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Lord Carter of Barnes
Minister for Communications, Technology & Broadcasting
Department for Business Enterprise and Regulatory Reform
1 Victoria Street
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12 March 2009

Dear Lord Carter

Digital Britain: The Interim Report

3UK strongly supports the Digital Britain initiative and appreciates this opportunity to provide its input. This letter sets out the comments of 3UK on the Interim Report published on 29 January 2009.

3UK notes the Government's desire to make available universal high quality broadband and hereby commits to delivering 2Mbps access to over 99% of the UK population within their homes or offices by 31 December 2012, conditional only on the fair availability to 3UK of sufficient and appropriate spectrum.

1. Executive Summary

3UK supports the objectives of Digital Britain and welcomes many of the views expressed in the Interim Report. We are pleased to see that the Government recognises the exciting possibilities that exist for mobile broadband, a technology of which 3UK has been and continues to be a champion.

1.1 *Sections 2 and 4: Digital Networks and Universal Connectivity*

We see the Interim Report's vision of Digital Britain as one in which there is universal broadband connectivity and thriving competition to provide all citizens of the United Kingdom with the best, most innovative broadband products at the cheapest prices. The pre-requisite to delivering such benefits to the UK economy is the provision of high quality infrastructure.

3UK can play a key role in helping the Government to pursue this vision. The Government took a bold step when it decided in 1999 that it needed to create a fifth UK mobile operator to introduce further competition in the mobile sector, challenge the incumbents and encourage new investment in what had become a stagnant market. We trust the Government will agree



that 3UK has done what was expected of it and more. We have rolled-out a state-of-the-art network and introduced radical new content and services. Our 3G network is the largest in the UK with 91% of the UK population covered today and, through our radio network sharing arrangement with T-Mobile, we plan to provide outdoor 3G coverage to over 98% of the population by the end of next year.

Realising the Government's vision for Digital Britain will, though, require much more investment in infrastructure and services. Our view is that this can only be achieved if there is a favourable climate for investment that will attract and retain the necessary funding and, further, that Government must ensure a continuing level playing field for all participants and appropriate access to suitable spectrum. If these conditions are in place, 3UK can assist the Government in delivering broadband access and commits to delivering indoor coverage (i.e. within homes and offices etc) to over 99% of the UK population at speeds of 2Mbps by 31 December 2012. This will have a significant positive benefit to the wider economy: 3UK urges the Government to estimate the benefits of near universal mobile broadband access in terms of the effect on GDP growth in order to provide the crucial context for these debates.

It is in this context that we agree that the future of the 2G spectrum¹ must be resolved on a fair and equitable basis. Availability of spectrum is, as the Interim Report recognises, critical to the success of efforts to provide universal, innovative and affordable mobile broadband. An equal opportunity to access spectrum available for mobile broadband should be afforded to all operators. Individual bands cannot be considered in isolation because fair and equitable competition requires fair and equitable access to spectrum resources.

3UK believes that the 800MHz band, being made available through the Digital Dividend Review process, also has an important role to play in allowing operators to provide the required coverage and capacity. Any advantages which the 900MHz spectrum has in relation to timing of availability should also be taken into account (for example, through the setting of AIP payments) to ensure a level competitive playing field.

3UK supports the proposal to seek an industry solution and has been actively engaged in the discussions that have taken place. In order to achieve near universal access to mobile broadband indoors, a significantly greater number of sites will be required. A world class infrastructure can be delivered providing such access if the Government makes spectrum available on suitable terms and in an appropriate way. 3UK believes that efficient use of spectrum and ensuring a level competitive playing field requires that all the available spectrum for mobile broadband needs to be considered in the round. Lower frequency spectrum (in practice the 900MHz and 800MHz bands) needs to be made available to the industry in a

¹ This term is used to refer to both the 900MHz and 1800MHz bands, currently used to provide GSM services.



competitively neutral way and in suitable bandwidths. Careful consideration will be required of the impact of any possible consolidation or cooperation between holders of low frequency spectrum. The coverage and speed obligations set out in the Interim Report should also be attached to the spectrum licences for these bands. We expand on this approach below. If the right spectrum licences are available, then 3UK believes the industry will have the right incentives to invest to deliver world-leading mobile broadband networks for the UK with consequent benefits for the wider economy. Such a high quality mobile broadband infrastructure requires suitable blocks of contiguous spectrum and an increased volume of sites per network. Further increased network sharing would provide an economic and environmentally sound way to achieve the greater number of sites required to deliver this vision.

