

2008 No. 1420

BROADCASTING

The Television Multiplex Services (Reservation of Digital Capacity) Order 2008

<i>Made</i>	- - - -	<i>9th June 2008</i>
<i>Laid before Parliament</i>		<i>10th June 2008</i>
<i>Coming into force</i>	- -	<i>2nd July 2008</i>

The Secretary of State makes the following Order in exercise of the powers conferred by sections 243(1) and (3) and 402(3) of the Communications Act 2003(a):

Citation and commencement

1. This Order may be cited as the Television Multiplex Services (Reservation of Digital Capacity) Order 2008 and comes into force on 2nd July 2008.

Interpretation

2.—(1) In this Order—

“the 1996 Act” means the Broadcasting Act 1996(b);

“digital additional services licence” has the meaning given in section 25(1) of the 1996 Act(c) (licensing of digital additional television services);

“digital programme licence” has the meaning given in section 18(1) of that Act(d) (licensing of digital television programme services);

“high definition television service” means a television service which is broadcast in a format designed to display the images comprising a television programme by employing either 720 or 1080 lines of pixels per frame;

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- (a) 2003 c. 21. Those provisions of that Act were extended (with modifications) to Guernsey, by article 6 of and paragraph 44 of Schedule 1 to SI 2003/3195, as amended by article 2(a)(i) of SI 2005/856 and paragraph 3(b)(i) in Part 1 of Schedule 2 to SI 2006/3325; to the Isle of Man by article 6(1) of SI 2003/3198, as amended by paragraph 1(b) in Part 1 of Schedule 2 to SI 2007/278; and (with modifications) to Jersey by article 6 of, and paragraph 44 of Schedule 2 to, SI 2003/3197, as amended by article 2(a)(i) of SI 2005/855 and by paragraph 2(a) in Part 1 of Schedule 2 to SI 2006/3324. SI 2003/3195, SI 2003/3197 and SI 2003/3198 have also been the subject of amendments that are not material to this Order.
- (b) 1996 c. 55.
- (c) Section 25(1) was amended by paragraph 94 in Part 2 of Schedule 15 to the Communications Act 2003, and repealed in part by Schedule 19 to that Act. Section 25 was extended (with modifications) to Guernsey, by article 2(a) of and paragraph 15 of Schedule 1 to SI 2003/3192; to the Isle of Man, by article 2(a) of and paragraph 7 of Schedule 1 to SI 2003/3193; and to Jersey, by article 2(a) of and paragraph 14 of Schedule 1 to SI 2003/3203. Those instruments have also been the subject of amendments that are not material to this Order.
- (d) Section 18 of the 1996 Act was amended by paragraph 90(1) and (2) in Part 2 of Schedule 15 to the Communications Act 2003 and repealed in part by paragraph 90(1) and (3) of that Part of that Schedule and by Schedule 19 to that Act. Section 18 was extended to Guernsey, by article 2(a) of SI 2003/3192; to the Isle of Man, by article 2(a) of SI 2003/3193; and to Jersey, by article 2(a) of SI 2003/3203.

“Multiplex A” means the television multiplex service which, on the day this Order is made, SDN Limited is authorised to provide by virtue of the licence to that effect (“the Multiplex A licence”) granted under Part 1 of the 1996 Act by the Independent Television Commission^(a) on 26th May 1998;

“Multiplex B” means the television multiplex service which, on the day this Order is made, BBC Free To View Limited is authorised to provide by virtue of the licence to that effect (“the Multiplex B licence”) granted under Part 1 of the 1996 Act by the Independent Television Commission on 16th August 2002;

“Multiplex 2” means the television multiplex service which, on the day this Order is made, Digital 3 and 4 Limited is authorised to provide by virtue of the licence to that effect (“the Multiplex 2 licence”) granted under Part 1 of the 1996 Act by the Independent Television Commission on 19th December 1997;

“national Channel 3 licence” has the same meaning as it has in Part 1 of the Broadcasting Act 1990^(b);

“public service digital television programme service” and “public service digital programme licence” each has the meaning given in article 5;

“standard definition television service” means a television service which is broadcast in a format designed to display the images comprising a television programme by employing 576 active lines of pixels per frame;

“television service” means any digital television programme service or qualifying service.

(2) Part 1 of Schedule 2 to the Broadcasting Act 1990 (restrictions on the holding of broadcasting licences)^(c) shall apply for determining whether or not a person controls a body corporate for the purposes of any provision of this Order as it so applies for the purposes of that Schedule^(d).

