



CONSULTATION RESPONSE

PROPOSALS FOR THE SETTING OF REGULATORY FEES FOR VIDEO ON DEMAND ("VOD") SERVICES FOR THE PERIOD UP TO 31 MARCH 2011 - JOINT CONSULTATION BY OFFICE OF COMMUNICATIONS ("OFCOM") AND THE ASSOCIATION FOR TELEVISION ON DEMAND LIMITED ("ATVOD") PUBLISHED 26 MARCH 2010 (COLLECTIVELY THE "CONSULTATION") RESPONSE FROM UNITED FOR LOCAL TELEVISION ("ULTV")



FOUR IMPORTANT QUESTIONS FOR ED RICHARDS, OFCOM CHIEF EXECUTIVE

Dear Mr Richards

When considering our response to the questions set out in your Consultation, we felt prompted to ask you four of our own questions:

1. Do you believe it is fair and proportionate for Ofcom to consent to impose a £2,500 'poll tax' on the UK's smallest VOD service providers?
2. Are you aware a fee of £2,500 could destroy small-scale VOD services seeking to enhance democratic participation and civil society?
3. Do you believe it is in the interests of citizens and consumers for a quasi-autonomous non-governmental organisation to damage small-scale VOD services by imposing punitive fees they can ill afford?
4. Do you share the view of ULTV, MPs in the last Parliament and civil society groups that Ofcom should devise a fair fee structure for VOD regulation which does not damage small-scale operators or stifle experimental services and innovation?

Thank you for considering our questions – we look forward to your response.

Yours sincerely

UNITED FOR LOCAL TELEVISION
7 May 2010

IMPORTANT NOTICE

ULTV has sought to minimise the repetition of comments made in the introduction or in response to subsequent questions. Therefore, a number of questions are answered together.

This submission is intended to be read as a whole and in conjunction with the correspondence and views ULTV has previously given directly to Ofcom/ATVOD (ULTV trusts Ofcom will share with ATVOD copies of all correspondence between ULTV and Ofcom - copies available upon request).

ULTV is grateful to **GDB Secure Limited** for contributing comments to this Consultation response. The final document is the responsibility of ULTV.

The consultation Ofcom never wanted

1. Ofcom has now been forced by the government to consult on a decision it has already announced.¹
2. Ofcom’s approach to setting VOD editorial fees has been, to date:
 - to make a decision;
 - to insist it will not consult upon this decision;
 - to purport to consult on the decision when forced by legislation;
 - to fail to include any options within the Consultation which it regards as practical or workable other than its pre-announced decision.
3. Although Ofcom now claims that it has not yet reached a decision, this claim is contradicted by correspondence with ULTV and the Community Media Association (“CMA”). The Consultation fails to address any of the concerns which have previously been raised by ULTV/CMA:
 - in correspondence and emails;
 - at Ofcom’s Annual Plan stakeholder seminar and subsequent telephone conversations; and
 - in ULTV’s formal response to Ofcom’s Draft Annual Plan 2010/11 consultation.
4. Further, Ofcom dishonoured commitments to meet to discuss ULTV’s concerns. Although Ofcom did finally acquiesce to a meeting after publishing the Consultation, this was followed by an email once again rejecting ULTV’s proposals.

Ofcom’s misconduct

5. The timeline below further demonstrates Ofcom’s misconduct:

14 September 2009	Ofcom issues a short (six week) consultation on proposals for the regulation of VOD editorial. The executive summary and press release make no reference to fees and no questions are included in the document. However, a proposal for a flat-rate fee with no concessions (a “poll tax”) is included in the body of the document under the headline “ <i>Funding and Revenue Collection (further work is required in this area)</i> ”.
26 November 2009	The government’s Department for Culture, Media and Sport holds a stakeholder event on VOD regulation. Ofcom uses the event to publicly announce its decision to collect a universal poll tax and dismisses concerns raised by representatives of small-scale groups.

¹ http://www.ofcom.org.uk/consult/condocs/vod_proposals/vod_proposal.pdf - accessed date of this submission

4 December 2009	ULTV writes a letter of complaint to Stewart Purvis, Ofcom Partner for Content and Standards, opposing Ofcom's universal poll tax and calling for a "full public consultation".
9 December 2009	Ofcom issues its draft Annual Plan for 2010/11 with no commitment to consult on VOD regulatory fees when new regulations are in place.
18 December 2009	Ofcom issues final policy statement on VOD regulation deciding in favour of a universal poll tax stating: "...a flat-rate fee system is a proportionate and practicable funding solution..."
15 January 2010	Ofcom writes to dismiss all concerns raised in ULTV's letter of 4 December 2009 and stating: "Having taken into account all the responses we remain satisfied that a flat-rate 'notification fee' is a proportionate and practicable funding solution in the short-term".
16 February 2010	ULTV submits formal complaint to Ofcom Chief Executive, Ed Richards, suggesting Ofcom is acting illegally in reaching any policy conclusion before the government's regulations are enacted.
25 February 2010	Government lays down legislation (coming into force 18 March 2010) requiring that VoD regulatory fees are "justified and proportionate having regard to the provider who will be required to pay it". The legislation also requires full prior consultation "with providers likely to be required to pay".

Inadequate pre-consultation

6. ULTV considers that issues which have the potential to damage the market for small-scale media service providers should always be subject to significant pre-consultation with relevant groups in line with Ofcom's stated "Consultation Principles".
7. ULTV has used its reasonable endeavours to address the questions raised by Ofcom within the time available. ULTV questions whether six weeks is an adequate consultation period given:
 - the reality that large numbers of small-scale groups are unlikely to be aware of the Consultation (not least since ULTV sees little evidence Ofcom has attempted to identify these organisations and make contact);
 - the complex and challenging nature of many of the questions raised (question 8 requires almost an entire page to reprint the question alone);
 - the time it can take to collect thoughts and evidence, draft submissions and gain board approval for final responses; and
 - the legal requirement to consult with "providers likely to be required to pay" places special responsibility on Ofcom to seek-out smaller providers who would ordinarily fall below the radar and involve them in the consultation process.

Rushed and ill-prepared

8. ULTV is concerned that the Consultation appears to have been rushed out by Ofcom without adequate thought or preparation – as well as no attempt at pre-consultation with small-scale groups most likely to be negatively impacted.
9. The Consultation states:

"The options put forward in this consultation have been agreed by ATVOD, and endorsed by Ofcom, as the appropriate options to consider for the 2010-2011 Fees."

10. ULTV notes the document is presented as a joint consultation between Ofcom and ATVOD. However, ULTV understands the new ATVOD board of directors had not even met prior to publication of the Consultation. ULTV questions why Ofcom rushed out the Consultation without allowing the new ATVOD board the opportunity to fully input to it (the former ATVOD board being dominated by major commercial interests).
11. ULTV is concerned that ATVOD is not left exposed to the risk of legal action resulting from the ongoing failure by Ofcom to implement an objective consultation exercise.

Wrong in principle – and devastating in practice

12. Nowhere, in the entire Consultation, does Ofcom/ATVOD seek to justify a universal poll tax on the basis it is fair or equitable. On the contrary, the Consultation appears to accept a poll tax with no concessions is the least fair option, stating:

“There are disadvantages to a flat-rate fee. It can be argued that depending on at what level it is set, a flat-rate fee can be seen to be inequitable and disproportionate and taking no account of VOD service providers’ business models or ability to pay, and imposes higher relative costs on smaller VOD service providers... There is also the issue that the level of a flat-rate fee would be dependent on factors external to the individual ODPS, as the more services that are subject to regulation, the lower the regulatory fee.

“We recognise that there are strong arguments that an option based on an ability to pay would, in principle, be a more equitable funding solution than a flat-rate fee.”

13. ULTV is disturbed that Ofcom caveats its support for a fee based on ability to pay by suggesting this is only fair *“in principle”*. ULTV believes that charging a universal poll tax which small-scale groups can ill-afford is not only wrong in principle – it is unfair, unreasonable, disproportionate and poorly targeted.
14. ULTV believes that Ofcom’s stated preference for a universal poll tax on VOD providers is not just wrong *“in principle”* – it is likely to be devastating in practice.

Inappropriate options

15. Not only does ULTV consider all of the three main fee options put forward in the Consultation as inappropriate but, remarkably, Ofcom itself makes clear that two out of the three proposals would be unworkable. As Ofcom says:

“...we state our initial analysis that, due to the lack of financial data and the nascent state of the VOD sector, we could not with any certainty or reliability propose a progressive fee system.”