If, however, the industry is to adopt a negotiated commercial solution to the future of 2G spectrum, as it should, details of the alternative to the negotiated solution are clearly of great importance. The industry will negotiate against the backdrop of what it believes the Government will otherwise impose. We are therefore disappointed to see what Ofcom has recently proposed as the alternative².

Ofcom's proposal, if implemented, would distort competition to the benefit of some operators and the detriment of others. It represents the antithesis of a level playing-field and would fail to provide the secure, predictable investment climate that is essential in order for consumers to feel the full benefits of a competitive market for mobile broadband. In addition, it does not facilitate the Government's objectives in the Digital Britain initiative. Mobile operators who may perceive that they will be "winners" under this alternative scenario are clearly not incentivised to engage constructively in industry negotiations and it will only take one obstructive operator to block agreement.

It would have been far more constructive for Ofcom to have signalled a pro-competitive and less comfortable outcome for the incumbent operators. The Government could still improve the prospects of an industry solution being agreed at this time by indicating clearly that Ofcom's proposal will not be pursued, because it does not facilitate the Government's objectives in the Digital Britain initiative.

1.2 Section 3: Digital Content

3UK recognises the contribution of the UK's creative sector and appreciates the challenges that exist for rights holders. We have considerable experience of working with rights holders to offer legal download services and do not support illegal downloading.

² Application of Spectrum Liberalisation and Trading to the Mobile Sector: A Further Consultation, 13 February 2009



We would be keen to see rights holders engaging with ISPs to trial different business models that may limit illegal file-sharing as we do consider that part of the illegal file-sharing problem is a function of rights holders' failure to adapt to the demands of the digital economy. Equally, though, we would suggest that rights holders should continue to seek to educate consumers about the difference between legal and illegal downloads. To the extent these actions are not enough, we would support moves to enhance the ability of rights holders to act against illegal file-sharers.

Mobile ISPs are currently limited in their ability to link IP addresses with particular customers and do not store the data that rights holders would seek. There would be substantial costs involved in re-engineering processes to allow the collection and storage of such data. These issues need to be considered further.

1.3 Section 5: Equipping Everyone to Benefit From Digital Britain

3UK agrees that there is a need for better knowledge and understanding on the part of consumers as to how they may benefit from digital services. This is something which can and should be addressed through education and confidence-building exercises. Industry including 3UK can, and already does, play a significant part in delivering information to consumers about the benefits of digital communications.

There is, though, still a big question as to why some consumers choose not to take advantage of digital services even though they are well-placed to do so. 3UK recommends that there should be more research to understand fully why this is the case.

2. Sections 2 and 4: Digital Networks and Universal Connectivity

2.1 Introduction

3UK, part of the global Hutchison Whampoa Group, was the successful bidder in the 2000 auction for the 3G licence reserved by the British Government for a new entrant to the UK mobile market. It became the first operator to offer 3G services when it started commercial operation in 2003.

3UK has been the most innovative of the mobile operators. In particular, it has driven the roll-out of 3G technology and services including mobile broadband dongles, the delivery of music tracks and videos to mobile handsets, voice over IP (i.e. Skype) on mobile handsets, mobile instant messaging, mobile TV services, user generated content sharing and mobile social networking sites. 3UK is leading the market with respect to mobile broadband.



3UK was the first operator to meet its licence commitment to roll-out 3G coverage to 80% of the UK population and has rolled-out the largest 3G network of any of the operators. On top of this, though, 3UK and T-Mobile announced in December 2007 that they had agreed to share radio access networks and 3UK plans to provide 3G outdoor coverage to over 98% of the population by the end of next year. This will be as close as any operator has yet come to offering universal mobile broadband.

3UK is passionate about seeing mobile broadband widely available and affordably priced. If other regulatory impediments can be removed, such as inefficiently high mobile termination rates, we would wish to offer fixed-price "all you can eat" deals for voice, text and data.

Mobile broadband can and should be a mass market product available to all.