(3) References in this Order (however expressed)—

- (a) to the Multiplex A licence, the Multiplex B licence or the Multiplex 2 licence include references to those licences as amended from time to time by the Independent Television Commission or OFCOM, whether before or (so far as the context permits) after the day on which this Order is made;
- (b) to the reservation of digital capacity for any person, are references to the reservation of digital capacity in accordance with this Order for use for the broadcasting of services provided by that person;
- (c) to the reservation of digital capacity sufficient for the broadcasting of a number of high definition or (as the case may be) standard definition television services, are references to the reservation of such digital capacity as is from time to time sufficient for the broadcasting of that number of such services;
- (d) to the holder of any licence, in relation to any time, are to the person who is the holder of the licence in question at that time.

(4) This paragraph declares, for the avoidance of doubt, that any provision of this Order requiring the broadcasting of services by means of a television multiplex service throughout the

^(a) The functions of the Independent Television Commission in relation to the licensing etc. of television services were transferred to OFCOM by section 2 of, and paragraph 3 of Schedule 1 to, the Communications Act 2003.

^(b) 1990 c. 42.

^(c) Part 1 of Schedule 2 to that Act was amended by paragraph 89 of Schedule 16 to the Local Government (Wales) Act 1994, by paragraph 166 of Schedule 13 to the Local Government etc. (Scotland) Act 1994, by Part 1 of Schedule 2 to the 1996 Act and by section 357(1) of, and paragraph 69 in Part 1 of Schedule 15 to, the Communications Act 2003. It was repealed in part by paragraph 89 of Schedule 16, and Schedule 18, to the Local Government (Wales) Act 1994, by Part 1 of Schedule 2, and Part 1 of Schedule 11, to the 1996 Act and by Schedule 19 to the Communications Act 2003. Part 1 of Schedule 2 was extended (with modifications) to Guernsey by article 3(g) of and paragraph 51 of the Schedule to SI 1991/1709 (as amended by paragraph (i) of Schedule 2 to SI 2003/3192); to Jersey by article 3(g) of and paragraph 51 of the Schedule to SI 1991/1710 (as amended by paragraph (i) of Schedule 2 to SI 2003/3203); and to the Isle of Man by article 2(1)(h) of and paragraph 51 of the Schedule to SI 1991/998 (as amended by paragraph 3(i) of Schedule 2 to SI 2003/3193).

^(d) See, in particular, paragraph 1(3), (3A) and (5) of that Schedule.

British Islands, or throughout any part of the British Islands, requires such broadcasting of those services throughout only—

- (a) that area or those areas of the British Islands, or
- (b) (as the case may be) that area or those areas of that part of the British Islands,

in which that multiplex service is from time to time required to be provided apart from this Order, and (in particular) that provision is not of itself to be taken to require the provision of that multiplex in any other area or areas.

(5) In relation to the Isle of Man, references in this Order to any provision of the Broadcasting Act 1990, the 1996 Act or the Communications Act 2003 are to that provision as it has effect in the Isle of Man.

(6) In relation to the Bailiwick of Guernsey, references in this Order to any provision of the Broadcasting Act 1990, the 1996 Act or the Communications Act 2003 are to that provision as it has effect in the Bailiwick of Guernsey.

(7) In relation to Jersey, references in this Order to any provision of the Broadcasting Act 1990, the 1996 Act or the Communications Act 2003 are to that provision as it has effect in Jersey.

Competition for digital capacity on Multiplex B

Competition for digital capacity to be reserved on Multiplex B

3.—(1) OFCOM must exercise their functions under this article with a view to selecting one or more relevant public service broadcasters^(a) for whom they will (to the extent provided for in this Order) reserve digital capacity on Multiplex B, by means of variations to the Multiplex B licence made under article 4.

(2) Within the period of six months beginning on the day on which this Order comes into force, but subject to paragraphs (11) to (14), OFCOM must publish a notice under paragraph (3).

(3) A notice under this paragraph shall be in writing and shall—

- (a) state that OFCOM propose to reserve digital capacity on Multiplex B for one or more relevant public service broadcasters;
- (b) specify, in such manner as OFCOM consider appropriate—
 - (i) the amount of digital capacity on Multiplex B which will be reserved for such broadcasters;
 - (ii) the area or areas within the British Islands where that capacity will be available; and
 - (iii) the transmission and coding technologies which OFCOM propose should be employed for the broadcasting of services by means of that capacity;
- (c) give such other details (if any) of Multiplex B as OFCOM consider appropriate;
- (d) give such details (if any) as OFCOM consider appropriate of—
 - (i) the nature of the services which in their opinion should be broadcast by means of digital capacity reserved for relevant public service broadcasters on Multiplex B, and
 - (ii) any of the terms and conditions they propose should apply in relation to services provided by such broadcasters for broadcasting by means of that capacity;
- (e) invite relevant public service broadcasters to apply for digital capacity to be reserved for them on Multiplex B, by making applications complying with paragraph (4); and
- (f) specify—
 - (i) the closing date for such applications; and

(a) This expression is defined in section 243(7) of the Communications Act 2003 and means the holder of a licence to provide a Channel 3 service, C4C, the holder of a licence to provide Channel 5, the Welsh Authority (except in the Channel Islands and the Isle of Man); and the public teletext provider.

