

23<sup>rd</sup> August 2007

Joe Sonke  
Ofcom  
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Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Dear Joe,

### **Ofcom's Consultation on UK Broadband application for Licence Variation**

O2 (UK) Limited ["O2"] welcomes this opportunity to comment on UK Broadband's application to Ofcom for a variation of its 3.4GHz band Fixed Wireless Access spectrum licence.

#### Licence Parity

Ofcom will be aware of O2's view of the importance of the issue of licence parity and the consistent application of Ofcom's duty under s9(7) Wireless Telegraphy Act 2006, to *all* spectrum licences in a relevant downstream market. Unfortunately Ofcom has yet to publish either (i) a statement in relation to its proposed auction of spectrum in the 2600MHz band and/or (ii) a consultation on the liberalisation of the 3G core band licences. However, both of these documents are pending within the next six months.

Ofcom's policy position in relation to both (i) and (ii) above is critically important. The 3G core band licences, the proposed 2600MHz licences and, subject to this consultation, the 3.4GHz licence of UK Broadband are all current or future resource inputs into the downstream mobile communications market.

In its response to Ofcom consultation on 2600MHz, O2 highlights the issue of licence parity. That is, the duty on Ofcom to treat like cases alike, unless there is an objective justification for doing otherwise. Inconvenient misalignment in the timing of consultations and statements is not an objective justification for inconsistent or discriminatory treatment. Ofcom itself notes, for the first time, that its duties under s9(7) of the 2006 Act are "*ongoing and must be assessed against the market circumstances and the state of technology development at the time.*" If Ofcom is to grant the requested variation to UK Broadband's licence, O2 expects & that Ofcom undertakes the tests set out in s9(7) of the 2006 Act on its 3G core band licence. Ofcom's forthcoming consultation on mobile spectrum liberalisation would appear to be the appropriate vehicle. Ofcom would be failing in its duties if it did not consult on this issue and address, in equivalent detail, the issue of licence parity in relation to 2600MHz and UK Broadband.

The case of UK Broadband raises analogous issues to those raised by O2 in relation to 2600MHz. In particular:

- a) The requirement for some licensees to build and maintain networks of a given size, scope and absolute operating cost, whilst a competitor is free to size its network (and cost base) as it wishes, creates a competitive distortion. This lack of licence parity would, in O2's view, be a breach of Ofcom's duties and/or be irrational.<sup>1</sup> This points to a coterminous decision in relation to UK Broadband, 2600MHz and 3G liberalisation; and
- b) Allowing UK Broadband to enter the downstream mobile market with a tradable and technology neutral licence<sup>2</sup> whilst unreasonably delaying or withholding such rights from O2 and the other MNOs causes further competitive distortion, as we evidence in detail in our response on 2600MHz.

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#### Maximum in-band EIRP

O2 agrees with Ofcom that there is a need to specify different maximum EIRP limits, depending on the type of radio equipment (station) being deployed, and we concur, generally, with the proposed variation. In addition, we concur with the conclusion reached by Ofcom with regard to out of block emission limits, i.e. not to change them at this time. This decision by Ofcom to wait for the outcome of the ongoing work on WAPECS is a welcome change to the position adopted by Ofcom in the context of the consultation on 2600MHz.

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<sup>1</sup> Ofcom itself accepts this as a relevant issue at §6.25 of the consultation.

<sup>2</sup> Previously granted within The Wireless Telegraphy (Spectrum Trading) Regulations 2004

## Timing

O2 has no firm views on the timing of any variation of UK Broadband's licence, subject to the responses in this consultation. However, it is important to note that:

- Ofcom is required by law to maintain licence parity for equivalent licences in the same downstream market and a failure to do so would be unlawful unless there were objective justification; and
- In the absence of objective justification and in the light of Ofcom's duties under law, Ofcom would be required to reach equivalent decisions in relation to O2's 3G licence; that is (a) to remove the rollout obligation, (b) to allow the licence to be tradable and (c) allow change of use.