This will require an infrastructure of the highest quality. Our 3G network provides mobile broadband services through handsets and modems. We have rolled out a High Speed Downlink Packet Access ("HSDPA") network which currently supports the 3.6 Mbps technical standard and will soon be supporting the 7.2 Mbps technical standard. 3UK is marketing its mobile broadband service based on plug and play USB modems. In addition to both mobile broadband and handset based services 3UK offers mobile use of major internet branded services such as Google and Yahoo search, Skype (internet telephony), Windows Live Messenger Service and Yahoo Messenger (instant messaging), Bebo, Facebook (social network and content sharing). Through software on handsets, such as on the innovative and recently launched INQ1, 3UK is promoting ease of use of such services to increase the usability of mobile internet communications services. The result is that 3UK is seeing a significant and steady increase in the usage of such services by its customers. 3UK has offered Skype services on its network since November 2006 and the number of Skype minutes carried on its network has continued to increase significantly over the last 6 months.

As a result of changes such as these, 3UK has seen significant increases in the use of internet communications services. For example, we carried 34 million Skype minutes in the month of December 2008, equating to around 1.3million Skype minutes used a day (amounting to nearly 5% of our network traffic).

We believe that the continuing evolution of mobile broadband and mobile internet communications services, the customer demand and appetite for which has been clearly demonstrated, will require regulatory policy to evolve further.

2.2 Objectives to be pursued

It will be apparent from this description of 3UK that we share many of the Government's



objectives for Digital Britain. In common with the Government, we want to see top-quality content available to all via world-class infrastructure. 3UK strongly supports the rolling out of mobile broadband to as many as possible, as soon as possible with the widest coverage possible.

We firmly believe that these objectives can be furthered in a commercial setting, provided that a level competitive playing field is established. Mobile broadband can and should be central to providing 2Mbps access to the vast majority of the population. This will depend on achieving the first and second of the Government's five objectives: upgrading and modernising existing networks and providing a dynamic investment climate for UK digital content, applications and services that makes the UK an attractive place for domestic and inward investment in our digital economy. A vital element of this is ensuring that spectrum allocations, suitable for the provision of mobile broadband, do not distort competition in the round. This is discussed further below.

Equally vital for securing further inward investment is that the objectives be implemented in the context of a level playing field between established operators and new entrants. This is consistent with the UK fully respecting its obligations under international investment treaties.

Those who might invest in Digital Britain, or who do so already, will have little confidence in the returns to be achieved unless they can see that all market participants are treated in an objective, open, transparent and non-discriminatory way by the Government and its agencies including Ofcom. Indeed, whilst the Interim Report talks about fairness for all primarily in the context of consumers, we consider that there is also a need for fairness between operators. It seems that Ofcom does not agree³. However, an efficient and competitive outcome, which will deliver the Government's objectives, can only be achieved where all operators are provided with equivalent opportunities to compete on equal terms.

In addition to the five main objectives set out in the Interim Report, we note that there are a number of further policy goals referred to in the Foreword that are also relevant to mobile broadband. In particular, we agree that the Government should give clear direction to the market and should seek to stimulate the digital and communications sector. We agree too that the Government should seek to deliver a low carbon knowledge economy.

2.3 Mobile broadband

3UK wholeheartedly agrees with the Interim Report's view that mobile broadband has an important role to play in stretching the universal coverage of broadband to the extremities of

³ Paragraph 7.17 of the 13 February 2009 consultation paper.



the UK and in extending broadband access to groups that would not otherwise have access to it. Provided that the investment climate and spectrum available is suitable, 3UK is of the view that mobile broadband can provide 2Mbps near universal access in an affordable way.

As the Interim Report notes, as much as 20% of some socio-economic groups have “cut the wire” and now only use mobile telephones. We expect this number only to increase. For these citizens and consumers, fixed line broadband is a much less attractive option and mobile broadband offers a more convenient alternative. 3UK is catering for these consumers with straightforward tariffs available without a BT line or even a fixed address that can allow access. Pre-pay tariffs make broadband accessible for even those on the lowest incomes or with no access to credit, those who are amongst the “digitally disenfranchised” targeted by the Digital Britain initiative.