(ii) the fee payable on any such application.

(4) Subject to paragraph (5), an application complies with this paragraph if it is made in writing and is accompanied by—

- (a) the fee specified pursuant to paragraph (3)(f)(ii);
- (b) details of the television services (which must include public service digital television programme services or qualifying services but need not include any high definition television services) and digital additional television services (if any) the applicant proposes to provide if digital capacity is reserved for it by OFCOM;
- (c) details of the timetable according to which the applicant proposes to begin providing those services;
- (d) a detailed explanation of the manner in which (in the view of the applicant) those services, if provided as proposed, would further the objectives mentioned in paragraph (8);
- (e) the applicant's proposals for promoting the adoption by members of the public of reception equipment which is compatible with the transmission and coding technologies specified by OFCOM pursuant to paragraph (3)(b)(iii); and
- (f) such other information as OFCOM may reasonably require for the purpose of considering the application.

(5) A person who is a relevant public service broadcaster by virtue of holding a Channel 3 licence may make an application under this article only if that person makes it on behalf of at least 13 holders of regional Channel 3 licences; and accordingly, in the case of such an application—

- (a) the application complies with paragraph (4) only if it contains a statement in such form as OFCOM may require to the effect that the application is made on behalf of at least 13 holders of regional Channel 3 licences; and
- (b) any reference in this article to an applicant includes a reference to every holder of a Channel 3 licence on whose behalf the application is made.

(6) At any time after receiving an application under this article and before determining it, OFCOM may require the applicant to furnish additional information about its proposals.

(7) Any information to be furnished to OFCOM under this article shall, if they so require, be in such form or verified in such manner as they may specify.

(8) In determining whether to reserve digital capacity on Multiplex B and (if so) the applicant or applicants for whom they will reserve it, OFCOM shall have regard, in particular, to the extent to which the services that an applicant proposes to provide for broadcasting by means of that capacity appear to OFCOM to—

- (a) promote the efficient use of the radio spectrum, paying particular regard to how the content proposed to be included in those services would be likely to encourage members of the public to adopt reception equipment which is compatible with the transmission and coding technologies specified by OFCOM pursuant to paragraph (3)(b)(iii);
- (b) contribute to the fulfilment of the purposes of public service television broadcasting in the British Islands, having regard to the desirability of those purposes being fulfilled in a manner that is compatible with subsection (6) of section 264 of the Communications Act 2003 (read as if those services were relevant television services within the meaning of that section); and
- (c) contribute to enhancing or maintaining the range and diversity of high quality television services available on digital terrestrial television.

(9) Where OFCOM make a determination under this article to reserve some or all of the digital capacity specified pursuant to paragraph (3)(b), they shall, as soon as reasonably practicable after making their determination—

- (a) publish, in such manner as they consider appropriate, the name of each applicant for whom such capacity is to be reserved, and such other information as OFCOM consider appropriate;

- (b) grant to each such applicant a public service digital programme licence in respect of the services it proposes to provide, except in the case of any proposed service that appears to OFCOM to be a qualifying service or a digital additional television service; and
- (c) treat any application that includes proposals for providing digital additional television services on such capacity (otherwise than as a service that is or is comprised in a qualifying service) as an application for a digital additional services licence made by the applicant in question under and in accordance with section 25(1) of the 1996 Act.

(10) Where OFCOM decide to make no determination to reserve digital capacity, or to make a determination reserving less digital capacity than was specified pursuant to paragraph (3)(b), they shall, as soon as reasonably practicable after reaching that decision, publish their decision and the reasons for it.

(11) Nothing in this article is to be taken to authorise or require OFCOM to publish a notice under paragraph (3) with a view to securing the reservation of more digital capacity than is permitted to be reserved by article 4(2).

(12) Nothing in paragraph (2) is to be taken to authorise or require OFCOM to publish a notice under paragraph (3) within the period of six months beginning on the day on which this Order comes into force unless, within that period, they have reason to consider it likely that as from a date no later than that on which they propose that any reservation of digital capacity on Multiplex B should take effect, there will be capacity on that multiplex sufficient for the broadcasting of at least three high definition television services.

(13) In a case where they do not, within that period, have reason to consider that outcome likely—

- (a) OFCOM must, before the end of that period, publish a notice stating that fact; and
- (b) if, on a date after the end of that period, OFCOM decide that they do then have reason to consider that outcome likely, they must as soon as reasonably practicable after that date publish a notice stating that date;

and paragraph (2) shall have effect as if the reference there to the day on which this Order comes into force were a reference to the date mentioned in sub-paragraph (b).