16. Ofcom appears to believe the main advantage of a universal poll tax is that it is *“practicable”* – even though it seems resigned to accept that it is not particularly equitable *“from a theoretical point of view”*:

“although a flat-rate fee is not necessarily the most equitable approach from a theoretical point of view, in the circumstances, it appears to us to be the most practicable...”

17. ULTV considers that for Ofcom to purport to be consulting on the *“appropriate options”* at the same time as suggesting that only one of the options proposed is likely to be workable does not constitute a genuine consultation. By rushing out a

consultation without adequate preparation, Ofcom appears to ULTV to have put forward one workable option which is unfair and two alternative options which are impractical.

18. ULTV is concerned that Ofcom/ATVOD portrays the impression of undertaking a pseudo-consultation exercise, in which respondents are not given any fair or practical alternatives to the only option the Consultation states as “*practicable*”. ULTV is deeply disappointed Ofcom rejected the option of consulting with representatives of small-scale groups to review alternatives prior to publishing the Consultation – ULTV first requested and was promised a meeting with Ofcom in January 2010.

Ofcom’s preferred option

19. Rather than put forward a proposal which is “*proportionate and fair*” Ofcom has made clear its preferred option remains to set fees in a manner that means that the smallest VOD providers will disproportionately suffer. ULTV queries whether the problem is a lack of ability within Ofcom to devise a fair and workable fee structure or just a lack of any demonstrable will to do so.
20. ULTV has little choice but to question the purpose of putting forward views which Ofcom has already dismissed in correspondence with ULTV prior the publication of the Consultation. ULTV considers it to be prejudicial to an objective consultation exercise for Ofcom to refuse to include the proposal which ULTV has been advocating in correspondence with Ofcom since December 2009.
21. Whilst ULTV has invested time seeking to respond to the questions raised in the Consultation, ULTV is prompted to ask five questions of Ofcom which appear to remain unanswered – these are set out on the front cover of this document.

Next steps

22. ULTV understands Ofcom/ATVOD’s desire to act quickly but not by over-looking the interests of small-scale groups. ULTV is sorry that Ofcom/ATVOD chose to publish a consultation which, in ULTV’s view, included no sensible or workable options.
23. Regrettably, ULTV believes that a short period of further consultation is now required. If necessary, ULTV finds it difficult to imagine that ATVOD would fail to secure a further small interim loan on reasonable commercial terms either from the government or the market (secured by an Ofcom guarantee if necessary). This would help give Ofcom/ ATVOD the time necessary to properly address legitimate concerns raised by ULTV and others. ULTV will, of course, seek to contribute to constructive discussions prior to any final decisions being taken on fee structures by Ofcom/ATVOD.

Question 1

Do you have any comments on our analysis concerning the number of services that are likely to be subject to regulation?

Question 2

Do you have any comments on our estimates for regulating ODPS set out in paragraphs 3.23 to 3.29 above?

Ofcom’s use of misleading data

24. UDTV has consistently complained that Ofcom appears to be over-looking small-scale VOD services and the impact a universal poll tax would have on struggling organisations within communities.
25. In its response to the serious complaints raised by UDTV, Ofcom wrote in a letter dated 15 January 2010:

“Our current understanding of the size and rate of growth of the VOD industry also suggests that any flat rate ‘notification fee’ is actually likely to be less than the sum of £2000 per annum suggested in our consultation. I do not believe that a fee of less than £2000 is inappropriate or disproportionate for these services that are subject to regulation”.

26. UDTV regards Ofcom’s response to its concerns as dismissive. However, it is now evident that Ofcom’s data was also inaccurate and misleading. Ofcom has now presented a consultation which entirely contradicts its claim in correspondence that *“the size and rate of growth of the VOD industry”* suggests a universal poll tax would be *“under £2000”*. UDTV is disappointed Ofcom relied upon inaccurate data as evidence when seeking to dismiss UDTV’s concerns.

Ofcom cannot know how many VOD services exist

27. UDTV queries why Ofcom is requesting comments on its *“analysis concerning the number of services that are likely to be subject to regulation”* when this analysis is not set out anywhere within the Consultation.
28. Ofcom has admitted it cannot know how many VOD service providers exist.² On 28 April 2010 Ofcom stated in response to a request for information submitted by UDTV:

“In practice, the regulatory status of a service depends on a number of factors, some of which can only be determined by a service provider; this is particularly the case in relation to establishing editorial control. As we stated in the consultation, we have undertaken a provisional and necessarily limited survey, on the basis of which we believe 150 to be a reasonable estimate of the number of notifiable services for the purposes of setting a regulatory fee. We did consider the GDB platform, although the availability of services was somewhat volatile during the review period.

“As well as uncertainty over the determination of editorial control, there are uncertainties: around the extent to which services provided on multiple platforms or in multiple territories will require multiple notifications (which is the case if the programming provided is not “substantially the same”); and over the extent to which entities providing content under more than one brand on a single platform will submit multiple notifications.”

29. All of the statements made above have always been known to Ofcom. UDTV is surprised and disappointed Ofcom has managed to reach a figure of “150” notifiable services without giving any reasonable explanation as to how it managed to arrive at this figure – or allowing its full analysis to be subjected to the rigour of public scrutiny.

Ofcom’s approach appears to be to ignore small-scale services

² Throughout this submission references to “VOD services” or “VOD providers” (or similar) refer only to services that come within the definition of an *“on-demand programme service”* under section 368A of the Communications Act 2003. UDTV acknowledges there are likely to be other forms of video-on-demand services which do not fall within this definition and will not be required to pay the ATVOD levy.

30. Ofcom admits that the “*availability of services was somewhat volatile during the review period*”. This suggests Ofcom is aware that the VOD sector is in its embryonic stages with different types of organisations experimenting and innovating. It also suggests Ofcom is aware that some smaller services are under financial pressure and may cease providing services if their cost burden increases.
31. As Ofcom is aware, even experimental short-term VOD services have a requirement to notify ATVOD (whether or not they choose to do so is obviously another matter). ULTV does not condone or encourage civil disobedience – it is a matter for individuals to decide if they wish to comply with the requirement to notify their service to ATVOD. ULTV assumes that, as of today, many small-scale groups remain unaware of their requirement to notify ATVOD given that Ofcom/ATVOD since little or no effort appears to have been made to identify small-scale groups and consult with them.
32. It is apparent to ULTV that Ofcom has never sought to produce any list of small-scale groups it believes could be required to pay a fee towards the costs of VOD editorial regulation (the “ATVOD levy”). Instead, Ofcom has simply focused on producing a list of groups it believes are likely to comply with the requirement to notify. Ofcom cannot fail to be aware that the prospect of having to pay a prohibitive levy is likely to be a serious disincentive to small-scale groups to identify themselves.
33. It is notable Ofcom believes that the regulatory status of a service “*can only be determined by a service provider*”. If this is true it has serious implications for Ofcom’s ability to enforce the ATVOD levy at all.

The importance of surveying small-scale providers

34. Ofcom does not appear to have given any serious consideration to exploring how many local/student/community or other small-scale VOD services may already exist.
35. Ofcom states:

“...it would be an inefficient use of resources to try to survey the entire internet in advance...”
36. This is indisputable. However, Ofcom’s decision to deliberately not to seek to assess the number of small-scale services which may fall under the scope of the regulations suggests that it has little interest or concern whether its policy may have a devastating impact on small-scale providers. ULTV finds it difficult to imagine Ofcom/ATVOD has come across no VOD providers or prospective providers that might struggle to pay a fee of £2,500.
37. The CMA charges its members around £60 per annum and ULTV understands that some organisations find this too high to pay – despite the many benefits of membership. It seems extraordinary to ULTV that Ofcom/ATVOD believes a fee 40 times this amount many be entirely affordable to small-scale, challenged, VOD services seeking to make a constructive and positive contribution to society.

Ofcom’s assessment is flawed

38. The Consultation appears to recognise that its own assessment is flawed:

“..we reviewed the customer/partner lists of some of the IPTV and online VOD platforms such as: BrightCove, Narrowstep, Tangy TV and Fetch TV, to try to identify

larger UK providers from outside the broadcast sector. Providing a strictly accurate number, in advance of all relevant services being required to notify, is not feasible, in light of a number of practical hurdles.”