More fundamentally, there are some whose location means that they simply cannot benefit from high quality broadband via a fixed line. The fact of the matter is that it is unlikely ever to be economic to provide the fastest broadband services to remote areas via fixed lines. 3UK is already doing much to target these consumers with its roll-out with T-Mobile looking to cover over 98% of the population with outdoor coverage by the end of next year. This is also what is already happening in Ireland, for example, where the Government’s national broadband scheme is using wireless technologies to reach those areas where ADSL is not available. For mobile broadband to be central in providing near universal broadband access, greater indoor coverage will be required. With licensed lower frequency spectrum in suitably large contiguous blocks, 3UK believes that this can be provided. The greater speeds and capacity required will lead to a need for more sites. Investment in these new sites would be economically and environmentally feasible through increased network sharing between existing infrastructure providers. Such sharing would provide massive benefits to the UK economy, which would flow through to UK consumers, and would lead to a world class mobile broadband infrastructure. If the right conditions and spectrum allocations are in place, mobile infrastructure will be able to provide indoor broadband access to over 99% of the UK population. In this regard, 3UK commits to delivering 2Mbps access to over 99% of the UK population within their homes or offices by 31 December 2012 this commitment being necessarily conditional on the fair availability to 3UK of sufficient and appropriate spectrum (including low frequency spectrum).

2.4 Spectrum

All of this, though, is dependent on spectrum. Spectrum is an essential input for the delivery of mobile broadband and one which is controlled by the State. The Government’s Digital Britain objectives, efficient use of this vital national resource and the existence of a fair competitive market are therefore all dependent on ensuring that opportunity to access this essential input



is provided on fair, reasonable and non-discriminatory terms. Ofcom's current proposals put all of this at risk.

3UK agrees with the logic behind the Government's Radio Spectrum Modernisation Programme: namely that the spectrum related issues need to be considered, and resolved, as an integrated whole.

The amount of spectrum to which an operator has access determines the capacity available with which it can compete. Access to greater amounts of spectrum allows operators to serve more customers at lower cost. Where operators have access to different amounts of spectrum for mobile broadband overall or on substantially different terms, competition will be affected. If differences in the distribution of spectrum, or terms on which it is held, are the result of state intervention rather than market forces then it will effectively be a case of the state distorting competition on the market. The management of a state resource will cause a cost difference between otherwise similarly placed operators. Further, larger bandwidths of spectrum, whether at higher or lower frequencies, are also important in allowing greater data speeds to be achieved with next generation mobile broadband technologies

Access to the lower mobile broadband frequencies (principally the 900MHz band and, potentially in future, the 800MHz band) has an impact on the costs and ability to provide coverage. As all in the industry have recognised, lower frequencies of spectrum allow coverage of areas (whether rural or urban) that would not be economic with higher frequencies. In particular, lower frequencies allow better coverage inside buildings where much mobile broadband usage is likely to occur. In remote areas lower frequencies allow for greater distances to be covered with fewer sites because signals travel further and are less affected by environmental obstacles.

The intensity of competition in the mobile broadband market could be significantly restricted by the distribution of spectrum rights. At its simplest, if lower frequency spectrum is restricted to only 2 or 3 networks then consumers in the most remote areas will have the choice of no more than those 2 or 3 networks (at best). At a broader level of generality, preferential spectrum holdings may result in a small number of operators providing better coverage, the ability to provide greater capacity at a lower cost and faster data speeds with the result that they will naturally capture more of the market and be less constrained by competition. Such competitive distortion may well be exacerbated in the event of consolidation or cooperation



between the holders of rights to lower frequency spectrum⁴. Over the long term, consumers will have less choice, pay higher prices and receive less innovative services.

History shows that if the competitive dynamics are right, new technologies will succeed. As recognised in the Interim Report, we have seen this to be the case for first generation broadband and for digital television. 3UK is looking to do the same for mobile broadband. For this to succeed there must be equal opportunities to access different classes of spectrum band, such that competition is not distorted. The capacity, coverage and download speed capabilities provided to operators through spectrum policies should not be distorted.

This requires a holistic view to be taken across all mobile broadband-ready spectrum bands such that the spectrum resource available to any individual operator, and the terms on which it is available, do not become a source of competitive advantage. Further, spectrum holdings must not be fragmented, but allow operators access to the large contiguous bandwidths which can deliver higher speeds (if necessary based on network sharing arrangements). Further, mobile broadband infrastructure which can achieve the objectives of Digital Britain will need to provide indoor coverage. 2Mbps access indoors across the vast majority of UK population will require access to contiguous bandwidths of lower frequency spectrum (800MHz or 900MHz bands) of at least 15MHz paired. In order to achieve its objectives, the Government should therefore ensure an open and transparent process for allowing operators access to such spectrum.

