be before the autumn of 2006.
- 4.3 Several respondents (including the BBC, Channel 4 and Virgin Radio) supported Ofcom's proposal to advertise the second national radio multiplex licence as soon as possible – Virgin stated that doing so would help to drive the awareness and appeal of DAB at a UK-wide level and also provide an additional boost for the wider commercial radio industry. GCap Media expressed the view that the licensing of a further national radio multiplex should not commence until the ability for all local digital radio to migrate to DAB digital radio multiplexes has been confirmed. In the *Radio – Licensing Policy for VHF Band III, Sub-band 3* statement, Ofcom set out its reasons why it does not intend to adopt this approach and having considered all responses to the consultation document, including those from GCap, considers those reasons remain valid. Ofcom therefore concludes that it will seek to advertise the further national radio multiplex licence as soon as is practicable, and intends to do so before the end of 2006. The spectrum which will be used for the licence will be vacated by the end of 2007, thus enabling the service to launch any time from the beginning of 2008. As was stated in the consultation document, the closing-date for applications will be three months after the date of advertisement, with the timing of the licence award dependent on the number of applications submitted. As noted in paragraph 3.8, the licence advertisement will make clear the coverage restrictions that need to be imposed in order to comply with international agreements reached at RRC.

Local radio multiplex licences

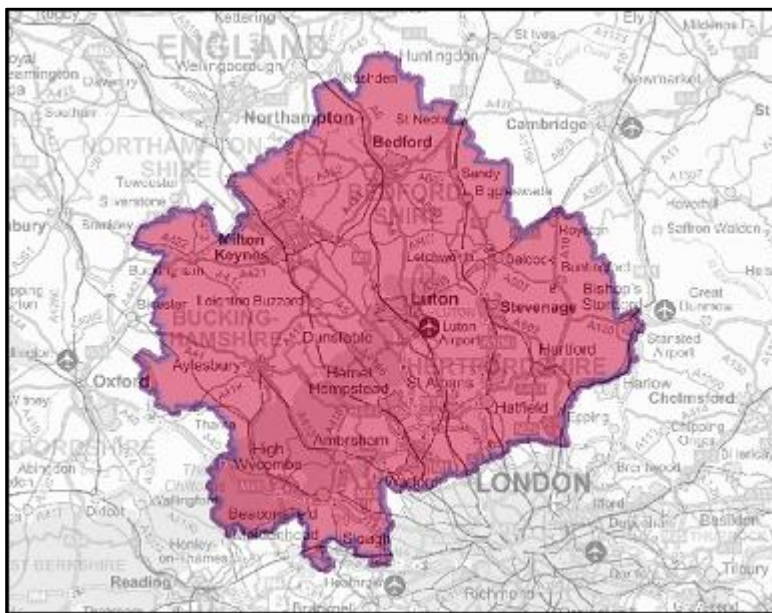
- 4.4 The consultation document included indicative maps and population coverage figures for all of the proposed new local radio multiplex licences, and sought expressions of interest from potential applicants (or non-interest from existing analogue stations within each proposed area) and views on the timing of licensing and the commercial viability of the areas proposed.
- 4.5 The majority of feedback in respect of the proposed new local radio multiplex licence areas was positive – where respondents made comments in relation to specific multiplexes, these are discussed below under each individual multiplex. In drawing up its plans, Ofcom has taken full cognisance of the local interests and specialist interests highlighted by particular responses, but as always in radio licensing these have needed to be balanced against issues of commercial viability and likely demand from broadcasters and multiplex operators.

- 4.6 It remains Ofcom's intention to commence advertising the new local radio multiplex licences in late 2006, and thereafter to advertise them at a rate of approximately one per month in descending order of population coverage (where exceptions have been made to this approach, these are explained below under the relevant multiplexes). Since issuing the consultation document, Ofcom has reviewed the likely population coverage of each planned local radio multiplex licence – the timetable below reflects this updated information as well as the responses to the consultation document. As was set out in the consultation document, the closing-date for applications generally will be three months after the date of advertisement, and the interval between the receipt of applications and licence award largely will depend upon the number of applications submitted for any given licence, although most awards should be made within three months of the closing-date for applications.
- 4.7 The initial licensing timetable will include only the first twelve local radio multiplex licences to be advertised. As was stated in the consultation document and was supported by many of the responses, the likely viability of, and/or demand for, the remaining potential local multiplex licences will be reviewed before it is decided whether they should be added to the timetable. However, Ofcom notes and welcomes the intention of Digital One and Arqiva to work to find ways of making smaller DAB multiplexes commercially viable.
- 4.8 The following is Ofcom's planned timetable for the advertisement of new local radio multiplex licences. These licences will be advertised from late 2006 onwards (a full timetable, with planned dates of advertisement for each licence, will be published on the Ofcom website in due course):