In O2's view this would point to a coterminous decision on UK Broadband, 2600MHz and 3G spectrum liberalisation.

We note press reports that PCCW, UK Broadband's parent company, is seeking to exit from its investment. PCCW may consequently benefit from the removal of uncertainty over the future value of its 3.4GHz licence. We hope that Ofcom will bring forward proposals soon, in order to similarly reduce the uncertainty over the future of O2's 3G licence and reduce O2's bidding uncertainty in relation to 2600MHz. It would be ironic if Ofcom were only willing to reduce uncertainty for players wishing to exit the UK mobile communications market, rather than for those which remain as long term investors.

At Annex A we provide answers to the specific questions posed in Ofcom's consultation. I look forward to discussing these matters with you further, in due course.

Yours sincerely

**Nicholas Blades**  
**Head of Regulatory Affairs**

## ANNEX A Response to Consultation Question

Do you agree that the case for making changes requested by UK Broadband to its licence has been made? If not, why would it not be appropriate to vary UK Broadband's Wireless Telegraphy Public Fixed Wireless Access Operator Licence by (i) allowing application neutrality and (ii) increasing the permitted maximum in-band EIRP, and why would it not be appropriate to vary the licence as soon as practicable?

### (i) Allowing application neutrality

#### Ofcom's Statutory Duties

O2 welcomes Ofcom's clarification of its statutory duties in relation to undertaking its spectrum functions. In particular O2 notes §4.8 where Ofcom acknowledges that Article 6 of the Authorisation Directive places an *ongoing* requirement on Ofcom to ensure that *all* spectrum licences have conditions which are objectively justified in relation to the networks and service to which they relate, non-discriminatory, proportionate and transparent. Ofcom also notes that any consideration of a licence condition must take place within the context of the prevailing market circumstances and technological developments.

This interpretation of Ofcom's duties builds on that set out in the Spectrum Framework Review: Implementation Plan<sup>3</sup> and more recently Ofcom consultation on proposals to award 2600MHz.<sup>4</sup> In response to the latter, O2 made strong representations to the effect that Article 6 AD applies on an ongoing basis to its 3G licence and that Ofcom was bound to review the obligations in that licence in light of its intention to auction spectrum licences in direct competition on more favourable terms.<sup>5</sup>

Furthermore, Ofcom's analysis in the 2600MHz consultation rested in part on *caveat emptor*, effectively that as O2 had purchased its licence on terms defined in the 3G Information Memorandum, those terms applied in perpetuity and therefore the terms of new licences entering the same downstream market were irrelevant. O2 looks forward to Ofcom's analysis in light of its more developed view of its statutory duties.

O2 agrees with the relevant considerations in relation to the licence variation (§4.13), in particular we will focus on:

- Impact on competition;
- Objective justification for licence conditions; and
- Legal considerations that limit Ofcom's discretion to vary licence conditions.

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<sup>3</sup> §§3.29-3.39

<sup>4</sup> §§3.1-3.22

<sup>5</sup> <http://www.ofcom.org.uk/consult/condocs/2ghzawards/responses/o2.pdf>

### Analysing a Wireless Telegraphy Act licence variation request

UK Broadband's licence specifically prohibits the provision of mobile or nomadic services. O2 accepts that this does not sit well with the requirement on Ofcom to act in "a *technology neutral way*"<sup>6</sup>. However, at the time of the auction the Radiocommunications Agency was very explicit about the limitations of UK Broadband's licence within the context of the legal and regulatory regime at that time.

That legal and regulatory regime has changed, with the introduction of the Communications Act 2003 and Ofcom's adoption of its market oriented spectrum management policy. As we highlight above, and as identified by the Competition Appeals Tribunal in *Floe Telecom vs Ofcom*, Ofcom must assess a licence's compatibility with prevailing law and also interpret the meaning of such a licence with respect to prevailing law and any pertinent historical documents. Ofcom has correctly sought to do that through this consultation.