39. ULTV regards it as an extraordinary confession for Ofcom to state that it only sought “to identify **larger UK providers**”. Why did Ofcom not seek to identify smaller providers? Is Ofcom really not interested in surveying small-scale services? ULTV is seriously concerned Ofcom has failed to make even a modicum of effort to understand the implications of its proposals on smaller providers.
40. Ofcom’s assessment may or may or may not be adequate as a broad estimate of the number of “*larger UK providers*” willing and able to identify themselves to ATVOD. However, even Ofcom appears to accept it has done little more than the bare minimum in terms of sector analysis. As an attempt to consider how many small-scale groups could be seriously damaged by a universal poll tax, Ofcom’s assessment appears to ULTV to be wholly flawed.
41. ULTV reserves judgement on ATVOD’s cost estimates in the absence of a full budgetary breakdown and explanation. However, ULTV welcomes the principle of regulating a substantial sized sector on a very low cost-base. ULTV praises Ofcom and ATVOD’s initiative in this regard and has no doubt both organisations will want to review, in due course, the success of this approach and whether it holds any wider lessons for regulatory best practice in the future.

Question 3

Do you agree or disagree with us taking account of the criteria and principles outlined in paragraphs 3.31 and 3.34 above in developing our approach for the 2010-2011 Fees?

Charging principles have no statutory force

42. ULTV held a meeting with Ofcom and ATVOD to discuss its concerns on 8 April 2010. ULTV reiterated it is in favour of flat-rate fee to pay for VOD editorial regulation so long as an appropriate concessionary rate is applied for small-scale groups. ULTV expressed its disappointment Ofcom had omitted this option from the Consultation.
43. In an email to ULTV dated 19 April 2010, Ofcom wrote:

“On the second issue of whether regulatory fees could be waived or reduced, the legal provisions allow for different fees to be levied “in relation to different cases or circumstances” on ODPS providers (the provider of a service being the particular person who has editorial responsibility for what is included in that service). This is a statutory power rather than an obligation and is reflected in Options A and B in our Consultation Document. However, it would not be consistent with our charging principles to give a discount from the applicable tariff for a particular provider and the legal framework does not allow for providers to be exempted altogether from the requirement to pay a fee.”
44. ULTV is surprised and disappointed that Ofcom appears to have rejected its constructive suggestion on no more than the basis that “*it would not be consistent with our charging principles to give a discount to a particular provider*”. ULTV notes that Ofcom’s so-called “*charging principles*” have no statutory force and are open to ongoing amendment. ULTV cannot understand why Ofcom would seek to elevate its own self-invented “*charging principles*” over its non-negotiable duty, set in statute, to implement fees that are “*fair and proportionate*”.

45. ULTV does not believe Ofcom should be unduly influenced by charging principles which were established at a different time, for a different purpose and in different circumstances. Whilst ULTV believes that regulatory fees should be proportionate across all areas covered by Ofcom (including VOD editorial), ULTV believes that it would be wise for Ofcom to reviews some of the widely-accepted principles of taxation, not just its own “*charging principles*”.
46. Two of the most important principles of taxation are, in ULTV’s view:
- convenience: taxes should be enforced in a manner that facilitates voluntary compliance to the maximum extent possible and in a manner than encourages (rather than discourages) investment and productivity; and
 - equity: taxes should equally burden all individuals or entities in similar economic circumstances.
47. ULTV believes Ofcom should not be unduly influenced by any considerations other than its statutory duties. These duties require Ofcom to regulate and impose fees in a manner which is “*fair and proportionate*”. ULTV regards it as noteworthy that Ofcom’s universal poll tax fails to comply with its own charging principles as well as the government’s regulations and Ofcom’s wider statutory duties to citizens and consumers.

Question 4

Do you agree or disagree with our assessment of the alternative bases of charging VOD regulatory fees laid out in figure 2 above?

Question 5

Do you agree or disagree with our assessment of the alternative attributes laid out in figure 3 above?

Question 6

- a) Do you agree or disagree with our analysis above in relation to a minimum payment mechanism?
- b) Are there any other bases and attributes for a regulatory fees approach that we have not considered?

Question 7

Do you agree or disagree with the approach we have adopted to drawing up options for the 2011-2012 Fees as outlined in Section 3?

Question 8

a) Do you agree or disagree with our preferred approach - Option (C) – as a means of ensuring an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011?. In your response please give as much detail as possible giving reasons how a flat-rate fees approach would be a means of ensuring an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011.

b) Do you agree or disagree with either Options (A) or (B) as a means of ensuring an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011? In your response, please give as much detail as possible. In particular please provide the following: i) details of either actual revenues attributable to any ODPS that you may operate, or estimates of revenues in the case of a new or proposed ODPS that you intend to launch [any revenue information provided will be treated in confidence];

ii) reasons how a revenue-based approach would ensure that ODPS would make an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011; and

iii) if appropriate alternative tariffs and/or levels of minimum payment, giving reasons as to how these would ensure that ODPS would make an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011.

c) Are there any other options for a regulatory fees approach, that we have not considered, that you feel would be appropriate? If so, please state why, giving as much detail as possible, and stating how an alternative option would ensure that ODPS would make an appropriate aggregate contribution, to be recovered by way of fees payable by ODPS in the period 1 April 2010 to 31 March 2011, towards the likely costs of carrying out the relevant functions during the period 19 December 2009 to 31 March 2011.

The ULTV proposal

48. As Ofcom is aware, ULTV has consistently advocated an alternative to all of the options presented in the Consultation. ULTV proposes a simple flat-rate ATVOD levy for 2010-11 but with an **exemption** for any company that can demonstrate its group of companies has a consolidated gross turnover (from all business activities) of under £1million per annum in its most recent signed accounts (hereafter the "ULTV proposal"). As explained in this submission, ULTV uses the term 'exemption' to mean an exemption from a requirement to pay the vast majority of the ATVOD levy (i.e. a "concession").
49. ULTV continues to advocate the ULTV proposal. However, if Ofcom/ATVOD does not feel that the ULTV proposal **on its own** is sufficient to assess the ability of a provider to pay the full ATVOD levy then ULTV accepts that additional concession 'tests' could also be applied.
50. By way of example, Ofcom/ATVOD might conclude that a provider could only be eligible to apply for the concession if the company **and** its group of companies has a consolidated gross turnover of under £1million from all trading activities **and**, in addition, its most recent accounts demonstrate that the provider and its ultimate parent company:
- (i) has profits before tax of under £100,000; **and**
 - (ii) has not paid a dividend to its shareholders to an aggregate value of more than £100,000 OR is constituted as a not-for-profit company; **and**;
 - (iii) no individual director has been paid fees or salary package to an aggregate value of £100,000 or more (recognising that some might potentially argue it is inappropriate to offer a concession to groups who manage to pay a substantial remuneration to their own directors).

51. All of the criteria set out above involves the provision of data readily available to any company and group seeking to demonstrate the validity of its small-scale status (i.e. in the form of full accounts which all UK trading companies are required to produce for Customs and Revenue or other accounting records retained for business and tax purposes).
52. UDTV recognises the benefits of setting objective tests that allow small-scale groups to apply for a concession to the ATVOD levy by clearly demonstrating they are limited in their size of trading – with separate tests covering turnover, profitability and, potentially, payments to directors. These tests have been carefully designed by UDTV with a view to fulfilling Ofcom/ATVOD's legal duty to ensure that groups do not face regulatory fees which are disproportionate to them and, therefore, unaffordable.
53. UDTV notes that nowhere does the legislation suggest regulatory fees should be based on the revenues associated with VOD content – the legislation refers to the “*provider*” not the “*programme service*”. UDTV is perplexed as to why Ofcom appears to have largely ignored the legislation when drawing up the options for consultation.
54. UDTV recognises it may be possible to refine and improve the UDTV proposal based on experience and consultation in future years. Whilst UDTV would have preferred more time to develop the UDTV proposal in discussion with its members and others, UDTV considers it to be a significant improvement upon any of the proposals contained within the Consultation.