	Licence area	BBC station(s) to be carried	Est. pop. Coverage (000s)
1	Hertfordshire, Bedfordshire & Buckinghamshire	BBC Three Counties Radio	1,829
2	Derbyshire	BBC Radio Derby	843
3	Wrexham & Chester	BBC Radio Wales and BBC Radio Cymru	638
4	Herefordshire & Worcestershire	BBC Hereford & Worcester	586
5	Northamptonshire	BBC Radio Northampton	505
6	Oxfordshire	BBC Radio Oxford	494
7	York & Scarborough	BBC Radio York	489
8	Gloucestershire	BBC Radio Gloucester	460
9	Pembrokeshire & Carmarthenshire	BBC Radio Wales and BBC Radio Cymru	234
10	Guildford	BBC Southern Counties Radio	1,086
11	Reigate and Crawley	BBC Southern Counties Radio	466
12	Lincolnshire	BBC Radio Lincolnshire	669

- 4.9 The following pages set out in more detail the geographical areas to be covered by each of these local radio multiplex licences. Where appropriate, these take full account of the responses to the consultation document. However, prospective applicants for these licences should note that these maps, while more detailed than those set out in the consultation document, remain indicative only and may be subject to change prior to the advertisement of the licence. The exact primary protected area (PPA) for each multiplex, based on Postcode Areas, will be set out in the notice of advertisement for each licence.
- 4.10 Ofcom would like to be able to include licences for North Wales and in Northern Ireland in this first tranche, given the demand expressed by consultation respondents (notably the Welsh Assembly and the BBC). However, the frequencies which would need to be used by these licences are currently used for analogue television in the Republic of Ireland and so will not become available for use in the UK until analogue TV switch-off in Ireland. In the meantime, Ofcom will investigate possible alternative frequencies for these areas, and will also look for a frequency for a local radio multiplex licence for Suffolk (for which spectrum in VHF Band III presently allocated for T-DAB is not available).

1. Hertfordshire, Bedfordshire & Buckinghamshire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be the counties of Hertfordshire, Bedfordshire and Buckinghamshire, including the Unitary Authority areas of Luton and Milton Keynes.

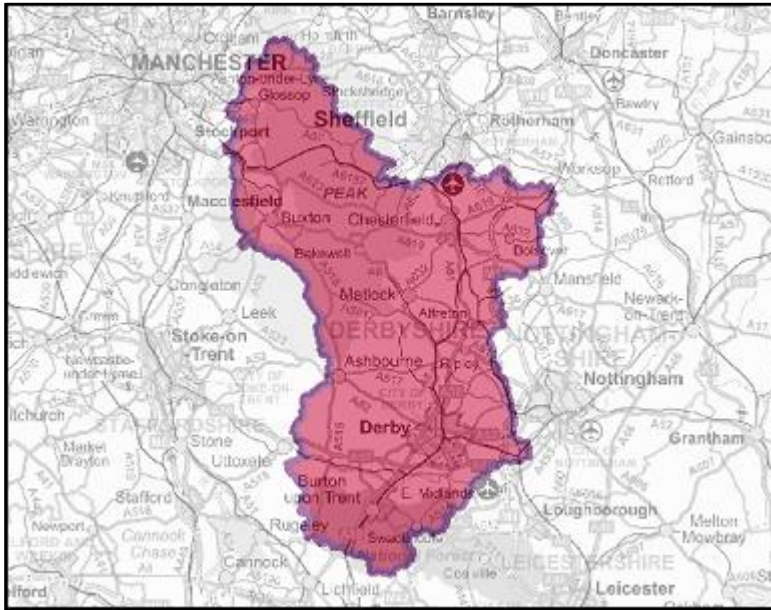
Capacity on this multiplex will be reserved for BBC Three Counties Radio.