Government and Ofcom need to consider the access to all relevant spectrum bands and the analysis cannot be partial and focused only on the solution in relation to individual bands (such as, for example, the 900MHz band). This is consistent with the spirit of the Wireless Radio Spectrum Modernisation Programme which considers these issues in the round. 3UK notes, however, that Ofcom's recent proposals with respect to Mobile Liberalisation only address part of the issue and are therefore flawed. Any solution must allow and foster competition on the merits with the overall opportunity to access spectrum being fair; on reasonable and equitable terms for all; and non-discriminatory. The policy instruments available to achieve this include setting appropriate AIP payments which reflect all relevant factors, the assignment of released and newly available spectrum and the terms which are attached to assigned spectrum. Government and Ofcom should not restrict artificially the range of spectrum bands considered or the policy instruments applied to those bands.

⁴ See, for example, press coverage today of a possible network share between O2 and Vodafone (*Mobile Operators Plan to Pool Networks*, Richard Wray, Guardian 12.03.09). Whether or not the story is correct, this report highlights the need to consider competition issues and risks arising from non-diversified holdings of low frequency spectrum.



2.5 2G reform

The liberalisation of the existing GSM licences (or “2G reform”) is an important component of this overall spectrum picture. This is because the existing GSM bands are the most immediately useful spectrum for mobile broadband capacity and coverage. This spectrum is all held by the incumbent 2G mobile operators and used for their existing 2G services. This spectrum was administratively allocated for the specific purpose of providing 2G mobile services. There has never been a 3G right of use for the spectrum.

If the 2G operators are permitted to use the spectrum for mobile broadband (3G and successor technologies) without any redistribution then they will enjoy clear advantages over 3UK and anyone else who might wish to provide mobile broadband services. In particular, those with 900 MHz spectrum will enjoy coverage advantages and those with 1800 MHz spectrum will enjoy capacity advantages (and maximum download speed advantages in the future). Clearly such an outcome would not represent a level competitive playing field.

Ofcom has acknowledged these advantages and so have the European authorities. Draft amendments to the GSM Directive to cater for liberalisation of the 2G spectrum specifically recognise the need to take steps to ensure that there is no distortion of competition as a result of the existing 2G spectrum allocations.

2.6 Industry solutions to the problem of 2G reform

2G reform has been contentious ever since the 3G auction in 2000. 3UK can see the benefits of brokering a compromise between all operators which will lead to all relevant parties being afforded appropriate access to the relevant spectrum bands. If such a consensus position can be reached, it would likely allow the benefits of expanding mobile broadband provision into other spectrum bands to be achieved at the earliest possible opportunity. All parties would have made an investment into making the solution work. As set out above, 3UK considers that any such solution must ensure that spectrum is not the source of an artificial competitive advantage. This applies as much to any negotiated or industry-led solution as it does to any regulatory imposed solution.

We have engaged actively in the discussions that have taken place and will continue to take a constructive approach to the process. We would be pleased to discuss with Government as well as the industry the suggestions that we have put forward. We would encourage the Government to keep an open mind as to all possible industry solutions since, in these times of rapid economic change and technological development, solutions which might initially appear unworkable may quickly appear more practicable.



In order for mobile broadband infrastructure, capable of delivering the Digital Britain objectives, to be delivered, spectrum allocations must not be fragmented between operators into sub-optimal bandwidths and individual operators should not achieve significant competitive advantages through access to legacy spectrum rights. As discussed further below, 3UK still believes that full release and re-auction of the existing 2G spectrum bands on suitable terms would be one option to ensure efficient spectrum usage and promote competition. Such outcomes could also be achieved by a suitably designed beauty parade allocation of these bands.

However, thinking more broadly, the ability of operators to access different classes of spectrum should be considered as a whole. Crucially, access to sufficient amounts of contiguous bandwidth at lower frequencies (that is, 15MHz or more), cannot be limited to operators which historically have used the 900MHz band. One option to ensure suitably competitive access to lower frequency mobile broadband spectrum would be for the 800MHz band to be packaged in suitably wide bandwidths (one package with at least a 15MHz paired bandwidth) and any auction of at least some of the resulting licences to be restricted to operators which do not already have access to lower frequencies (i.e. the 900MHz band). 3UK also believes that, in order to provide the right incentives to achieve the Digital Britain objectives, those operators who have licences for appropriate amounts of contiguous lower bandwidth spectrum should be subject to coverage and speed obligations. This approach would allow all operators to have the opportunity to access these crucial frequencies.⁵

Different types of spectrum are also complementary in the provision of high quality infrastructure. The higher frequency mobile broadband bands will be needed to provide sufficient capacity to meet demand. Again, a holistic view of spectrum allocations, should take account of the advantages in this regard of those operators with access to large contiguous blocks of 1800MHz spectrum (under Ofcom's proposal, T-Mobile and Orange). Such operators should be excluded from any award of large new contiguous blocks of spectrum for capacity, such as the 2600MHz band.