(14) At any time after first publishing a notice under paragraph (3) (and otherwise exercising their functions under this article), OFCOM may again publish such a notice (and exercise those functions) on one or more further occasions, in which case paragraph (2) shall have effect as if the words “Within the period of six months beginning on the day on which this Order comes into force” were omitted.

(15) Any obligation imposed on OFCOM by this article to publish any matter is an obligation to publish that matter in such manner as OFCOM consider appropriate for the purposes of bringing it to the attention of persons appearing to them to be likely to be affected by it.

Reservation of capacity on Multiplex B

Variation of the Multiplex B licence

4.—(1) Subject to paragraph (6), OFCOM must vary the Multiplex B licence in accordance with this article so that, as from the time when the variations take effect, the licence includes such conditions as they consider appropriate for securing that, in consideration for the making by each broadcaster for whom such capacity has been reserved of such payments as are from time to time—

- (a) agreed between that broadcaster and the holder of the Multiplex B licence, or
- (b) in default of agreement, determined by OFCOM,

the holder of the Multiplex B licence will use digital capacity reserved on Multiplex B for the broadcasting of services provided by that broadcaster.

(2) The total digital capacity to be reserved for relevant public service broadcasters on Multiplex B—

- (a) during any period in respect of which OFCOM are satisfied there is capacity on Multiplex B sufficient for the broadcasting of three high definition television services, must never exceed capacity sufficient for the broadcasting of two such services; and
- (b) during any period in respect of which OFCOM are satisfied there is capacity on Multiplex B sufficient for the broadcasting of at least four high definition television services, must never exceed capacity sufficient for the broadcasting of three such services.

(3) Conditions included in the Multiplex B licence by virtue of this article must also secure that capacity so reserved for a broadcaster—

- (a) is reserved only for so long as the person for whom it is reserved remains a relevant public service broadcaster;
- (b) must be used for the broadcasting of such services as OFCOM may from time to time license the broadcaster to provide pursuant to the broadcaster's application under article 3, and
- (c) subject to sub-paragraph (b), may with the consent of OFCOM also be used for the broadcasting of other services from time to time provided by the broadcaster.

(4) In the case of capacity reserved for the holder of a Channel 3 licence, if it appears to OFCOM that the service or services authorised to be broadcast by means of that reserved capacity are no longer being provided on behalf of at least 13 holders of regional Channel 3 licences, they may terminate the reservation of digital capacity (and if appropriate vary the Multiplex B licence accordingly), having first given—

- (a) each holder of a Channel 3 licence on whose behalf the service or services is or are being provided, and
- (b) the holder of the Multiplex B licence,

a reasonable opportunity to make representations about the matter.

(5) OFCOM may reserve digital capacity under this article either for the whole of each day or for any part or parts of each day, as they think fit.

(6) OFCOM are to vary the Multiplex B licence in accordance with the preceding provisions of this article—

- (a) on the first occasion—
 - (i) if, but only if, the condition in paragraph (7) is satisfied, and
 - (ii) within 12 months of the date on which they make a determination under article 3 in consequence of which that condition is first satisfied; and
- (b) thereafter, if applicable, within 12 months of the date on which they make a determination under article 3 to reserve for one or more relevant public service broadcasters capacity sufficient for the broadcasting of a third high definition television service.

(7) The condition is that OFCOM must have made a determination under article 3 whose effect is to reserve for one or more relevant public service broadcasters digital capacity on Multiplex B sufficient for the broadcasting of two or three high definition television services.

(8) At any time when there is digital capacity on Multiplex B reserved for any relevant public service broadcaster—

- (a) that broadcaster, or
- (b) the holder of the Multiplex B licence,

or both of them, may refer to OFCOM for determination any question arising as to the amount of digital capacity which is sufficient for the broadcasting of two or (as the case may be) three high definition television services.

Licensing of services other than qualifying services for broadcasting on Multiplex B

5. In this Order, “public service digital television programme service” means a digital television programme service provided by a relevant public service broadcaster under a digital programme licence which—

- (a) has been granted by OFCOM (whether under article 3(9) or subsequently) under section 18 of the 1996 Act^(a) (licensing of digital television programme services), as modified by article 6; and
- (b) accords with section 19 of that Act^(b) (duration and conditions of digital programme licences), as modified by article 7;

and in this Order such a licence is referred to as a “public service digital programme licence”.

Public service digital programme licences: award

6.—(1) The following modifications to section 18 of the 1996 Act (licensing of digital television programme services) shall have effect for the purposes of applications for, and the award and grant of, public service digital programme licences.

(2) Subsections (1) to (3) of that section (applications) shall not apply in relation to a public service digital programme licence granted under article 3(9), but in any other case shall have effect in relation to an application by a relevant public service broadcaster for a public service digital programme licence as they have effect in relation to an application for any other digital programme licence.