Predicted adult population within PPA: 1,829,000

The consultation document noted that, subject to international agreement, there will be two frequency-blocks available for use in the northern Home Counties (Herts/Beds/Bucks and Oxfordshire), and that the the boundary between the two areas could be drawn in a number of ways (e.g. Buckinghamshire could be included in either area).

Almost all of the respondents who expressed a view on this issue agreed with the proposals in the consultation document that Buckinghamshire should be included within the licensed area of a Herts/Beds/Bucks multiplex rather than as part of an Oxfordshire/Buckinghamshire multiplex. GCap Media reiterated the point made in the consultation document that the relatively large number of existing analogue local commercial radio services in the Herts/Beds/Bucks area could mean that there would be little available capacity on this local multiplex for new services to be provided. While Ofcom recognises that the choice of new local digital radio services available to listeners in areas such as Aylesbury, Milton Keynes and Bedford may be comparatively limited compared to that in areas such as Luton and St. Albans, which are included within the PPAs of the Greater London multiplexes, it considers that a Herts/Beds/Bucks multiplex represents the best use of the available spectrum, and also will enable Ofcom better to fulfil its statutory responsibilities under section 49 of the 1996 Act to enable the local BBC service (Three Counties Radio) to be received in digital form within a coverage area that so far as is reasonably practicable corresponds with its analogue coverage area.

2. Derbyshire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be the county of Derbyshire, including the Unitary Authority area of Derby, and parts of the East Staffordshire and Staffordshire Moorlands districts of Staffordshire, including Burton-upon-Trent.

Capacity on this multiplex will be reserved for BBC Radio Derby.

Predicted adult population within PPA: 843,000

3. Wrexham & Chester



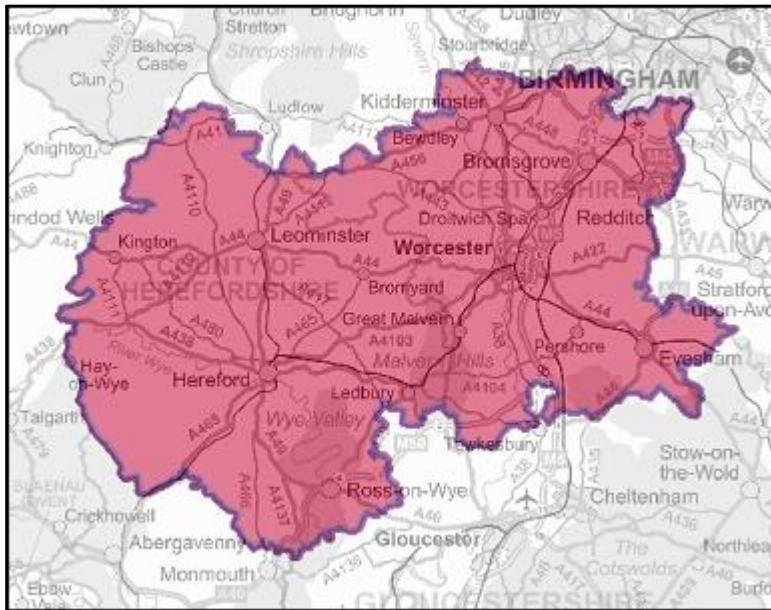
Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be the Unitary Authorities of Flintshire/Sir y Fflint and most of Wrexham/Wreccsam, the western part of Cheshire, including the districts of Chester and Ellesmere Port & Neston, and the Wirral district of Merseyside.

Capacity on this multiplex will be reserved for BBC Radio Wales and BBC Radio Cymru.

Predicted adult population within PPA: 638,000

4. Herefordshire & Worcestershire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be the counties of Herefordshire and Worcestershire.

Capacity on this multiplex will be reserved for BBC Hereford & Worcester.