Simple and practical

55. UDTV accepts that it would not be “*fair and proportionate*” to impose a fee structure which involves significantly adding to the bureaucratic burden imposed on VOD providers. UDTV believes that no company should be required to apply for a concession if they feel that it is more convenient to pay the full fee.
56. Under the UDTV proposal, groups which qualify for small-scale status would ‘self-certify’ this status. Where a company is applying for a concession to the ATVOD levy it would need to declare its shareholder structure and whether it is part of a larger group of companies. A company would need to complete an application form and provide accompanying incontrovertible evidence to support their application to be granted a concession as a ‘small-scale’ operator (in a form acceptable to Ofcom).
57. UDTV's view is that the concessionary criteria should be objective and simple to implement. The most obvious form of evidence acceptable to Ofcom seems to UDTV likely to be signed year-end accounts. However, in exceptional circumstances, Ofcom may, at its discretion, may wish to accept other objective evidence of a business qualifying for a concession (in the unlikely event a person can justify not supplying their accounts to Ofcom but can produce another form of verifiable confirmation of meeting the concession tests).
58. To encourage innovation, UDTV would suggest that new companies with no existing group turnover from any trading activity should automatically be able to apply for small-scale status in their first year of operation so long as they can demonstrate they are not under the legal control of any third party.

Easily verified

59. There is unlikely to be any notifiable business that does not monitor its turnover. There is a statutory obligation on all UK companies to supply accurate copies of

accounts to HM Customs and Revenue following the end of their accounting period and to place copies of accounts (in summary form for smaller companies) at Companies House.

60. UDTV believes that the UDTV proposal would be simple to implement – requiring no more than a form to be completed by those seeking a concession with submitted with their most recent accounts highlighting all relevant information for Ofcom. The time that would be required for Ofcom to assess applications for concessionary status should be no more than a few minutes.
61. UDTV does not envisage companies would seek to falsely apply for concessionary status which would, in any case, constitute an act of fraud. In practice, Ofcom already is aware of the broadcast turnover of many companies likely to be notifying in the 2010-11 year.
62. UDTV believes that, assuming groups are not dishonestly hiding their revenues from HM Customs and Revenue, Ofcom could implement the UDTV proposal with the confidence it was fairly applying a concession to small-scale VOD providers who would otherwise be at risk of suffering hardship.

Nature of concession

63. UDTV believes that a major purpose of applying a discount to the full ATVOD levy should be ensure small-scale groups do not find themselves suddenly and unexpectedly facing a new fee they can ill afford.
64. In considering a minimum fee, the Consultation states:

“...we have used a minimum fee of £1,000...the minimum fee which is currently paid by Ofcom Television Licensable Content Service Licensees.”
65. UDTV believes it is unreasonable for Ofcom/ATVOD to compare the costs of VOD regulation to the regulation of existing Ofcom broadcast licences. A provider of a satellite TV channel may have annual carriage-related fees of several hundred thousand pounds. A VOD service provider may have distribution fees which are close to zero. UDTV believes that Ofcom should be looking at setting regulatory fees which are fair and proportionate relative to the business which is the subject of regulation – not an entirely unconnected business with an unrelated business model.
66. For Ofcom to compare a small-scale VOD service provider with a satellite TV channel's application or broadcast fees (which are likely to be a very small proportion of their overall transmission and other fixed costs) seems to UDTV to be absurd. Ofcom plans to spend £21.1m on regulating and licensing TV in 2010/11 and a further £2.85m on regulating and licensing radio. The projected costs of operating ATVOD appear to pale into insignificance relative to these amounts.
67. UDTV considers that for the Consultation to suggest that a minimum rate of £1,000 might be “*fair and proportionate*” suggests a worrying disconnect between Ofcom/ATVOD and the circumstances of existing and prospective small-scale VOD services. UDTV would be likely to conclude, if implemented, that Ofcom/ATVOD has no desire to encourage the provision of VOD services by small-scale groups.
68. Ofcom is aware that, when amending fee levels in the past, Ofcom has offered transitional relief to assist groups and seek to mitigate hardship. UDTV is disappointed Ofcom has not considered adopting a similar approach on this

occasion. Instead, Ofcom/ATVOD appear to be adopting the opposite approach – setting an onerous poll tax likely to prove unaffordable to some small-scale groups.

69. Whilst ULTV would prefer a total exemption for all small-scale groups (no payment), ULTV acknowledges Ofcom/ATVOD may wish to charge a minor fee as a contribution towards incremental administrative costs. If this is the case then ULTV would expect Ofcom/ATVOD to err on the side of caution and ensure the concessionary rate is set a level that all small-scale groups can be expected to manage to stretch to.
70. ULTV believes that a concessionary rate of around £20-25 in 2010-11 to cover the costs of postage and stationery would be reasonable (potentially increasing to a maximum of £40-50 if not paid promptly). ULTV believes £40-50 is a material sum of money to some small-scale groups and that a concessionary fee set at a higher level could lead to substantial suffering.
71. ULTV notes that the Consultation suggested the possibility of a fee of £46 per annum for groups with revenue from VOD provision of up to £100,000 per annum (figure 4 of the Consultation).
72. ULTV is opposed to a minimum fixed rate if it is unrelated to affordability. ULTV does not believe that a parallel with Ofcom's rate card is rational. In broadcasting, Ofcom has traditionally implemented high levels of regulation and passed on costs relating to many other important issues of licensing, spectrum planning and coordination. In contrast, one of the purposes of Ofcom designating ATVOD as co-regulator was to implement an entirely new type of regulation which is minimal and light-touch.

Incremental costs to ATVOD

73. ULTV understands that ATVOD's operational costs are expected to be relatively fixed (within reason) regardless as to how many notifiable services identify themselves. ULTV believes that the true incremental cost to ATVOD and Ofcom of regulating small-scale VOD groups is likely to be close to zero, given that staff systems and procedures will already be in place.
74. ULTV notes that enforcement activity is likely to be extremely challenging and expensive if groups do not voluntarily comply with their requirement to notify ATVOD. Ofcom has admitted in correspondence with a member of ULTV that it is almost impossible to determine editorial control without the cooperation of VOD providers:

“In practice, the regulatory status of a service depends on a number of factors, some of which can only be determined by a service provider..”
75. ULTV would suggest that setting a concessionary rate at a maximum of £25-£50 is likely to lead to far lower levels of evasion/avoidance and, therefore, far lower true cost to the regulators. ULTV believes that any attempt at enforcement activity (i.e. tackling evasion) could be more expensive than simply setting an affordable rate which encourages compliance – especially given the prospect that some groups might be forced to close if Ofcom/ATVOD seriously attempt to enforce a levy that is unaffordable.

Difficult to enforce

76. ULTV notes Ofcom/ATVOD have themselves described a universal poll tax as “*disproportionate*”. According to the Consultation:

“A flat-rate fee would be disproportionate, incurring higher relative costs to smaller regulated services.”

77. ULTV believes that Ofcom/ATVOD would be acting in a manner that is irresponsible and irrational as well as disproportionate and illegal by setting a fee which is so high that it is unaffordable for some VOD providers whilst for others it is relatively insignificant. If this encourages evasion or avoidance one result could be that consumers/citizens suffer as VOD services remain unknown to the regulatory authorities and non-compliant with the regulatory regime.
78. One of the primary objectives of introducing VOD regulation was to put unlicensed non-broadcast operations on a more level regulatory footing with licensed broadcasters. ULTV believes that a universal poll tax, far from being practical, could prove difficult to enforce amongst some of the smaller groups generally not known to Ofcom/ATVOD and, therefore, potentially lead to regulatory goals not being achieved.
79. The Consultation makes reference to the fees payable by radio Restricted Service Licences (RSLs). ULTV notes these are relatively expensive and may well prove a disincentive to some groups to provide radio RSLs (notably no such fees are paid by the many illegal ‘pirate’ broadcasters who choose not to abide by the Ofcom licensing regime). However, ULTV also notes the significant work undertaken by Ofcom in spectrum planning and licensing without which no radio RSLs would be available. In contrast, ULTV assumes many small-scale VOD providers will seriously question what the benefits are of paying an onerous annual fee to ATVOD.
80. In a meeting with ULTV on 8 April 2010, Ofcom indicated that it was unlikely ATVOD would prioritise enforcement activity in the current financial year. Whilst this is noted, ULTV feels it is unreasonable for Ofcom/ATVOD to effectively force VOD services who can ill-afford the ATVOD levy to choose between evasion/avoidance; ceasing to supply VOD services; or otherwise paying a fee which would result in hardship or suffering to their VOD service or wider business.
81. ULTV notes that it is possible small-scale groups will reach the conclusion there are not likely to be any serious repercussions if they fail to notify their services to ATVOD. Regardless, ULTV would suggest the regime would not be working effectively if Ofcom/ATVOD manage to lose the goodwill and support of small-scale groups by imposing a fee they can ill afford.