(3) Except as otherwise provided in this Order, a public service digital programme licence shall be treated as if it were a digital programme licence granted under subsection (4) of that section.

(4) Nothing in this Order shall require OFCOM to grant a licence to an applicant if they are prevented from doing so by—

- (a) section 3(3)(a) of the 1996 Act (which provides that OFCOM must not grant a licence to a person unless satisfied that they are a fit and proper person to hold it), or
- (b) section 5(1)(a) of that Act (which provides that OFCOM must do all they can to secure that a person does not become or remain the holder of a licence under Part 1 of that Act if they are a disqualified person in relation to that licence by virtue of Part 2 of Schedule 2 to the Broadcasting Act 1990).

(5) For the purposes of paragraph (4), the reference in section 18(4) (grant of licence) to section 5(1)(a) of the 1996 Act shall not be taken to prevent OFCOM from granting a public service digital programme licence to the Welsh Authority.

Public service digital programme licences: conditions and duration

7.—(1) The following modifications to section 19 of the 1996 Act (duration and conditions of digital programme licences) shall have effect for the purposes of this Order in relation to public service digital programme licences.

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- (a) Section 18 of the 1996 Act was amended by paragraph 90(1) and (2) in Part 2 of Schedule 15 to the Communications Act 2003 and repealed in part by paragraph 90(1) and (3) of that Part of that Schedule and by Schedule 19 to that Act. Section 18 was extended (with modifications) to Guernsey, by article 2(a) of and paragraph 15 of Schedule 1 to SI 2003/3192; to the Isle of Man, by article 2(a) of and paragraph 7 of Schedule 1 to SI 2003/3193; and to Jersey, by article 2(a) of and paragraph 14 of Schedule 1 to SI 2003/3203.
 - (b) Section 19 of the 1996 Act was amended by paragraph 91(1) and (2) in Part 2 of Schedule 15 to the Communications Act 2003 and repealed in part by paragraph 91(1) and (3) of that Part of that Schedule and by Schedule 19 to that Act. Section 19 was extended (with modifications) to Guernsey, by article 2(a) of and paragraph 1 of Schedule 1 to SI 2003/3192; to the Isle of Man by article 2(a) of and paragraph 1 of Schedule 1 to SI 2003/3193; and to Jersey, by article 2(a) and paragraph 1 of Schedule 1 to SI 2003/3203.

(2) Subsection (1) of that section shall have effect as if, after the words “shall continue in force until it is surrendered by its holder” there were added the words—

“or, if sooner, in the case of a public service digital programme licence, until—

- (a) the expiry or other termination of the Multiplex B licence, or
- (b) in a case where the holder of the public service digital programme licence also holds a Channel 3 licence or a licence to provide Channel 5, the holder ceases, by virtue of article 4(3)(a) or (4) of the 2008 Order, to have digital capacity on Multiplex B reserved for it.”

(3) That section shall have effect as if, after subsection (3), there were inserted—

“(3A) A public service digital programme licence shall include such conditions as appear to OFCOM to be appropriate for securing that the holder of the licence provides the public service digital television programme services and digital additional services (if any) proposed by the holder of the licence in its application made under article 3 of the 2008 Order, for the duration of the licence, subject to subsection (3C).

(3B) A public service digital programme licence whose holder is also the holder of a regional Channel 3 licence (within the meaning of Part 1 of the Broadcasting Act 1990) may also include such conditions as appear to OFCOM to be appropriate for securing that the services referred to in subsection (3A) are provided in such area or areas in the British Islands as may be specified in the conditions.

(3C) Where the holder of a public service digital programme licence applies for the variation of any condition included in that licence by virtue of subsection (3A), OFCOM must grant the application unless it appears to them that, if the application were granted, the capacity of the public service digital television programme services provided under it (or any digital additional services associated with it) to further the objectives mentioned in article 3(8) of the 2008 Order would be unduly diminished.

(3D) In this section, “the 2008 Order” means the Television Multiplex Services (Reservation of Digital Capacity) Order 2008; and expressions used in this section and in that Order have the same meaning in this section as they have in that Order.”

Multiplex 2

Variation of the Multiplex 2 licence

8.—(1) If, but only if, OFCOM (by means of variations to the Multiplex B licence made under article 4) reserve digital capacity on Multiplex B, they must also vary the Multiplex 2 licence in accordance with this article.

(2) OFCOM must vary the Multiplex 2 licence so that, as from the time when the variations reserving capacity on Multiplex B take effect, the Multiplex 2 licence includes such conditions as OFCOM consider appropriate for securing—

- (a) that the holder of the Multiplex 2 licence will use the digital capacity reserved on Multiplex 2 as mentioned in paragraph (3) for the broadcasting of services provided by Channel 3 licence holders and C4C, respectively; and
- (b) that in consideration for the making by the holder of a licence to provide Channel 5, the Welsh Authority and the public teletext provider, respectively, of such payments as are from time to time—
 - (i) agreed between the broadcaster and the holder of the Multiplex 2 licence, or
 - (ii) in default of agreement, determined by OFCOM,the holder of the Multiplex 2 licence will use the digital capacity reserved on Multiplex 2 as mentioned in paragraph (3) for the broadcasting of services provided by those broadcasters.