Predicted adult population within PPA: 586,000

5. Northamptonshire



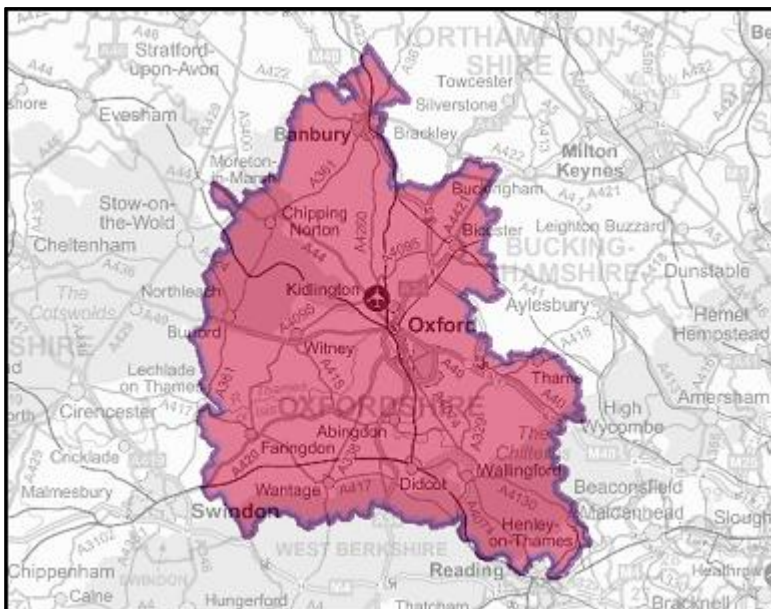
Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be the county of Northamptonshire.

Capacity on this multiplex will be reserved for BBC Radio Northampton.

Predicted adult population within PPA: 505,000

6. Oxfordshire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

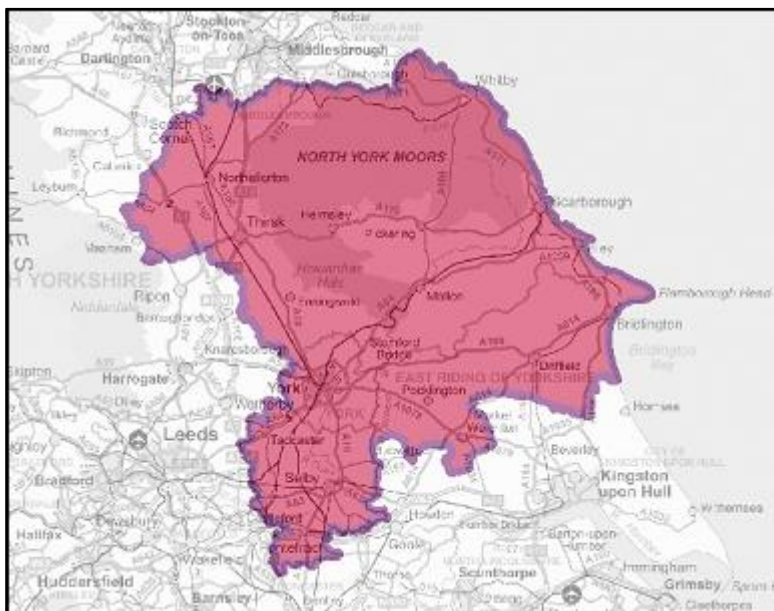
The area covered will be the county of Oxfordshire.

Capacity on this multiplex will be reserved for BBC Radio Oxford.

Predicted adult population within PPA: 494,000

As noted above in respect of the Herts/Beds/Bucks multiplex, the coverage area of this planned multiplex licence reflects the view of almost all the respondents who addressed the issue that this multiplex should not also cover Buckinghamshire.

7. York and Scarborough



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

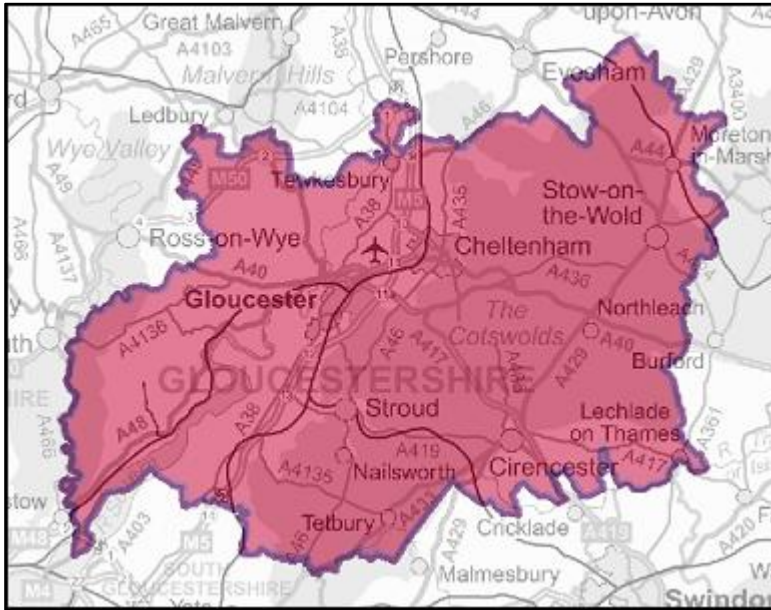
The area covered will be the eastern part of North Yorkshire, the City of York, and northern districts of the East Riding of Yorkshire.