Advantages of the ULTV proposal

82. Ofcom states:

“We note that the VOD sector presents opportunities for a range of new business models involving platform operators, ODPS providers, advertisers and advertising networks, giving rise to a complex revenue picture. Therefore, we consider that it is not a trivial task to define revenue.”

83. ULTV agrees with Ofcom that the VOD sector “presents opportunities for a range of new business models”. ULTV notes this includes opportunities for small-scale groups to provide video services. ULTV further notes that there are a range of reasons why groups may wish to supply VOD services and that generating substantial revenue may not necessarily be a primary motivation at the current time. ULTV agrees with

Ofcom that it is likely to be impractical to agree a commonly-accepted definition of VOD revenue in the near future.

84. UDTV believes that group revenue is likely to be a far fairer and more accurate reflection of a provider's financial circumstances (and therefore a better legal basis for a concessionary rate) than purely examining VOD revenues.
85. UDTV obviously accepts that there is no perfect fee structure that will satisfy all. However, the UDTV proposal has been designed with the intention of being (i) fair and (ii) proportionate. UDTV is concerned the same cannot be said about any of the proposals contained within the Consultation and least of all a universal poll tax where the fee level only relates to the number of groups who notify and not the providers' ability to pay.
86. UDTV acknowledges that past group turnover may not always be an accurate reflection of future group turnover as businesses develop. However, as a proxy for ability to pay turnover is, in UDTV's view, likely to broadly reflect the size of the company and its relative 'pain' at being required to pay a fee of circa £2,500. Alongside other potential 'tests' of data reading available from company accounts (such as group profitability and/or the level of director fees) UDTV believes it is not beyond Ofcom/ATVOD's capability to assess the financial circumstances of a provider.
87. UDTV believes that groups with a turnover of under £1million and a profitability of under £100,000 in their most recent financial year are typically marginal businesses. VOD service provision is unlikely to be core to their group and there could be a serious risk they would be discouraged from offering a VOD service by the imposition of an onerous fee. UDTV believes that, for any group with a turnover of £1 million or more, the full ATVOD levy is much less likely to discourage service provision.
88. UDTV suggests the turnover level for concessions (and any other 'tests') should be set carefully so as to minimise – rather than maximise – the potential damage caused to a nascent sector.
89. UDTV accepts that precise tests can be debated but advocates £1 million turnover and £100,000 profitability as sensible 'cut off' points likely to gain broad acceptance. UDTV notes that Ofcom has previously described radio stations generating a profit of under £100,000 per annum as generating "*only limited returns*".³

"Even many profitable stations make only limited returns. 50% of licence-holding companies either lose money or make less than £100k per annum"
90. UDTV finds it inconceivable that any of the 150 potential VOD service providers so far identified by Ofcom could successfully apply for a concession on the basis of having a group turnover less than £1 million. Nevertheless, UDTV notes that it would not be a difficult task to identify the likely candidates for a concession from those who have so far notified their services to ATVOD (if any) prior to Ofcom/ATVOD setting the final level of the fixed-rate notification fee for 2010-11.
91. The UDTV proposal for a concessionary rate for small-scale groups has been designed to give financial certainty to ATVOD in 2010-11. UDTV notes this cannot be said of any of the alternatives to a universal poll tax which Ofcom/ATVOD purport to be consulting upon.

³ http://www.ofcom.org.uk/consult/condocs/radio_future/radio_future.pdf - accessed date of this submission

The importance of assessing group turnover

92. ULTV notes that the legislation allows Ofcom/ATVOD to apply concessions to the ATVOD levy “*in relation to different cases or circumstances*”.⁴ ULTV considers that it is impossible to consider the “*circumstances*” of any single company without taking into account the group of companies it belongs to (if any). It is possible for a company with a very small turnover to belong to a highly-profitable group of companies with substantial financial resources.
93. In line with the legislation, ULTV proposes that a concession should be applied to the ATVOD levy based on the “*circumstances*” of the provider. ULTV believes these circumstances must include an assessment of the group company resources which could be made available to a provider. Where a company is legally controlled by another party, it is a decision for the controlling party to determine what group resources from its consolidated revenue and profits it chooses to make available to its subsidiary (if any).
94. ULTV believes that a well-resourced group has the option of facilitating inter-company funding to support the development of new services and that trading from a number of activities contributes to day-to-day cash-flow. Indeed, ULTV suspects that a large number of existing VOD services would not exist if their companies were purely dependent upon revenues generated by VOD trading.
95. It seems likely to ULTV that, in many circumstances, VOD services rely upon the support of group’s non-VOD trading activities. ULTV finds it difficult to accept that a group with a turnover of £1 million or more (from all trading) could argue it does not have the resources to pay the ATVOD levy. Should a parent company not wish to offer funding to its subsidiary, it is free to decide that the group should cease to provide a VOD service – just as it can under Ofcom’s current proposal for a universal poll tax.
96. In the Consultation, Ofcom notes there is anecdotal evidence that many groups are willing to cross-subsidise loss-making VOD services. ULTV does not consider it realistic to assume that a well-resourced group would cease to provide a VOD service purely to avoid an ATVOD levy of around £2,500 per annum. ULTV believes it is fair, reasonable and proportionate to take into account the “*circumstances*” of a provider in line with the legislation.
97. ULTV notes that no party whom Ofcom/ATVOD expects to pay a universal poll tax would be materially disadvantaged by the ULTV proposal. Rather than creating large numbers of ‘losers’ the ULTV proposal only creates ‘winners’ in the form of small scale groups who would be most at risk of severe hardship from a universal poll tax.

ULTV regards Ofcom’s proposals as irrational

98. ULTV considers it to be irrational for Ofcom/ATVOD to only consult on alternatives to a universal ‘poll tax’ based on a concept of “*qualifying turnover*”. ULTV does not consider Ofcom/ATVOD’s approach to this Consultation can be regarded as reasonable. ULTV cannot see how measuring VOD-exclusive turnover is likely to have any practical application or relevance for assessing a provider’s ability to pay VOD regulatory fees if its service is in its embryonic stages.

⁴ http://www.opsi.gov.uk/si/si2010/uksi_20100419_en_1 - accessed date of this submission

99. UDTV notes that the question for Ofcom in law is whether the ATVOD fee is “*justifiable and proportionate having regard to the provider who will be required to pay it*”. Where a “*provider*” has the benefit of the circumstances of belonging to a well-resourced group, it seems obvious to UDTV that it is a decision for the provider’s beneficial shareholder to finance or otherwise support the development of the VOD service if owns (should it wish to do so).
100. It is far from unusual for a parent company to provide a guarantee or finance to support the development of a trading subsidiary within a group of companies.
101. A universal poll tax has no relationship to VOD turnover which suggests Ofcom recognises there is no legal difficulty in using criteria to set fees which are unrelated to the success or otherwise of the VOD service. UDTV cannot understand Ofcom’s apparent unwillingness to include group turnover as an option for consultation when setting the criteria for an ATVOD levy concession:
- UDTV notes that group turnover is a common and widely used metric for measuring eligibility for government contracts and government grants;
 - group turnover is used by HM Revenue and Customs for assessing liability for corporation tax;
 - historically, Ofcom often requested copies of group accounts when assessing radio broadcasting licence applications; and
 - Ofcom previously applied exemptions to certain reporting requests (e.g. equal opportunities) on the basis of group staff numbers.
102. UDTV is disappointed Ofcom appears to have rashly dismissed assessment of group turnover and other groups resources as an option for testing small-scale status without any adequate public consultation. UDTV regards it as grossly unreasonable for Ofcom to have dismissed the UDTV proposal prior to the publication of the Consultation.

Ofcom should not act as though it is above the law

103. On 19 April 2010, Ofcom wrote in an email to UDTV:
- “...we did not consider that calculating fees using group turnover would be a viable option as it would not be consistent with Ofcom’s charging principles and was not legally sustainable, not least because it raised issues of double jeopardy and would not be fair, reasonable or proportionate.”*
104. UDTV does not comprehend how Ofcom can argue that charging a universal poll tax with devastating consequences for small-scale services is “*fair and reasonable*” but applying a discount to groups with a very small turnover is “*not legally sustainable*”. It appears to UDTV that Ofcom is simply turning the law on its head.
105. It seems to UDTV that Ofcom is confused – appearing to believe that taking account of a provider’s ability to pay would “*not be legally sustainable*” whilst arguing that a universal poll tax has full “*regard to the provider who will be required to pay it*”. UDTV is concerned Ofcom appears to be making a decision against the UDTV proposal based upon the most absurd grounds. UDTV believes Ofcom should not seek to act as though it is above the law of the land.
106. The UDTV proposal is, in effect, based on the principle of “free school meals”. The concept is that small-scale groups should receive a substantial discount because

they do not have an overall income level (i.e. pass a fair threshold) that enables them to afford the full levy. ULTV believes this is a concept that is simple, fair and rational. ULTV cannot understand why Ofcom has set its face against it.