(3) The digital capacity to be reserved by virtue of paragraph (2)—

- (a) for the holder of a Channel 3 licence, is—

- (i) 48.5 per cent. of the digital capacity available on the frequencies on which Multiplex 2 is broadcast, throughout the appropriate area, less
 - (ii) digital capacity sufficient for the broadcasting (as a standard definition television service) of Channel 5, throughout the British Islands; and
 - (b) for C4C, is—
 - (i) 48.5 per cent. of the digital capacity available on the frequencies on which Multiplex 2 is broadcast, throughout the British Islands, less
 - (ii) digital capacity sufficient for the broadcasting (as a standard definition television service) of the service known as S4C Digital (or S4C Digidol), throughout Wales;
 - (c) for the holder of a licence to provide Channel 5, is the capacity referred to in sub-paragraph (a)(ii);
 - (d) for the Welsh Authority, is the capacity referred to in sub-paragraph (b)(ii);
 - (e) for the public teletext provider, 3 per cent. of the digital capacity available on the frequencies on which Multiplex 2 is broadcast, throughout the British Islands.
- (4) In paragraph (3)(a)(i), “the appropriate area” means—
- (a) in relation to the holder of a national Channel 3 licence, the British Islands; and
 - (b) in relation to the holder of a regional Channel 3 licence, the area for which the service provided pursuant to that licence is authorised to be provided.
- (5) At any time when there is digital capacity on Multiplex 2 reserved for a relevant public service broadcaster other than the public teletext provider—
- (a) an appropriate broadcaster, or
 - (b) the holder of the Multiplex 2 licence,
- or both (or all) of them, may refer to OFCOM for determination any question arising as to the amount of digital capacity which is sufficient for the broadcasting of S4C Digital or (as the case may be) Channel 5 (in either case, as a standard definition service).
- (6) In paragraph (5), “appropriate broadcaster” means—
- (a) in relation to capacity reserved under paragraph (3)(a) or (c), the holder of any Channel 3 licence or of a licence to provide Channel 5, and
 - (b) in relation to capacity reserved under paragraph (3)(b) or (d), C4C or the Welsh Authority.

Multiplex A

Variation of the Multiplex A licence: Channel 5 services

9.—(1) If, but only if, OFCOM reserve digital capacity on Multiplex 2 for the holder of a licence to provide Channel 5 as mentioned in article 8(3)(c), they must also vary the Multiplex A licence in accordance with this article.

(2) OFCOM must vary the Multiplex A licence so that, as from the time when the variations reserving capacity on Multiplex 2 for the holder of a licence to provide Channel 5 take effect, the Multiplex A licence includes such conditions as OFCOM consider appropriate for securing that its holder reserves for the holder of a licence to provide Channel 5 digital capacity equivalent to—

- (a) 50 per cent. of the digital capacity available on the frequencies on which Multiplex A is broadcast, throughout the British Islands, less
 - (b) digital capacity sufficient for the broadcasting (as a standard definition television service) of Channel 5, throughout the British Islands.
- (3) At any time when there is digital capacity on Multiplex A reserved for Channel 5 services—
 - (a) the holder of a licence to provide Channel 5, or
 - (b) the holder of the Multiplex A licence,

or both of them, may refer to OFCOM for determination any question arising as to the amount of digital capacity which is sufficient for the broadcasting of Channel 5 as a standard definition television service.

Variation of the Multiplex A licence: Welsh Authority services

10.—(1) If, but only if, OFCOM reserve digital capacity on Multiplex 2 for the Welsh Authority as mentioned in article 8(3)(d), they must also vary the Multiplex A licence in accordance with this article.

(2) OFCOM must vary the Multiplex A licence so that, as from the time when the variations reserving capacity on Multiplex 2 for the Welsh Authority take effect, that licence includes such conditions as OFCOM consider appropriate for securing that its holder reserves for the Welsh Authority digital capacity equivalent to—

- (a) 50 per cent. of the digital capacity available on the frequencies on which Multiplex A is broadcast, throughout Wales, less
- (b) digital capacity sufficient for the broadcasting (as a standard definition television service) of the service known as S4C Digital (or S4C Digidol), throughout Wales.

(3) At any time when there is digital capacity on Multiplex A reserved for the Welsh Authority—

- (a) that Authority, or
- (b) the holder of the Multiplex A licence,

or both of them, may refer to OFCOM for determination any question arising as to the amount of digital capacity which is sufficient for the broadcasting of S4C Digital as a standard definition television service.