Such an approach to other mobile broadband spectrum bands would make commercial solutions, including network sharing arrangements, more feasible around the current GSM spectrum bands. All operators would be placed on an equal footing and the objectives of Digital Britain would be effectively promoted. Network sharing arrangements are a way of sharing network roll out costs between multiple operators making it feasible to roll-out mobile broadband to all but the tiniest minority of consumers (perhaps less than 1% of the population,

⁵ Timescales of availability of spectrum must also be considered. 3UK urges further consideration of geographical release of the 800MHz band to make at least some of this spectrum usable for mobile broadband earlier. Further any first mover advantages arising through access to the 900MHz band should be taken into account in the terms of access for the different spectrum bands.



who might be better served via satellite). The costs of providing any universal service via mobile broadband will obviously be much higher if five or more competing networks must be built and the costs will be passed-on to consumers in one way or another.

Any form of increased network sharing also has real environmental benefits. Fewer networks mean fewer masts – a particularly important issue when talking about the coverage of remote areas that will tend to include many areas of outstanding natural beauty, but not necessarily areas with less capacity requirements. Fewer networks also mean less carbon emissions and network sharing solutions will therefore further the policy goal of building a low carbon economy, as reflected in the Interim Report.

With network sharing solutions, competition, and the very real benefits that brings, would remain in a number of dimensions. First, at the retail and service level, operators would still be able to compete and differentiate themselves as they do today. Second, new shared networks would continue to face some network competition, at least for many years to come, from existing 3G networks using 2.1GHz spectrum.

3UK has put forward these ideas in a spirit of compromise for discussion and in an effort to be constructive. It should not be taken necessarily to reflect 3UK's view of the legal rights on which it would be entitled to rely.

2.7 Ofcom's proposals

We remain willing to consider any other ideas which achieve a level competitive playing field. 3UK was, however, disappointed by Ofcom's alternative proposals in its consultation document published on 13 February 2009. 3UK will respond more fully to Ofcom's proposals in due course but we summarise here how we see the proposals affecting the industry negotiations, and why we consider that they also do not provide a viable commercial, technical, practical, competitive or legal solution to the issues surrounding spectrum suitable for the future of mobile broadband.

As any businessman or economist will confirm, commercial negotiations are inevitably conditioned by each party's appreciation of what it considers to be its "best alternative to a negotiated agreement" (BATNA). Ofcom's intervention will undoubtedly influence what parties consider to be their BATNA. Some may perceive Ofcom's proposal to be their BATNA and refuse to accept anything less (though others may appreciate that the likelihood of challenge makes it far from certain that Ofcom's proposal would be implemented).

In any event, it would only take one operator believing that it would get a better result from a regulator-imposed solution in order to stymie the efforts to agree an industry solution of which



the Government has said it is supportive. In a competitive market where relative strengths and weaknesses are important, it may be that “winning” is a matter of others losing out and Ofcom’s proposals are certain to create “winners” and “losers”.

Ofcom’s proposal, if implemented, would distort competition to the benefit of some operators and the detriment of others. As such, it represents the antithesis of the level playing-field that 3UK considers essential and would fail to provide the secure, predictable investment climate needed in order for consumers to feel the full benefits of a competitive market for mobile broadband. As discussed above, inefficient allocation of spectrum will reduce the intensity of competition and jeopardise the achievement of the Government’s Digital Britain objectives.

It would have assisted industry negotiations much more for Ofcom to have signalled a pro-competitive and less comfortable outcome for the incumbent operators.

As such, Ofcom’s proposed regulatory solution (the fall back should negotiations fail) not only distorts those negotiations themselves, but also does not represent a viable or legal alternative should the negotiations fail. In addition to the economic and consumer disadvantages arising from Ofcom’s proposal, and partly because of them, 3UK considers that implementing the proposal would give rise to state aid issues, run counter to Ofcom’s statutory duties to promote competition and secure efficient spectrum usage and discriminate between operators. In the language of the Interim Report, Ofcom’s approach does not respect “the principles of an equitable competitive start”.⁶

3UK has consistently sought a clear auction (termed the “full release” option in Ofcom’s consultation) of all the 2G spectrum that would allow the market to establish the most efficient uses, distribution and pricing. 3UK does not accept Ofcom’s rejection of this option and will expand upon this in its response to the Ofcom consultation.