### Economic effects

Ofcom concludes that further competitive entry into the UK mobile broadband markets has a number of beneficial effects, notably intensifying the competitive process. It also suggests that whilst there are circumstances where there might be negative impacts on the competitive process, but asserts (without evidence or analysis) that these are limited.

### Market analysis : flaws

Ofcom suggests one of the major benefits of the licence variation will be to enhance the conditions for future spectrum auctions by increasing the amount of innovation in mobile WiMax technology and services. This is not an objectively justified reason for introducing competition into the mobile communications market on more favourable terms and conditions than those afforded to O2 by its 3G licence. They are, in fact, purely a means of drumming up interest in the 2600MHz auction (§6.9) which would, *inter alia*, increase receipts to HM Treasury.

Optimal use of spectrum is enhanced if operators can respond dynamically to changing market circumstances, whether by changing technology, increasing or decreasing their holdings or by increasing or decreasing the size of their network. O2 agrees with Ofcom (§6.13) that the freedom afforded to UK Broadband by this variation would allow it to make optimal use of this spectrum in responding to new customer demands. However, Ofcom has not sufficiently analysed the impact of selectively allowing such benefits to rest with UK Broadband, whilst withholding them from O2 and the other MNOs. As O2 pointed out in its response to Ofcom on 2600MHz, selective application of spectrum liberalisation in the same downstream market can have harmful consequences on those parties from which such flexibility is withheld. O2 notes in this regard, that Ofcom has not provided any analysis of this impact of licence disparity.

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<sup>6</sup> Section 4(6) Communications Act 2003

Ofcom believes that more competitors are beneficial to output and therefore this is of benefit to consumers. It postulates some markets within which such additional competition might be realised following this licence variation, including markets within which O2 operates under its 3G licence.

Ofcom seeks to justify entry by UK Broadband into the mobile communications market, on more advantageous licence terms, on four grounds<sup>7</sup>:

- i. MNOs could adjust their tariff structures to respond to targeted (presumably geographic) entry. This appears to be at odds with Oftel's finding in 2003 of the scope of the mobile communications market being national in nature, in particular because prices are set on a national basis.<sup>8</sup> Ofcom would be required to revisit its market definition in a new market review to rely on what is, in fact, just an assertion.<sup>9</sup>
- ii. Incumbents have advantages over new entrants and, therefore, entry assistance (for that is what licence disparity is) is justified. In the absence of a full market review, O2 believes that Ofcom has no grounds to provide entry assistance to any party. In an effectively competitive market, this would be unlawful and may constitute state aid.
- iii. The propagation characteristics of 3.4GHz increase the number of base stations required to provide coverage compared to those at 2100MHz. In fact, this is just one factor to consider in relation to an operator's cost and cost equivalence. A robust analysis would need to take into consideration the relative whole life costs of different networks, which will be a function of:
  - the cost of the spectrum; plus
  - the number of cells required to cover a given area in light of the propagation characteristics of that spectrum; plus
  - the ongoing operating cost of these cells.

The overall NPV of this calculation can be equivalent for two different frequencies of spectrum by simply varying the upfront cost of the spectrum. O2 notes that UK Broadband has twice as much 3.4GHz spectrum as O2 has 2100MHz spectrum, but paid c. £7m rather than the c. £4bn paid by O2 for its licence. Any credible analysis would examine the whole life cost of the network required to deliver an equivalent service, not just look at one element of physics in isolation.

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<sup>7</sup> §§6.21-6.25

<sup>8</sup> Oftel, Mobile Access and Call Origination Market Review Decision (2003) §2.11.

<sup>9</sup> Imagine for a moment the scene; Mr Jones is using his mobile telephone in an area of UK Broadband coverage and taking advantage of the lower rates afforded to him in that vicinity by his MNO because of the enhanced competition. As he walks out of this area, in the interests of transparency, his conversation is interrupted by a recorded announcement reminding him that he is now perambulating through a higher charge area of the country which enjoys lower levels of infrastructure competition.