The issue of ‘double jeopardy’

107. ULTV notes Ofcom’s apparent concern that use of group turnover would raise “*issues of double jeopardy*”. It seems obvious to ULTV there are no issues of “*double jeopardy*”. According to Wikipedia: “*Double jeopardy is a procedural defence that forbids a defendant from being tried twice for the same crime on the same set of facts.*” It is inexplicable to ULTV how Ofcom can cite “*double jeopardy*” as a rational reason for not applying a discount to very low turnover groups who cannot afford to pay the full ATVOD levy.
108. There are, of course, numerous examples of multiple taxation on income. ULTV does not believe it is legitimate to argue that some broadcasters already pay regulatory fees relating to part of their turnover and therefore the ATVOD levy should not take account of this turnover when considering who is eligible for concessions to the ATVOD levy.
109. ULTV believes that existing Ofcom television licensees are likely to have many significant advantages over many other VOD service providers. Existing licensees have a primary outlet for their content and an established broadcast platform to aggressively cross-promote their VOD services.
110. Far from raising **any** issues of “double jeopardy” it is clear to ULTV that a VOD service can be seen as benefiting from and forming part of a broadcaster’s extended group offering. Should a group wish to offer such a service (it has no obligation to do so) ULTV maintains it is entirely reasonable to ask such a group with sufficient revenues to pay a flat-rate fee.
111. Whilst it would be an option to allow existing Ofcom licensees to deduct broadcast revenue from their group turnover, ULTV does not believe this would be fair or reasonable. A VOD service provided by an established UK broadcaster can, in ULTV’s view, only rationally be looked at as part of their broadcasting business as a whole when assessing ability to pay the ATVOD levy. ULTV believes it is fair Ofcom licensees contribute towards VOD editorial regulation on the same basis as all other parties.
112. Double jeopardy cannot be said to apply when a group is purchasing a new authority or consent. No existing Ofcom licensee is compelled by statute to provide a VOD service. Should they be willing and able to do so, then ULTV believes they must make an “*appropriate*” contribution towards VOD regulatory fees in line with the legislation. Furthermore, ULTV is now suggesting Ofcom also considers additional criteria which means an application for a concession could be based on more than one factor (e.g. assessing other measures of a group’s size and resources such as its profitability and remuneration to directors) and not group turnover alone.
113. ULTV does not believe that any the grounds stated by Ofcom for refusing to consult on the ULTV proposal stand up to any objective scrutiny.

The ‘litigious broadcaster’ issue

114. At a meeting held between Ofcom, ATVOD and ULTV’s representative on 8 April 2010, some considerable time was spent debating whether a hypothetical substantial

broadcaster might seek to take legal action if Ofcom were to apply a concession to small-scale groups (based on criteria of a group turnover test as per the ULTV proposal).

115. To be blunt, ULTV regards it as ridiculous that Ofcom should waste significant time contemplating such an implausible prospect. ULTV believes Ofcom must be aware there is no realistic prospect of a substantial UK-wide broadcaster taking legal action in an attempt to save around £2,500 in regulatory fees and no realistic prospect of a successful outcome in the event they were to seek to do so.
116. ULTV believes it is important that Ofcom implement fees that are fair, proportionate and legally justifiable. As ULTV made clear at the meeting of 8 April 2010, it regards Ofcom's use of the 'litigious broadcaster' question to justify its preference for a universal poll tax as entirely illegitimate.
117. ULTV appeals to Ofcom/ATVOD to reach a decision on fee structures based on a balanced and informed judgment – not a flawed, rushed and ill conceived assessment based upon absurdities.

Industry support for a flat-rate fee

118. On 8 April 2010, Ofcom informed ULTV that a number of VOD service providers have already volunteered to pay the ATVOD levy up-front because they are keen to see the new regulatory structure work. ULTV does not believe there are any legitimate grounds for Ofcom to be concerned of lack of industry support for the new regulatory framework or a flat-rate fee structure implemented fairly with appropriate concessions as ULTV proposes.
119. ULTV believes the fundamental question for the directors of both Ofcom and ATVOD is whether a provider has a reasonable ability to access the resources it requires to pay the full ATVOD levy. ULTV is aware of VOD providers and prospective providers for whom the ATVOD levy might be expected to create genuine difficulty. Where a provider faces significant difficulty in paying the ATVOD levy, ULTV maintains it would be illegal for Ofcom and ATVOD to impose the fee.
120. ULTV believes its proposal is sustainable, rational, fair, modest, proportionate and targeted at achieving public policy objectives.

Ofcom's statutory duties

121. ULTV finds it difficult to imagine how Ofcom can fail to understand the meaning of imposing fees that have "*regard to the provider who will be required to pay it*" or fail to realise why a universal poll tax of £2,500 is incompatible with this legal requirement. ULTV is of the view that none of the current three proposals set out in the Consultation fulfil Ofcom's legal requirements and that the Consultation process is therefore flawed.
122. ULTV outlined a proposal for small-scale groups to be exempt from the full ATVOD levy in a letter to Ofcom dated 4 December 2009. Subsequently, on 15 January 2010, Ofcom wrote to ULTV rejecting the ULTV proposal stating:

"While we consider the current (flat-rate fee) proposal to be fair and reasonable, we would nevertheless expect the co-regulator to review the notification fee system before 1 April 2011."

123. ULTV is not comforted by the fact that ATVOD expects to radically review fee structures again prior to 2011. If Ofcom/ATVOD recognise that a universal poll tax needs to be reviewed almost immediately this only further reinforces the impression both organisations are aware it is deeply unfair to introduce it at all.
124. ULTV finds it unlikely that any of the challenges faced in setting fee structures will subside in the current financial year. Ofcom/ATVOD cannot offer any realistic prospect of a fairer or more proportionate system being devised that will offer certainty to small-scale groups weighing investment decisions.
125. The government did not lay the most recent VOD regulations before Parliament until 25 February 2010. However, even before seeing these regulations, ULTV felt confident it would be incompatible with Ofcom's general duties under Section 3 of the Communications Act 2003 to force citizen-focused groups to cease to provide a VOD service by imposing fees which they can ill afford.
126. ULTV believes it is inconceivable that the government or Parliament intended that Ofcom would act in a manner likely to cause serious damage to small-scale service providers. ULTV is concerned Ofcom is now proposing to act in a manner incompatible with its core statutory duties to citizens and consumers.

Considering the purpose of ATVOD

127. ULTV rejects the argument that the core purpose of ATVOD in its first year is to establish administrative systems and structures and that all VOD providers should contribute equally towards this purpose.
128. The Consultation states:

"...it is not clear that a revenue-based regulatory fee would be the most likely way to match the particular costs of regulating different services. This is because revenue is not necessarily correlated to the amount of regulatory activity attributable to each regulated service."
129. ULTV fails to understand Ofcom/ATVOD's rationale for making this argument. If Ofcom/ATVOD believe that the only fair method to pay for public services is by the amount that users benefit then no government would ever seek to implement a progressive tax system.
130. ULTV accepts it is not possible to predict with certainty how ATVOD's workload will develop. Neither does ULTV believe it is reasonable to suggest that each licensee should pay for the precise amount they contribute to ATVOD's work. ATVOD is only an agent of the government – it is not an adviser which starts to clock up time it bills to clients.
131. Overall, ULTV believes it is broadly reasonable to assume that small-sale groups will generate less web traffic than other VOD operators and that low group turnover will, in the absence of any other metrics, be a broadly accurate proxy for regulatory activity since larger groups will have more resources to invest in developing substantial services.