If a clear auction is not seen as politically acceptable then we would suggest that further consideration be given to a “beauty parade”. A “beauty parade” would allow Ofcom and the Government to lock-in commitments to meet the Digital Britain objectives concerning roll-out and services. “Beauty parades” were what led to the GSM spectrum allocations and the Freeview spectrum allocation and so clearly can have their uses. It has also very recently been used without complaint to allocate spectrum for high definition digital terrestrial television. Ofcom objects that it would be imposing its own views rather than letting the market decide but the reality is that its proposal only allows the market to decide on one carrier anyway and the market is unlikely to meet the Digital Britain objectives if it is distorted by the maintenance of existing spectrum holdings. What is more, Ofcom’s imposed solution is extremely unlikely to

⁶ Page 29 of the Interim Report.



be corrected by future trades because of the uneven competitive landscape it leaves and the inequity in bargaining power on the part of different potential parties to any such trades.

The clear auction and beauty parade options could potentially ensure competitive neutrality between operators in allowing the refarming of the existing 2G spectrum. 3UK believes that these options could be implemented in a way which would not cause undue disruption given the significant benefits to competition and the Digital Britain objectives which could be realised by such an approach. However, 3UK accepts that such approaches would cause some disruption. These costs could be further minimised and the benefits significantly increased if a more holistic approach is taken to the issue of mobile broadband spectrum as argued above.

It is not too late for Ofcom or the Government to support the industry negotiations by moving away from the proposals that Ofcom has put forward.

3. Section 3: Digital Content

3.1 Overview

3UK recognises the value and contribution the UK's creative and cultural sector makes to the UK economy, and appreciates the challenges faced by the sector in its transition to digital economics. As with any evolutionary process there will be winners and losers and 3UK believes it is those who embrace change and adapt their business models who will be best placed to monetise the opportunities offered in the digital economy.

3UK agrees that commissioners and creators of new content may face particular pressures in the transition from traditional sales and advertising models towards digital distribution and new sales models. We welcome the report's belief that new business models must emerge in the transition, and trust that the final report will ensure that the regulatory framework not only contributes constructively to the transition but does not seek to place regulatory burdens on other contributors to the digital economy (namely communications providers) in order to lessen the pressure being felt by other players.

3.2 3UK's support for rights holders

As the first mobile network to develop portal content services, 3UK has considerable experience in working with rights holders. Through our 3 Music Store we offer legal dual downloads to both handset and computer, as well as film, TV and ebook downloads. We compliment our role as a provider of legitimate content, with a platform that is attractive to prospective advertisers and with the fastest growing and largest mobile ISP business in the UK.



Whilst we recognise that the illegal sharing of content is a widespread activity, this has not deterred us from offering our customers a simple embedded process to download legal content through our portal.

We therefore welcome the Interim Report's statement that "there is a clear and unambiguous distinction between the legal and illegal sharing of content." 3UK has worked with rights holders from its formation to offer legal download channels for products and services.

3.3 Regulatory intervention and the particular issues faced by mobile ISPs

3UK fully supports the Government's efforts towards combating IP crime and the increased emphasis in addressing criminal piracy. We believe that a concerted education campaign from the rights holders to illustrate the differences between the legal and illegal downloading of content would be extremely beneficial and would also serve to promote the alternate means of delivery which they are now beginning to open up.

The Interim Report discusses some of the potential technical and enforcement options that might be considered in the final report as a response to illegal file sharing. One such measure is the notion that ISPs could assume a responsibility to hold data about customers whose IP addresses are allegedly associated with illegal file sharing. On receipt of a notification the ISP would be required to log the report and at some future date could be called upon to disclose data about the customer to whom the IP address belongs. This is a variation on the system trialled under the Memorandum of Understanding (MOU) between the Internet Service Providers (ISPs) and rights holders to tackle unlawful file-sharing by consumers. We note that no mobile ISPs were involved in the MOU and it seems that the technical differences that exist between mobile and fixed ISPs need to be more fully considered. These technical differences impose a significant additional cost on mobile ISP's in order to comply with this proposed enforcement option.