Capacity on this multiplex will be reserved for BBC Radio York.

Predicted adult population within PPA: 489,000

This licence will be advertised earlier than was proposed in the consultation document, partly due to the greater population coverage that further investigations have established will be afforded by this licence, and also in recognition of the comments made by two respondents (UBC and Mr Mark Sutherland) that, because it includes coverage of a major urban population centre (i.e. York), this particular multiplex licence should be advertised earlier than was proposed in the consultation document.

8. Gloucestershire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

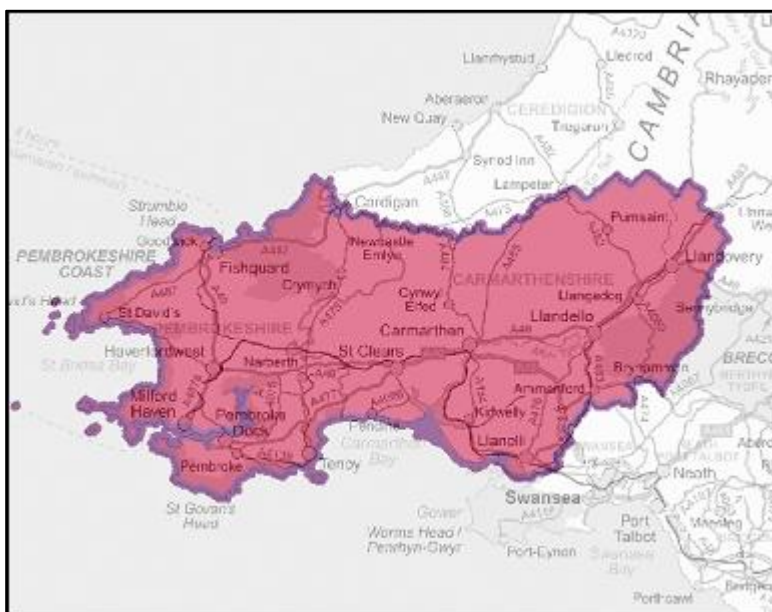
The area covered will be the county of Gloucestershire.

Capacity on this multiplex will be reserved for BBC Radio Gloucestershire.

Predicted adult population within PPA: 460,000

The coverage area of this multiplex has been extended to include Stroud and Tewkesbury, as was suggested by a respondent to the consultation document. This licence will be advertised earlier than was proposed in the consultation document, partly due to the greater population coverage that will result from the expanded area, and also in recognition of the comments made by three respondents (UBC, Mr Mark Sutherland, and Mr David Bennoson) that, because it includes coverage of two major urban population centres (i.e. Gloucester and Cheltenham), this particular multiplex licence should be advertised earlier than was proposed in the consultation document.

9. Pembrokeshire & Carmarthenshire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

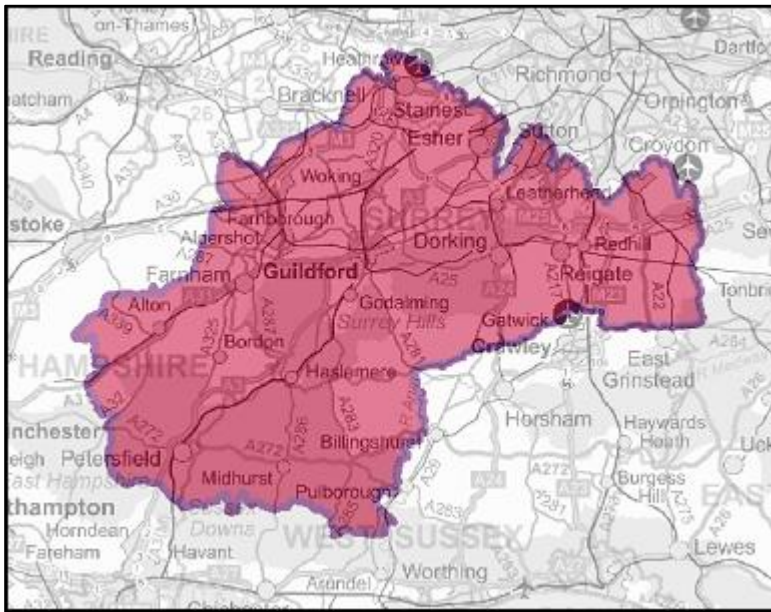
The area covered will be the counties of Pembrokeshire/Sir Benfro and Carmarthenshire/Sir Gaerfyrddin.