Relevant charging principles

132. ULTV believes it is irrational for Ofcom/ATVOD to seek to argue that a concession should not be applied to those whose group circumstances mean they cannot afford to pay the ATVOD levy.
133. ULTV believes that Ofcom's statutory duties must take precedence over its non-statutory charging principles. Furthermore, ULTV regards many of Ofcom's non-statutory charging principles as irrelevant given that they were developed in a different time and for an entirely different purpose with application in unrelated circumstances. Nevertheless, ULTV believes that the ULTV proposal meets Ofcom's charging principles to a far greater degree than any of the proposals set out within the Consultation:
- **fairness** – this is regarded by ULTV as the most important principle as it is a statutory requirement and, unlike a universal poll tax, a flat-rate fee with a concession for small-scale groups is, in ULTV's view, likely to be widely accepted as equitable had Ofcom been willing to consult on this proposal;
 - **cost-reflectiveness** – this principle does not appear to ULTV to be applicable since there is only one category of stakeholder (VOD service provider) – even so, ULTV notes that there are many examples of Ofcom implementing fees which do not reflect underlying costs of regulation (e.g. all progressive fee structures);
 - **reliability** – unlike a universal poll tax, ULTV believes that a flat-rate fee with a concession for small-scale groups would mean that there is no sudden and unexpected burden for small-scale groups in 2010-11 and it is less likely there would be any urgency to radically revise fee structures in future years;
 - **simplicity** – the application of objective concession criteria would be simple to administer and use data that stakeholders would anyway gather for their own management purposes;
 - **be easily verified** – the concession criteria proposed by ULTV would be easily verifiable to ensure industry-wide compliance;
 - **adaptable** – unlike a universal poll tax, a flat-rate fee with a concession would not impede the market from offering a wide range of new small-scale services (as ULTV believes is increasingly likely as technology develops) and would be consistent with Ofcom's wider policy to support local media and new entrants; and
 - **relevance** – ULTV does not regard this principle as applicable since no licence is being issued and turnover narrowly related to VOD activities is unlikely to reflect a group's financial circumstances or ability to pay (presumably the reason why Ofcom has ignored this principle by proposing a universal poll tax); nevertheless ULTV regards a flat-rate fee with a concession based on group turnover as of broad relevance given that small-scale groups might be regarded as less likely to promote and grow substantial VOD operations as other suppliers.

Inconsistent application of charging principles

134. ULTV notes that Ofcom has a history of inconsistency in the manner in which its charging principles are applied. For example, Ofcom states:

“Ofcom recognises that alignment with cost is only one factor to be taken into account when judging the detailed structure of fees. Other objectives also need to be considered, including the impact of fee levels on the incentives of licensees, and the

interaction with Ofcom's goals for the development of the sector, for example in relation to digital radio."⁵

135. ULTV does not regard it as acceptable behaviour for Ofcom to refuse to consult on the ULTV proposal by making reference to its charging principles when there are numerous examples of Ofcom being highly selective in which charging principles it chooses to adhere – especially when an unaffordable poll tax is incompatible with Ofcom's charging principles.
136. ULTV does not believe that ATVOD levy should be set with reference to unrelated tariffs on the Ofcom rate card. Nevertheless, ULTV notes that, on Ofcom's current rate card, local DAB multiplex licences pay a fixed flat-rate administrative fee of £500 per annum (five times less than the proposed ATVOD levy). Whilst this fee is not directly related to turnover, it is deliberately set at a level designed to be affordable to multiplex operators and their expected financial circumstances as spectrum gatekeepers renting out capacity to third parties.

Ofcom appears to accept revenue-related tariffs would be the fairest option

137. The Consultation states:

"Revenue could be a viable basis for calculating a regulatory fee for several reasons. In terms of the statutory tests, firstly, it can be seen as being "justifiable and proportionate having regard to the provider who will be required to pay" the regulatory fee... revenue would fulfil the criteria of: fairness (in that it would more readily match regulated services' ability to pay)..."

138. However, the Consultation warns:

"Further, anecdotal evidence suggests that even some of the largest VOD services fail to generate substantial (VOD) revenues..."

139. This suggests that Ofcom/ATVOD understands that group turnover would be a fairer and more practical option for assessing a concessionary rate than narrow VOD turnover. However, despite making this argument, Ofcom/ATVOD failed to even allow this option to be included within the Consultation.
140. In an email to ULTV dated 4 April 2010, Ofcom stated that its reason for refusing to consult on the ULTV proposal was that *"it would not be consistent with our charging principles to give a discount from the applicable tariff for a particular provider"*. ULTV regards this justification as reprehensible in light of its power to levy different fees *"in relation to different cases or circumstances"*.
141. ULTV believes there is a strong prospect the ULTV proposal would have achieved broad consensus if Ofcom had not refused to put it to consultation. ULTV is disappointed its efforts to engage in constructive dialogue with Ofcom have proven unsuccessful to date. ULTV considers that Ofcom's actions have been prejudicial to a fair, transparent and objective consultation procedure.

Other options rejected by ULTV

⁵ http://www.ofcom.org.uk/consult/condocs/licence_admin_fee/licence_admin.pdf - accessed date of this submission

142. ULTV has considered a number of alternative options which it does not endorse even though they may be considered slightly preferable to any of the Consultation proposals.
143. Alternative options rejected by ULTV include:
- applying automatic exemptions to not-for-profit / charitable VOD providers;
 - applying reduced fees to VOD services who can demonstrate that the majority of content they supply is produced by volunteers rather than professionals; and/or
 - limiting the amount of content made available by a service provider.
144. For example, ULTV acknowledges that some could argue small-scale groups may generally have less ability to invest in significant quantities of original VOD content than larger groups. Therefore Ofcom/ATVOD could offer an exemption to the ATVOD levy to groups willing to commit to limiting the amount of TV-like programming made available via on-line services. Any such limits would need to be subject to analysis and consultation but might, for example, be under 100 hours at any one point in time and/or an agreement not to vary more than 20 hours of non-linear content made available on-line on a weekly basis (but excluding video content that is not 'in scope').
145. Under this alternative proposal, it would be for ATVOD to require providers supply data in a set format for compliance checking from time-to-time. ULTV believes the advantage of this option is that it is inconceivable a large group would choose to limit its business potential and add to its own administrative burden for the sake of saving under £3,000 per annum. In contrast, a small-scale group may choose to accept this limitation rather than break the law or close. This might, for example, make it viable for Restricted Television Service Licences, student TV societies, voluntary groups and community organisations to provide limited 'catch up' and other VOD services. However, ULTV rejects this option because it would or could, inter alia:
- unfairly limit the potential of small-scale groups to serve their communities;
 - place a burden on groups to delete content whenever new content is added on-line;
 - have potentially damaging social consequences– such as limiting the archive of socially-valuable news, current affairs or community programming available on-line;
 - add administrative bureaucracy to providers through the requirement to maintain additional records for compliance checking;
 - create confusion about where to draw lines between services which are 'in scope' but subject to the full ATVOD levy, 'in scope' but not subject to the full levy and not 'in scope' at all; and/or
 - have other undesirable or unforeseen consequences.
146. ULTV notes that the Consultation specifically rejected this option.

Ofcom/ATVOD appear confused

147. Ofcom sent an email to ULTV on 19 April 2010 claiming that it is not legally able to wholly exempt some VOD providers from paying the ATVOD levy:

“the legal framework does not allow for providers to be exempted altogether from the requirement to pay a fee”.

148. If this is the case, ULTV finds it surprising that Ofcom/ATVOD omit to mention this anywhere in their Consultation. On the contrary, figure 4 of the Consultation specifically proposed a model in which providers with no revenue paid no fee and the Consultation asked for comments on the benefits of this very option stating:

“Using a minimum revenue threshold removes the smallest regulated entities from having to pay a regulatory fee.”

149. ULTV is concerned that Ofcom is purporting to consult on a policy which it now is claiming is illegal. ULTV fears this is systematic of Ofcom’s approach which appears marred by confusion, flawed analysis and general disregard for the law. In the meantime, Ofcom has refused ULTV’s request to consult on the ULTV proposal.
150. In its email to ULTV dated 19 April 2010, the reason provided by Ofcom for refusing to consult on the ULTV proposal was that this *“would not be consistent with our charging principles”*. ULTV expects Ofcom to fully assess all proposals made by stakeholders – not to simply dismiss them on the basis of *“principles”* which have no statutory basis. There is only one legitimate foundation for Ofcom to base its policy decisions and that is the law of the land.

Question 9

Are there any potential impacts arising from the options we have laid out in Section 4 that we have not considered?