In this regard, mobile ISPs have some technical limitations with regards to identifying a customer from an IP address. For example, for customers accessing the internet through their handset it is not currently possible to match the IP address to customer data, even if the report of an infringement were received in real time. In contrast, it is technically possible to match an IP address and port to customers accessing the internet through one of 3's mobile broadband dongles. At current capacity, however, it takes two weeks to process a request to link the use of one IP address and time to a user and the IP data is not currently stored for this length of time so it is not possible to retrospectively match an IP address to a customer account. There would be considerable costs to mobile ISPs in developing the infrastructure to link IP to



customers, automate and record that process, issue notifications of infringement, and produce customer information on receipt of a court order.

3UK broadly supports the aims of the Interim Report with regards to digital content. We believe that rights holders would be well advised to engage further with ISPs to look at new models to distribute their goods in order to limit illegal file-sharing. We also believe that rights holders should match this activity with a cross-media education campaign. 3UK acknowledges that such an approach would only limit, but not stop, illegal file-sharing on the internet. We therefore generally support moves to enhance the ability of rights holders to act against illegal file-sharers but do so only to the extent that mobile ISPs are not required to bear the significant costs associated therewith.

4. Section 5: Equipping Everyone to Benefit From Digital Britain

3UK supports the Government's view that the benefits of becoming a digital nation will only be realised if the provision of infrastructure and access is accompanied by increased levels of understanding, education and media literacy. There is, in short, little to be gained from communications providers forever extending access to communications networks if the benefits of being digital are not understood by a sizeable proportion of the population.

Industry can, and already does, play a significant part in delivering information to consumers about the benefits of digital communications. 3UK's stores offer face to face advice on new products and services and the benefits mobile communications can provide to particular groups for whom fixed communications are not suitable (i.e. because they move or travel regularly) or accessible (e.g. because they are unable to obtain credit) and for whom pre-pay devices are the only option. 3UK also provides extensive advice to consumers both via its website and on its portal to assist customers in understanding and utilising the services it provides.

Nevertheless 3UK believes that for some consumers the first step to utilising the digital services that are readily available is not knowledge or understanding of their functionality but an understanding of the benefits that accrue from being a digital citizen.

The Interim Report focuses, rightly, on the importance of education and training in supporting and creating a digitally competent workforce. The Interim Report also focuses on the need to overcome some of the hesitation and concern felt by some members of society when engaging with online services, and build a "confident and empowered population". Furthermore the Interim Report talks extensively of the concerns surrounding online safeguards and rightly acknowledges the work of the Byron review in bringing these issues to the front of Government thinking.



3UK is, however, concerned that by focussing on the issues of knowledge gaps and online safety, Digital Britain will fail to answer the fundamental question as to why some people, even when they live in urban areas served by a multitude of communications providers, still shun digital services. This in turn will influence the reappraisal of Ofcom's current responsibilities for Media Literacy and risk any future National Media Literacy Plan missing its target.

With increasing numbers of local and national government services being transferred online (in some instances reducing or eradicating the off line access), it is key that Digital Britain charge any National Media Literacy Plan with first understanding the factors that influence a decision (be it actively or passively taken) by a citizen not to 'go digital'.

Only once these factors are understood, assessed and prioritised in terms of the genuine impact they have on an individual's decision not to 'go digital', can a National Media Literacy plan attempt to tackle the root causes that result in individuals being excluded from the digital nation.

Action 22 should, therefore, be met first by a comprehensive research project that measures the reasons that underpin individuals' decisions not to access digital services, and interrogates those reasons to ensure they are genuine, and not given because they appear more tangible and understandable. For example an individual may claim not to purchase broadband because of the expense, where as in reality they may be disinterested but they feel this is not a genuine reason. Meanwhile for the researcher and policymaker cost is simpler to evaluate and respond to in policy terms when contrasted with the many factors that might go to make-up a 'disinterested' decision.

5. Conclusion

3UK strongly supports the Digital Britain initiative and looks forward to playing a significant role in helping the Government to achieve many of the objectives set out in the Interim Report. In this regard, 3UK commits to delivering 2Mbps access to over 99% of the UK population within their homes or offices by 31 December 2012 this commitment being necessarily conditional on the fair availability to 3UK of sufficient and appropriate spectrum.

Yours faithfully

A handwritten signature in black ink, appearing to read 'S Lerner', written over a white background.

Stephen Lerner
General Counsel
For and on behalf of Hutchison 3G UK Limited