- iv. Ofcom does not commit itself as to whether restrictive licence conditions in the licences of the 3G MNOs  $\times$ , prevent incumbents responding to competition. In light of this uncertainty Ofcom will need to re-consult on this particular point in relation to this licence variation.  $\times$

#### No analysis of the impact of licence disparity

##### *Licences are sufficiently equivalent*

At §6.43 Ofcom suggests that the spectrum in O2's 3G licence and that owned by UK Broadband are not of sufficiently equivalent utility to leave concerns about discriminatory treatment. It states:

*“The MNOs and UK Broadband operate in different frequency bands which make them more suitable for different applications, technologies and deployment strategies. The 2G and 3G bands are recognised as prime mobile bands. On the other hand, the 3.5 GHz band was until recent years seen primarily as one suitable for fixed services. It is only the technology developments since the 2003 auction that has seen the band transformed to one that can support nomadic and mobile applications. Equipment being developed for the band has had to be designed to overcome the unfavourable propagation characteristics of the band for mobile communications relative to those of the established mobile cellular bands.”*

Firstly, as we highlight above, Ofcom should have analysed and consulted on the relative whole life costs of different networks based on different spectrum assignments. To rely on one input in isolation is insufficient.

Secondly, UK Broadband has 2x20MHz of spectrum, whilst O2 has just 2x10MHz of 3G spectrum. If UK Broadband were to become successful in the market, the cost of its network would be more influenced by the cost of creating additional capacity (cell splitting) than the cost of providing coverage. This has been identified by Ofcom in its recent Statement on mobile voice call termination<sup>10</sup>. Again, it is easy to envisage traffic scenarios that would, from a cost perspective, lead to unit cost equivalence between O2 and UK Broadband. Blithe assertions such as those at §6.43 do not point to a lack of equivalence.

Finally, Ofcom itself notes the impact of changing technology and that it is now possible for mobile services to be delivered at 3.4GHz. O2 expects the performance of such technology will continue to improve, especially in light of the potential identification of the all or part of the 3.4-4.2GHz band<sup>11</sup> for “systems beyond IMT-2000”<sup>12</sup>, or, more generically, IMT systems<sup>13</sup>. Indeed, part of the European Common Proposal for WRC-07 Agenda Item 1.4, agreed at the July 2007 meeting of the European Conference Preparatory Group, is to modify the Radio Regulations relating to the 3.4-3.8GHz band, replacing the current secondary mobile allocation

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<sup>10</sup> Mobile Call Termination Statement – 27 March 2007 §9.97

<sup>11</sup> To be discussed at the World Radio Conference (WRC-07) in October/November 2007.

<sup>12</sup> Now called IMT-Advanced within the ITU.

<sup>13</sup> Incorporating both IMT-Advanced and IMT-2000 and its evolutions.

with a primary mobile allocation (except aeronautical mobile) and adding a footnote to identify the band for IMT systems.

#### *UK Broadband would operate in the same downstream market as O2*

Ofcom correctly identifies that the implication of this licence variation request is to allow UK Broadband to offer mobile services, in competition with O2 in a downstream mobile communications market.

At §§6.20-6.27 Ofcom postulates some potential downstream markets within which Ofcom might need to assess the impact of the proposed licence variation<sup>14</sup>. The analysis still remains well below the required evidential standard. In the absence of a market review, Ofcom must assume that as UK Broadband would become a provider of at least mobile data (and voice via VoIP) services then it would be in direct competition with O2 and the other MNOs.

#### *Requirement to maintain licence parity*

Ofcom has a duty to act consistently under the Communications Act 2003 and a regulator has a public law duty to treat like with like. This is a widely acknowledged long-standing principle of good administration.<sup>15</sup> Ofcom must therefore apply the same regulatory treatment to equivalent spectrum assignments unless it can justify disparate treatment - i.e. there is an assumption of parity.