Capacity on this multiplex will be reserved for BBC Radio Wales and BBC Radio Cymru.

Predicted adult population within PPA: 234,000

Despite the relatively small population coverage afforded by this local radio multiplex licence, it has been placed earlier in the timetable in recognition of the demand expressed by both the Minister for Culture, Welsh Language and Sport for the Welsh Assembly Government, and the BBC, that licences which offer coverage of areas of Wales should be prioritised given the current relative lack of local and BBC nations DAB provision in Wales.

10. Guildford



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be the county of Surrey, together with the Rushmoor district and parts of the Hart and East Hampshire districts of Hampshire, and parts of the Chichester district of West Sussex.

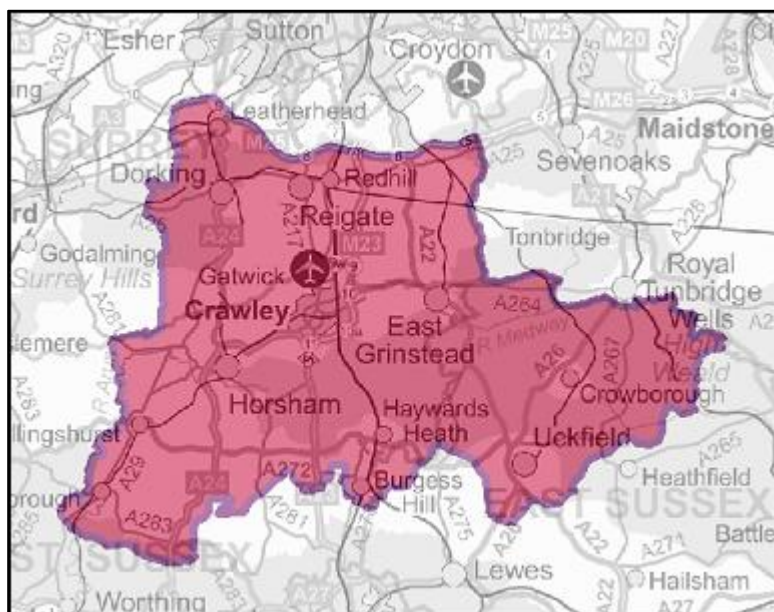
Capacity on this multiplex will be reserved for BBC Southern Counties Radio.

Predicted adult population within PPA: 1,086,000

In light of the responses to the consultation document, the area to be covered by this multiplex has been expanded to include locations such as Fleet, Farnborough, Alton, Petersfield and Haslemere. In particular, Mr Paul Groves highlighted the fact that Fleet and Farnborough are both served on FM and AM by the Guildford analogue commercial radio services and also by BBC Southern Counties Radio, while Haslemere is served by the Guildford AM service and is within the editorial area of BBC Southern Counties Radio. He also suggested, and Ofcom agrees, that on its own the Alton/Bordon/Petersfield area of Hampshire would be too small for a viable local multiplex, and thus including it within the coverage of the Guildford multiplex appears to be the best way to facilitate a local DAB service in the area. Ofcom also agrees with Mr Groves that extending the coverage of the Guildford multiplex further beyond the area already served by the Greater London multiplexes may help to attract more new services to the multiplex. The area described above also takes account of the BBC's request for Aldershot, Farnborough and Camberley to be included within the PPA of the Guildford multiplex.