Supplemental provisions applying to Multiplex A, Multiplex B and Multiplex 2

Modifications of the 1996 Act

11.—(1) Section 12 of the 1996 Act (conditions in television multiplex licences) shall have effect in relation to the Multiplex A licence, the Multiplex B licence and the Multiplex 2 licence with the following modifications.

(2) In that section, in relation to those licences—

- (a) subsection (1)(e) (which provides that a multiplex licence shall include conditions appropriate for securing that the licence holder does not unduly discriminate between broadcasters) shall have effect as if it were expressed to have effect subject to this Order; and
- (b) subsection (2) (which provides that certain conditions of a multiplex licence can be varied only with the holder's consent) and subsection (3) (which provides that, subject to a proviso, OFCOM must grant applications for certain variations) shall not apply to any variation to a television multiplex licence made pursuant to this Order.

(3) Section 12(1)(f) of the 1996 Act (which provides that a multiplex licence shall include conditions appropriate for securing that the licence holder does not restrict the freedom of any person entitled to use capacity on the multiplex to arrange for another person to use that capacity) shall have effect in relation to those licences as if—

- (a) it required any condition included in the licence by OFCOM by virtue of it to have effect subject to any conditions so included by virtue of this Order; and
- (b) it provided that those licences may in particular contain such conditions as OFCOM consider appropriate for securing that the holder does not, without OFCOM's prior consent, use any of the capacity reserved by virtue of this Order otherwise than for the broadcasting of services provided by—

- (i) any holder of a Channel 3 licence, or any two or more holders of such licences acting together, or any body corporate which is controlled either by the holder of a Channel 3 licence or by two or more holders of such licences acting together;
- (ii) the holder of a licence to provide Channel 5 or any body corporate which is controlled by the holder of such a licence;
- (iii) C4C or a body corporate which is controlled by C4C;
- (iv) the public teletext provider or any body corporate which is controlled by it;
- (v) the BBC or a body corporate which is controlled by the BBC; or
- (vi) the Welsh Authority or a body corporate which is controlled by that Authority.

Effect of reservation of capacity

12. The reservation by virtue of any provision of this Order of any digital capacity for any person on Multiplex A, Multiplex B or Multiplex 2 is without prejudice to the use by the holder of the Multiplex A licence, the Multiplex B licence or (as the case may be) the Multiplex 2 licence of digital capacity that is not subject to such a reservation for the broadcasting of any other services permitted by or under that licence.

Calculation of amounts of digital capacity

13. Where—

- (a) any condition included by virtue of this Order in a licence to provide a television multiplex service requires the reservation of an amount of digital capacity on that multiplex for any broadcaster,
- (b) the amount of capacity to be so reserved is expressed in this Order by reference to the amount of capacity that is sufficient for the broadcasting of a number of high definition or standard definition television services,
- (c) capacity on the multiplex concerned that is not subject to the reservation mentioned in sub-paragraph (a) is being used for the broadcasting of any high definition or standard definition television service, and
- (d) any question arises at any time as to how much capacity is sufficient for the broadcasting of a high definition or (as the case may be) standard definition television service,

then in determining that question, particular regard is to be had to the amount of digital capacity that the holder of the multiplex licence is in fact using at that time for the broadcasting, on such capacity as is mentioned in sub-paragraph (c), of any high definition or (as the case may require) standard definition television service.

9th June 2008

Andy Burnham
Secretary of State for Culture, Media and Sport

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision enabling the Office of Communications (“OFCOM”) to re-organise the broadcasting of digital terrestrial television services, in order to facilitate the introduction of new technologies. To achieve this, the Order modifies Part 1 of the Broadcasting Act 1996 (“the Act”) and also makes provision having effect in place of provisions in that Part, in relation to licences to provide television multiplex services (see below) and digital television programme services. It is made under section 243(1) and (3) of the Communications Act 2003 (“the 2003 Act”) and applies across the United Kingdom, the Channel Islands and the Isle of Man.

Digital terrestrial television (i.e. services received via a conventional aerial) is broadcast by means of six “television multiplex services”; the Order is concerned only with three of those. In summary, the Order will require OFCOM:

- (a) to conduct a competition amongst certain broadcasters (“relevant public service broadcasters”) for the right to provide digital television programme services on one such multiplex (“Multiplex B”);
- (b) to reserve capacity on Multiplex B for the broadcasting of digital television programme services provided by the relevant public service broadcasters which successfully compete for such capacity (whilst allowing the operator of Multiplex B to retain capacity for a BBC service); and
- (c) to reserve capacity on two other multiplexes (Multiplex 2 and Multiplex A) to deal with the consequences of displacing existing services from Multiplex B.