No impact assessment

151. ULTV expected Ofcom to analyse all options and consider their impacts prior to launching the Consultation. ULTV has searched the Consultation in vain for an impact assessment on the proposals contained within the Consultation or other options such as the ULTV proposal. Whilst Ofcom claims that its impact assessment is contained within the body of the Consultation document, ULTV has found nothing that reasonably constitutes a statutory regulatory impact assessment.
152. ULTV is surprised that Ofcom/ATVOD appears to have failed to conduct a serious cost/benefit analysis including an examination of:
- how many small-scale groups might be impacted by the Consultation proposals and what this impact could be;
 - the risk of current or prospective small-scale services closing / not launching and what impact this might have on experimental services, innovation, citizen groups and wider societal benefit;
 - the many costs and risks of Ofcom’s proposal including the risk of evasion/avoidance; and
 - whether a universal poll tax is in the interests of the VOD industry and, more widely, society relative to other funding options such as a concessionary rate based on turnover tests and/or a group’s other financial circumstances.
153. ULTV believes that considering the potential impact of a policy should be Ofcom’s first priority when developing new proposals – not an afterthought. On this occasion, Ofcom gives the impression of being desperate to develop almost any policy which raises revenue for ATVOD – no matter what the impact on industry or society. ULTV finds it difficult to imagine Ofcom is unaware of the risks of its policy even in the absence of any serious impact assessment.

154. UDTV believes Ofcom's failure to produce any meaningful impact assessment for public comment renders the Consultation not fit for purpose. In the absence of any proportionality test, it is impossible to understand how Ofcom/ATVOD can reach any conclusion on the proportionality of its policy.
155. Major broadcasters such as Sky or ITV may have a £billion+ turnover of which little or none may be directly or indirectly related to VOD provision. It cannot reasonably argued that a lack of VOD revenues impacts on these companies ability to pay an annual fee of circa £2,500 as they strive to develop and grow multi-platform businesses in the interests of their shareholders. In contrast, a community media or other small-scale group may have a comparatively small turnover and be forced to close its VOD service if required to pay a £2,500 poll tax.
156. It may be difficult in some circumstances to separate VOD revenues from wider revenues obtained by a group. UDTV is perplexed as to why Ofcom has ignored group when assessing ability to pay and only looked at VOD revenues which may not accurately reflect the financial circumstances of a provider..
157. UDTV does not believe that community organisations and civil society groups should be presented with the potentially realistic choice between repairing a leaking roof, assisting some of the most vulnerable in society or paying a £2,500 ATVOD levy to subsidise regulation for some of the UK's largest broadcasters
158. Ofcom is aware of long-standing concerns from some stakeholders that it has consistently failed in its statutory duty to consider the implications of its policy decisions on citizens. Ofcom acknowledges:
- "The overwhelming majority of Ofcom's work has both citizen and consumer implications. Where appropriate we do seek to be explicit about what these interests are. In our forthcoming revision of the internal Ofcom guidelines on policy appraisal we will introduce a requirement to specifically state, where appropriate, the separate interests of citizens and consumers when making our policy decisions."*⁶
159. UDTV believes that the Consultation abjectly fails to take account of the impact of its proposals on citizens.

Impact of a universal poll tax

160. UDTV recognises that many small-scale and voluntary groups (including charities, community organisations and small media groups) employ staff and trade in challenging market conditions. UDTV believes these types of organisations are often highly marginal and could be discouraged from providing VOD services if required to pay the full ATVOD levy.
161. UDTV is aware of prospective local and community TV operators that have indicated their intention to cancel their plans to launch VOD services in the coming months if required to pay the full ATVOD levy.
162. UDTV believes that the number of small-scale groups seeking to provide VOD services is likely to grow exponentially as technology develops and new services (such as the Project Canvas proposal currently under review by the BBC Trust) continue to emerge.

⁶ http://www.ofcom.org.uk/consult/condocs/citizens/statement/Citizen_Statement.pdf - accessed date of this submission

163. ULTV has good reason to believe that a £2,500 poll tax will act as a serious disincentive to small-scale and citizen-based groups reviewing the prospect for notifiable VOD services. In contrast a concessionary rate for small-sale groups of a maximum of £40 is, in ULTV's view, likely to encourage service provision and compliance without impacting on ATVOD's ability to raise revenues from a flat-rate fee.
164. ULTV has a statutory duty to seek to secure the provision of a variety of television and radio stations catering for a wide range of tastes and interests. The Consultation does not explain whether and how a tax which disproportionately impacts on small-scale VOD services would be compatible with this duty.
165. ULTV considers the most likely result of Ofcom's policy would be that small-scale and not-for-profit groups in the community will be disadvantaged with consequent damage to those seeking to serve the disabled, the deaf, religious or minority ethnic groups, youth and senior citizens, rural and countryside groups, educational purposes, cultural purposes, geographic communities and/or other communities of interest.
166. As Ofcom is aware, the communications industry includes large-scale groups with billion+ turnovers and small-scale community media groups and many other services in between. There is now a 'third tier' which cannot generally afford broadcast licence fees or related costs but which is developing VOD content for the internet. It is this tier which Ofcom's universal poll tax appears to ULTV to be most at risk of seriously hindering, alongside other marginal providers.
167. ULTV believes that small-scale VOD businesses who do not use spectrum should not be charged a prohibitive poll tax simply for the right to help young people, senior citizens, the unemployed, community groups and others have a platform for expression and to contribute positively to society. ULTV believes these are public goods Ofcom should be encouraging, not potentially destroying. .

Question 10

- a) Do our proposals, as outlined in Section 4 concerning possible options for a regulatory fees approach for VOD services have any likely impacts in relation to matters of equality, specifically to gender, disability or ethnicity?
- b) Are there any other possible equality impacts that we have not considered?

168. ULTV is saddened that Ofcom has decided not to undertake a full equality impact assessment for this Consultation despite its statutory duty to do so. ULTV notes that justification for this stated in the Consultation is:

"On the basis of our initial EIA screening and the information currently available to us, Ofcom considers that it is not necessary for a full EIA to be undertaken as part of this consultation."

169. ULTV has worries that any "initial EIA screening" undertaken by Ofcom could not have been little more than cursory. For Ofcom's interest, ULTV draws attention to the previous equality impact assessment, contained within Ofcom's local media review discussion document, part of which is reproduced below.⁷

Black and minority ethnic (BME)

⁷ <http://www.ofcom.org.uk/research/tv/reports/lrmuk/lrmuk.pdf> - accessed date of this submission

Demographic data show that members of black and minority ethnic (BME) groups are unevenly dispersed throughout the UK. Therefore, policies which affect certain localities in different ways may have a differential impact on particular BME groups.

Our consumer research has previously indicated that community media in particular is used by a greater proportion of the BME community than of the population overall, and there are examples of community radio stations serving the needs of BME communities. Internet take-up among BME groups is also higher than in the population as a whole, and therefore, initiatives in this area may have a disproportionate impact on this diversity group.

Disability

There is no change to the requirements upon licensed television services to provide access services where required under the Broadcasting Code. In the event of a future decision to intervene to secure local television, a future EIA might for example, examine access services for such services.

We note that community media, including community radio, may have important role to play in promoting equality for disability groups. For example, one community station in Glasgow, Insight Radio, focuses on serving blind and partially-sighted audiences.

In relation to public funding for local content, we highlight the potential for conditions for public funding of community and other forms of local media to require the recipients to take account of the needs of the entire community, including members of BMEs and those with disabilities.

Ofcom's ongoing programme of consumer research enables Ofcom to continue to monitor the use and availability of local media by diversity groups and to build a sound evidence base for our ongoing work in this area.

170. ULTV trusts that Ofcom/ATVOD will recognise that community and small-scale media groups are able to provide valuable services for ethnic minorities, women, the disabled and those who are blind or partially sighted including, on occasions, sign-presented programming. These services are often operated primarily by volunteers under the umbrella of charitable or community groups. ULTV further trusts Ofcom/ATVOD will recognise it would be unacceptable to place some of these types of services in danger by failing to take account of the interests of small-scale groups.
171. ULTV finds it difficult to avoid the conclusion that Ofcom/ATVOD's failure to conduct an adequate impact assessment or equality impact assessment is related to its failure to conduct suitable research or analysis of the options when preparing for this Consultation. ULTV trusts Ofcom/ATVOD will not wish to damage the interests of some of the most vulnerable and least-well-served groups in society when reaching a policy conclusion on fee structures for 2010-11.

For further information, please contact Jaqui Devereux, ULTV Spokesperson:

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