If Ofcom's intended policy of advertising these planned new local radio multiplex licences in descending order of population coverage was to be strictly applied, this Guildford multiplex licence would be the second to be advertised. However, Ofcom has taken note of the suggestion made by two respondents that the advertisement of this multiplex licence (and that for Reigate/Crawley) should not be a priority given the large overlap between it and the existing Greater London multiplexes, and accordingly has placed it later in the planned timetable. Ofcom may consider advertising this Guildford local radio multiplex licence and the local radio multiplex licence for Reigate and Crawley (see below) at the same time.

11. Reigate and Crawley*



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be eastern parts of the county of Surrey south of the M25 orbital motorway, the Crawley district of West Sussex, the parts of the Horsham and Mid Sussex districts of West Sussex that are not in the PPA of the existing Sussex Coast multiplex, and the parts of the Lewes and Wealden districts of East Sussex that are not in the PPA of the existing Sussex Coast multiplex.

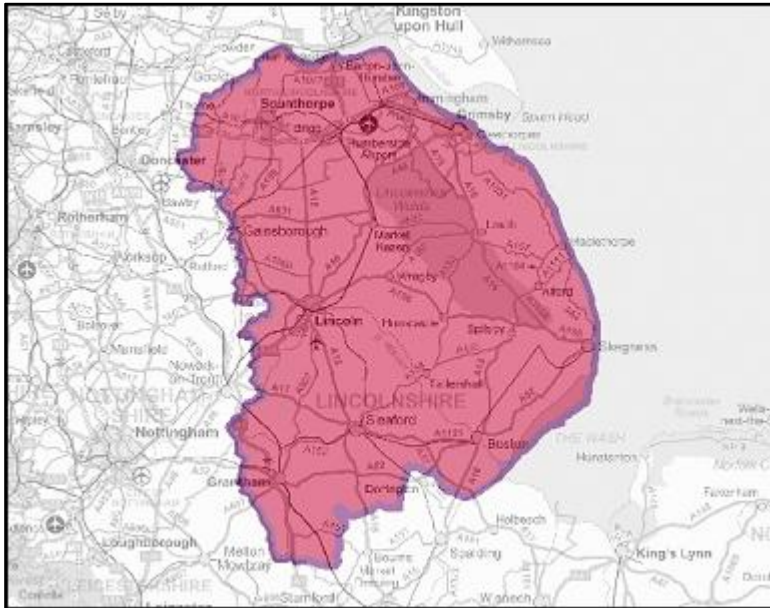
Capacity on this multiplex will be reserved for BBC Southern Counties Radio.

Predicted adult population within PPA: 466,000

If Ofcom's intended policy of advertising these planned new local radio multiplex licences in descending order of population coverage was to be strictly applied, this Reigate and Crawley multiplex licence would be higher up the timetable. However, Ofcom has taken note of the suggestion made by two respondents that the advertisement of this multiplex licence (and that for Guildford) should not be a priority given the extensive overlap between it and the existing Greater London multiplexes, and accordingly has placed it later in the planned timetable. As noted above, Ofcom may consider advertising this Reigate and Crawley local radio multiplex licence and the local radio multiplex licence for Guildford at the same time.

* Ofcom's ability to advertise this Reigate and Crawley local radio multiplex licence will be subject to international frequency co-ordination.

12. Lincolnshire



Map Images © Crown copyright. All rights reserved.
Licensee: Ofcom; licence number: 100018047; published 2006.

The area covered will be most of the county of Lincolnshire, including the Unitary Authority areas of North Lincolnshire and North East Lincolnshire. However, due to spectrum limitations, this local multiplex is unlikely to be able to cover the South Holland district of Lincolnshire or the southern part of the South Kesteven district of Lincolnshire. These districts are within the PPA of the Peterborough local radio multiplex.

Capacity on this multiplex will be reserved for BBC Radio Lincolnshire.

Predicted adult population within PPA: 669,000

This licence has been included later in the timetable than its potential population coverage would suggest. This is due to the fact that the main existing analogue local commercial radio licensee in this area (and only known prospective applicant for the multiplex licence), Lincs FM, responded to the consultation document by suggesting that Ofcom should delay the advertisement of any new local radio multiplex licences until after all possible alternatives to DAB have been explored, and in any case should not advertise any such licences before July 2007. It also reflects the fact that the northern part of this licence area is already within the PPA of the Humberside local multiplex, and thus the number of people in Lincolnshire not currently resident within the PPA of a local radio multiplex is somewhat smaller than the predicted population figure given above.