The duty to treat like cases alike means that the decision to offer the new licences on more favourable terms must be accompanied by a decision to offer similarly favourable terms to the existing 3G licensees, unless there are justifiable reasons for it not to do so. Furthermore, licence disparity is one form of entry assistance<sup>16</sup>.

#### *Impact of licence disparity*

In our response to Ofcom's consultation on 2600MHz, O2 and Oxera looked at the implications of differences between licences on a term by term basis, looking broadly at both their competitive implications and the effects this would produce in the spectrum market (where appropriate). Two elements appear relevant to this consultation; rollout obligations and change of use. We reprise our arguments below:

- *Rollout obligations* : The outcome of O2/Oxera's analysis suggests that, in the face of an asymmetrical roll-out obligation, the new entrant without the roll-out obligation will be able to:

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<sup>14</sup> Press reports indicate that PCCW intends to trial and then, subject to the outcome of this consultation, offer voice services over WiMax. Consequently, O2 believes that this consultation document does not identify or sufficiently analyse the relevant markets.

<sup>15</sup> See for example Lord Nicholls in *R (G) v Barnet LBC* [2003] UKHL 57, "like cases must be treated alike"; *R v Director General of Electricity Supply ex parte Scottish Power* [1997] EWCA Civ 911; *Waikato Regional Airport Limited and ors v. Attorney General* [2003] UKPC 50 (NZ).

<sup>16</sup> In the absence of a finding of SMP within the access and origination market, there can be no objective justification for imposing a remedy on that market of advantaged entry by another player. ✕

- build a network with the same average unit costs as the existing licensees in the areas in which it does build its own network;
- obtain access to the network with a roll-out obligation for those areas it does not cover, at a price below the average unit cost of the existing licensee's network in those areas.

The combination of these two factors means that the new entrant can obtain the same coverage as the existing licensees at a lower total cost, and will therefore have a price advantage over the existing licensees purely as a result of the lack of the roll-out obligation. This advantage will persist, since 2100MHz licence-holders must maintain 80% population coverage until end 2021.

This is incompatible with Ofcom's duty under Section 6(1) of the Communications Act 2003, to ensure that licence conditions are not unduly burdensome, or that their maintenance has not become unduly burdensome.

Our analysis shows new entrants can expect to gain access to national roaming services and therefore maximise their cost advantages whilst minimising their cost exposure (because, unlike existing licensees, they do not have to maintain uneconomic infrastructure, in order to comply with rollout obligations).

- *Change of Use* : Adverse effects arise from the ability of a new licensee to take advantage of new technologies to deliver the same services as the MNOs at a lower cost. A more efficient technology can confer a persistent cost advantage on a new licensee, which cannot be matched by incumbents under the conditions of current 2100MHz licences. As the new licensee with a cost advantage will drive down the market price, incumbents' profits will be reduced while the new licensee would enjoy some price-setting power and positive profits. This implies that asymmetric technological neutrality can reduce the value of incumbents' licences and cause competitive harm. If all licensees were granted technology neutrality, the cost asymmetry would be removed, as would the excess profits for the new licensee. The analysis shows that technological neutrality on its own has little value, but can be highly valuable if granted selectively.

In the light of the conclusions that the various licence asymmetries would lead to differences in forward-looking costs, the potential effects of those differences have been analysed by Oxera using the main economic models of how competition operates in markets with a few operators ('oligopolistic markets'). In our response on 2600MHz we set out to examine whether it was possible to distinguish between the adverse effects of entry (which could have been anticipated at the time of the original auctions and incorporated into the bid price) and entry with preferential licence terms (which would have been considered highly unlikely at the time of the original auctions).

In each of the models of competition examined, the analysis has shown that an adverse effect on incumbents' profits resulting from asymmetric entry can be clearly distinguished from the effects resulting from entry of an operator with equivalent licence terms (and therefore the same forward-looking costs).