The “relevant public service broadcasters” are the holders of a licence to provide a Channel 3 service; the Channel Four Television Corporation (“C4C”); the holder of a licence to provide Channel 5; the Welsh Authority (except in the Channel Islands and the Isle of Man); and the public teletext provider: see section 243(7) of the 2003 Act.

Article 2 defines key terms used in the Order.

Article 3 concerns the competition which OFCOM must hold for digital capacity to be reserved on Multiplex B. Article 3(2) and (3) require OFCOM to issue a notice inviting relevant public service broadcasters to apply for digital capacity, and specify certain details which the notice must provide. Article 3(4) specifies the details which a broadcaster must include in an application, and article 3(8) provides indicative criteria against which OFCOM are to assess whether digital capacity should be reserved in favour of the applicant. Article 3(5) relates specifically to Channel 3, which is a nationwide service organised on the basis of a number of regional licensees and one national licensee, and provides that a Channel 3 licence holder (whether national or local) must be supported by at least 13 holders of regional Channel 3 licences in order to bid for digital capacity.

Article 3(9) to (15) make supplementary provision. In particular, although the first notice under this Order should be issued within six months of it coming into force (see article 3(2)), article 3(12) and (13) provide for a delay in the event that it appears that not enough capacity is or will be available on Multiplex B.

Article 4 requires OFCOM to vary the Multiplex B licence in order to reserve capacity for the successful broadcaster or broadcasters, subject to certain preconditions and limits. OFCOM must not reserve more than two such tranches at any time when Multiplex B can accommodate no more than three high definition services (article 4(2)(a)). OFCOM can later reserve a third tranche so long as they are satisfied that Multiplex B can then carry at least four such television services (article 4(2)(b), (6)(b) and (7)). This structure ensures that there will always be capacity allowing for at least one other service to be chosen by the Multiplex B operator in addition to those services occupying capacity awarded by OFCOM. Further, no capacity at all is to be reserved unless and until OFCOM have awarded at least two tranches of capacity (article 4(6)(a) and (7)).

Article 4(3) requires the capacity reserved for a relevant public service broadcaster to be used for the carriage of the services which were indicated in that broadcaster’s application under article 3,

but (subject to that obligation) OFCOM has a discretion to permit the broadcaster to use the reserved capacity to carry other services. Capacity can remain reserved only for so long as the broadcaster remains a relevant public service broadcaster and (in the case of Channel 3) may be withdrawn if they cease to provide a service on behalf of 13 regional Channel 3 licensees: article 4(3)(a) and (4).

Article 4(8) permits either a broadcaster who has been awarded capacity or the Multiplex B licence holder (or both) to seek a determination from OFCOM on the question of the amount of digital capacity which is sufficient for the broadcasting of two, or as the case may be, three high definition services.

Articles 5 to 7 concern the licensing of services other than qualifying services for broadcasting on Multiplex B. Article 5 creates a new type of licence, namely a public service digital programme licence, to be held by a relevant public service broadcaster which successfully bids for capacity to provide a new service that is not a simulcast of an existing (licensed) one. Articles 6 and 7 modify sections 18 and 19 of the Act accordingly.

Article 8 concerns variations to the Multiplex 2 licence. These will be triggered only if OFCOM have made the changes to Multiplex B required by Article 4. Article 8(3) specifies the amount of digital capacity that is to be reserved for certain public service broadcasters. Article 8(5) enables an appropriate broadcaster (as defined in paragraph (6)) or the holder of the Multiplex 2 licence to seek a determination from OFCOM as to the amount of capacity which is sufficient for the broadcasting of specified services.

Articles 9 and 10 concern variations to the Multiplex A licence in respect of Channel 5 and Welsh Authority services respectively. These will be triggered only if OFCOM have made the changes to Multiplex 2 required by Article 8(3)(c) and (d) (capacity for Channel 5 and Welsh Authority) and will bring about a corresponding reduction of capacity on Multiplex A for those broadcasters. The parties can seek a determination from OFCOM as to the amount of capacity which is sufficient for the broadcasting of the specified services.

Article 11 makes supplementary modifications in section 12 of the Act.

Article 12 provides that a multiplex licence holder may use capacity that is not reserved as it sees fit, subject to the terms of the licence.

Article 13 provides that regard is to be had to the amount of capacity actually being used by the multiplex operator for broadcasting high or standard definition television services on unreserved capacity when assessing how much reserved capacity is “sufficient” for the purposes of the Order.

A Regulatory Impact Assessment of the effect that this instrument will have on the costs of business has been prepared and placed in the library of each House of Parliament. Copies are available from Moira Goatley at the Department for Culture, Media and Sport, 2 to 4 Cockspur Street, London SW1Y 5DH. (Tel: 0207 211 6927 or e-mail: moira.goatley@culture.gsi.gov.uk).

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