Completion of local fill-in

- 4.11 The consultation document listed a further 17 potential local radio multiplex licences which, if advertised, would complete the programme of local fill-in. As noted in paragraph 4.7, the likely viability of, and/or demand for, these remaining potential local multiplexes will be reviewed before it is decided whether they should be added to the timetable.
- 4.12 As was indicated in the consultation document, Ofcom is also seeking spectrum clearance to facilitate potential local radio multiplex licences for each of Guernsey/Alderney/Sark and Jersey. These have been added to the list of possible future local radio multiplex licences, which is now as follows (in alphabetical order):

Licence area	BBC station(s) to be carried
Ceredigion & Powys	BBC Radio Wales and BBC Radio Cymru
Dumfries & Galloway	BBC Radio Scotland and BBC Radio nan Gaidheal
Guernsey/Alderney/Sark	BBC Radio Guernsey
Harrogate and the Yorkshire Dales	BBC Radio York
Heads of the South Wales Valleys	BBC Radio Wales and BBC Radio Cymru
Jersey	BBC Radio Jersey
Morecambe Bay	BBC Radio Cumbria and BBC Radio Lancashire
North Devon	BBC Radio Devon
North & West Cumbria	BBC Radio Cumbria
North Wales	BBC Radio Wales and BBC Radio Cymru
Orkney & Shetland	BBC Radio Scotland and BBC Radio nan Gaidheal
Salisbury	BBC Wiltshire Sound
Scottish Borders	BBC Radio Scotland and BBC Radio nan Gaidheal
Somerset	BBC Somerset Sound
Suffolk	BBC Radio Suffolk
Warwickshire	BBC Coventry & Warwickshire
West Dorset	(the proposed BBC Radio Dorset)
Western Scotland	BBC Radio Scotland and BBC Radio nan Gaidheal
West Norfolk	BBC Radio Norfolk

Further local multiplexes in existing licensed areas

4.13 In the consultation document, it was indicated that once it has been used to support the further national radio multiplex and all of the planned local radio multiplexes set out in this document, the available spectrum in VHF Band III, sub-band 3, may be able to be used for further local or regional multiplexes in some areas that already have a local or regional multiplex, where there is evidence of demand and where this is likely to be financially viable. Following the agreement reached at RRC, further licences may be able to be advertised for the following areas:

- North West England (regional)
- Liverpool (smaller than the existing local radio multiplex for this area)
- North East England (regional)

- Tyne & Wear (smaller than the existing local radio multiplex for this area)
 - Teesside (smaller than the existing local radio multiplex for this area)
 - Central Scotland (regional)
 - Edinburgh
 - Glasgow
 - Northern Ireland (when spectrum becomes available, a local multiplex for each of Belfast, Londonderry, and Fermanagh & Tyrone, or a single local multiplex for all of Northern Ireland).
- 4.14 Beyond the above list, Ofcom does not expect there to be frequencies available which would allow for (in some cases, further) multiplexes in any other areas served by analogue regional licences (i.e. Greater London, East of England, East Midlands, Solent, Severn Estuary, South Wales, Yorkshire), although the situation will be kept under review and these areas may be added (either as single regional multiplexes, or as single or more local multiplexes serving part of the regional area) should further frequencies become available at a later date.
- 4.15 The consultation document sought views on the desirability of providing additional multiplexes in existing licensed areas such as those listed above, and expressions of interest from potential operators. It was also proposed that any such licences would not be advertised until after the programme of local fill-in had been completed. The majority of respondents who addressed this issue agreed with the proposal that local fill-in should take priority, although three confidential respondents felt differently, with one stating that licensing further regional and local multiplexes in existing areas would help to create greater commercial competition in important markets, and another expressing the view that an additional layer of DAB will have "significant benefits for the promotion of DAB in these areas". Having considered the responses to the consultation document, Ofcom nonetheless considers that the reasons set out in the statement on *Radio – Licensing Policy for VHF Band III, Sub-band 3* that it is an important public policy goal to facilitate the provision of local digital radio services in areas where no such services currently exist, remain valid. Ofcom therefore does not intend to advertise any further local radio multiplex licences in existing licensed areas until after the programme of local fill-in has been completed.