### Selective application of Ofcom's duties under UK and EC law is state aid

Above O2 welcomed Ofcom's further developed view of its duties under UK and EC law, especially in relation to Article 6 of the Authorisation Directive. We note that Ofcom is now wholeheartedly converted to this view, especially in relation to UK Broadband (§6.41) and the 2G licences (§6.46). However, there appears to be no similar damascene conversion in relation to the 3G licences.

Furthermore, Ofcom continues to accept the terms and conditions of the 3G licences "as a given" in its analysis of the implications of discrimination in relation to rollout obligations (§6.46).

At § 6.46 Ofcom says effectively:

- The rollout obligation bites at the end of 2007 and (hopefully) all operators will have complied by that point;
- It's hard to see how we could set a duplicate condition on UK Broadband, presumably given the short timescale within which UK Broadband would have to comply; and in any event
- It is not clear how a rollout obligation can be objectively justified.

O2 notes that the obligation within its 3G licence is an on-going one, ie it has to maintain the required level of coverage until licence expiry. It is therefore hard to see why UK Broadband could not be required to achieve 80% population coverage sometime between now and 2021 in order to maintain licence parity. ✕.

At §6.41 Ofcom states that it, "*is of the view that the exercise of that duty<sup>17</sup> (which is conferred by EU law) cannot, in any event, constitute a breach of EU state aid rules.*"

However, O2 is of the view that it is the very selective exercising of that duty, ie that Ofcom has chosen to exercise it towards a potential entrant on the downstream market for mobile communications services and not the MNOs in relation to their 3G licences, that might well constitute state aid.

It is noteworthy that in the case cited by Ofcom<sup>18</sup> as supporting its position on state aids, the NRA concerned reduced the fees of both UMTS licensees, rather than selectively undertaking its duties towards one and not the other.

### Discrimination

O2 is unable to assess whether Ofcom will be treating its 3G licence in a discriminatory manner because Ofcom has yet to bring forward proposals and identify the timing within which it

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<sup>17</sup> Article 6 AD in relation to UK Broadband's licence

<sup>18</sup> [http://ec.europa.eu/community\\_law/state\\_aids/comp-2004/nn042-04.pdf](http://ec.europa.eu/community_law/state_aids/comp-2004/nn042-04.pdf)

intends to introduce trading and liberalisation to the 3G licences. O2 reserves its position on discrimination until such proposals and timing become apparent.

**(ii) Increasing the permitted maximum in-band EIRP**

UK Broadband has requested a change of permitted maximum in-band power limits<sup>19</sup> to:

“The Licensee shall ensure that the Radio Equipment conforms to the following EIRP limits:

	Maximum EIRP per MHz
Conventional 90 degree sector	+23 dBW/MHz
Narrow sector or adaptive antenna	+29 dBW/MHz

“

and has cited CEPT/ECC Decision ECC/DEC/(07)AA<sup>20</sup> as the reference, without specifying which usage mode(s) or radio equipment this should apply to. We assume that the requested power limits were intended to apply to all Broadband Wireless Access (BWA) usage modes (FWA, NWA and MWA, as specified in ITU-R Recommendation F.1399) and to all types of radio equipment (Central Stations (CS) and Terminal Stations (TS)).

We therefore note that the Annex of ECC/DEC/(07)02 also specifies:

“As a starting point, the guidance given in ECC Recommendation (04)05 on technical conditions for implementation of flexible usage mode, to be set in the technology neutral BWA licence process, shall be considered.

Furthermore, the introduction of MWA usage mode will be subject to following additional requirements for deployment of mobile TS:

- a. Maximum radiated power density of 25 dBm/MHz”

and that CEPT/ECC Recommendation ECC/REC/(04)05 suggests the following maximum EIRP within a block:

“The following table A2 gives guidance for Administrations on setting possible maximum EIRP limits or to arbitrate interference cases between operators.

Station Type	Max EIRP spectral density (dBW/MHz)  (Including tolerances and ATPC range, Note 1)
Central Station (CS) (and Repeater Station(RS) down-links)	+23 Note 2

<sup>19</sup> “UK Broadband application for licence variation”, Ofcom, 18 June 2007, Annex 8, Appendix 2, p3.

<sup>20</sup> Now published as approved CEPT/ECC Decision ECC/DEC/(07)02, 30 March 2007.

Terminal Station (TS) outdoor (and RS up-links)	+ 20 Note 3
TS (indoor)	+ 12
<p>Note 1: the total power delivered by a transmitter to the antenna of a station should not exceed 13 dBW, ITU RR S21.5 refers</p> <p>Note 2: CS EIRP density value given in the table is considered suitable for conventional 90 deg sectorial antennas. Administrations may consider to adjust this value if other type of antennas are used (e.g. decrease the limit for omni-directional antennas, or increase when narrow-sector or adaptive antennas are used)</p> <p>Note 3: If Administrations wish to consider higher EIRP limits (e.g. for improving coverage in remote rural areas), this should be achieved by using the high gain directional antennas, not by increasing output power, however the higher interference potential of EIRP increase should be carefully considered</p>	

Table A2: EIRP density limits for CS and TS stations of PMP FWS”

O2 therefore agrees with Ofcom that there is a need to specify different maximum EIRP limits, depending on the type of radio equipment (station) being deployed, and we concur, generally, with the proposed variation<sup>21</sup>. We suggest however, to ensure absolute clarity, that a range of maximum EIRP spectral densities, as requested by UK Broadband, are also specified for Central Stations; that is, only allowing +29dBW/MHz with the requirement to use specific narrow-sector or adaptive antennas, allowing +23dBW/MHz if conventional 90 degree sector antennas are used, and stating that lower power limits would apply if other types such as omni-directional antennas are used.

In addition, we concur with the conclusion reached by Ofcom with regard to out of block emission limits, i.e. not to change them at this time. The uncertainty over the future requirements that might be imposed by any harmonisation measure adopted by the European Commission through the Radio Spectrum Committee (RSC) leads, in our view as well as Ofcom’s, to the conclusion that it would be better not to proceed with further consideration of the variation requested by UK Broadband, in case it is in contradiction with the outcome of the ongoing work on the Wireless Access Policy for Electronic Communications Services (WAPECS). The Commission has already presented a draft EC Decision at the most recent (June 2007) meeting of the RSC, and O2 understands that the absence of a Harmonised Standard for mobile applications in this band was highlighted as a serious issue that requires the urgent attention of ETSI. In the meantime, we understand that the Commission has proposed an incomplete set of reference parameters for the deployment of mobile networks. In contrast, the standard for the fixed and nomadic networks, EN 302 326, is complete and has been referenced in the draft Decision.

<sup>21</sup> §5.8.

This decision by Ofcom to wait for the outcome of the ongoing work on WAPECS is a welcome change to the position adopted by Ofcom in the context of the recent consultation on 2600MHz. In response to that consultation O2 stated that the award should only proceed once all the relevant issues had been resolved, including the pending European decisions on WAPECS. Ofcom had stated that it would “seek to remove uncertainties where possible, but without causing delay”; we interpreted this to mean that Ofcom planned to proceed even whilst uncertainties remain over issues such as WAPECS. This, we argued, was inefficient and unjustified, giving rise to considerable legal and commercial uncertainty. O2 highlighted that the Commission had previously cautioned against disregarding harmonisation initiatives, encouraging Member States:

*“to refrain from proposing/adopting draft technical measures which are inconsistent with harmonisation proposals under preparation”<sup>22</sup>*

One of the bands identified by the Commission for flexible use under the WAPECS initiative is the 3.4GHz band. As Ofcom acknowledges (§5.19), the Commission has issued a Mandate to CEPT to prepare a technical study on the use of a number of bands for mobile communications under least restrictive technical conditions, as part of the implementation of the principles adopted in Europe under WAPECS. CEPT was due to report back to the Commission in July 2007 but, as Ofcom anticipated, this work has not been completed<sup>23</sup>.

With regard to the 2.6GHz band Ofcom stated: *“The UK does not need, as a binding constraint, to wait for an RSC Decision before proceeding to the award of these bands in the UK”*. We therefore welcome the change in position that Ofcom now considers they **should** wait until the binding technical implementation measures relating to the 3.4GHz band has been established before proceeding with consideration of any variation that may be requested by UK Broadband in the future, in case it is in contradiction with the outcome of the ongoing work on WAPECS.

Whilst we concur, generally, with the proposed variation, O2 considers that part of Ofcom’s justification for allowing these higher power limits as part of the variation is inappropriate. Ofcom states (§5.14) that:

*“... The power level requested is broadly in line with the limits that apply internationally to the base stations of mobile networks. In the light of these points Ofcom considers ...”*

We do not believe that reference to what other licensees in other spectrum bands may or may not radiate is relevant when Ofcom has also said (§5.12) that:

*“it would not normally expect to grant a request to vary a licence if the change would reduce the estimated spectrum quality of neighbouring assignments.”*

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<sup>22</sup> For example, in Radio Spectrum Committee document RSC 06-103 “Notifications under Directive 98/34 in relation to Radio Spectrum Decisions”, 20 November 2006.

<sup>23</sup> We note that the Interim Response to the EC Mandate on WAPECS (SE42(07)048) concludes that, at the current stage of discussions, retaining the rights as described in ECC/REC/(04)05 and the Annex of ECC/DEC/(07)02 is the most appropriate option.

The maximum power limits that apply in other bands obviously has no bearing on the potential for interference with assignments neighbouring the 3.4GHz band.

O2 also considers that Ofcom's belief that "*the lower EIRP level for mobile terminals will offset the effects of the higher base station EIRP*" (§5.17) does not necessarily lead to the conclusion that the variation would not create extra receiver blocking effects on neighbouring licensees. Whilst Ofcom believes that "the aggregate position, broadly speaking, is likely to be unchanged", we consider that Ofcom should have undertaken a more quantitative study of the likely instances of blocking, based on an assessment of potential deployment scenarios for both UK Broadband and the adjacent PMSE and ENG/OB users.

## **(ii) Timing of any variation and the need for consistent decisions**

UK Broadband has put forward a report by Europe Economics, which Ofcom has reviewed, purporting to demonstrate the benefits to the UK economy of increased competition in the mobile broadband market. Ofcom's own analysis suggests that such benefits are short-lived. However, it would appear that UK Broadband's parent cannot wait to see such benefits materialise.<sup>24</sup> Perhaps UK Broadband's desire to secure certainty over this licence variation (ahead of any certainty afforded to its future competitors), is due to a need to firm up any windfall gain from liberalisation within its enterprise value? O2 does not view the need of an investor to make a quick sale as an objectively justified reason for applying Ofcom's duties under Article 6AD to one party whilst failing to undertake this duty towards others.

O2 has no firm views on the timing of any variation of UK Broadband's licence, subject to the responses in this consultation. However, it is important to note that:

- Ofcom is required by law to maintain licence parity for equivalent licences in the same downstream market and a failure to do so would be unlawful unless there were objective justification; and
- In the absence of objective justification and in the light of Ofcom's duties under law, Ofcom would be required to reach equivalent decisions in relation to O2's 3G licence; that is (a) to remove the rollout obligation, (b) to allow the licence to be tradable and (c) allow change of use.

In O2's view this would point to a coterminous decision on UK Broadband, 2600MHz and 3G spectrum liberalisation. ✕

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<sup>24</sup> The Times newspaper p.38, 6<sup>th</sup> August 2007