

# Response of Channel 5 Broadcasting Ltd (Five) to Ofcom's Consultation on its Review of the Rules on Party Political and Referendum Broadcasts

Five welcomes the opportunity to respond to Ofcom's proposed changes to its Rules governing Party Political Broadcasts (PPBs) and Referendum Campaign Broadcasts (RCBs). However, we find Ofcom's approach disappointing in two respects.

Firstly, we believe Ofcom should have conducted a more wide ranging review of the rules governing party political broadcasting, as it said it would do in the aftermath of the 2005 General Election<sup>1</sup>. Although the government never published the findings of its 2004 consultation on party political broadcasting, we believe Ofcom has had ample time to carry out a full review of its own well ahead of the forthcoming General Election. Five and Channel 4 called jointly for such a review in 2004 and proposed that it take place in the first half of the current Parliament "and in any case ahead of the 2009 European elections"<sup>2</sup>. Having failed to conduct a full review in the current Parliament, we believe Ofcom should have committed this year to conduct such a review after next year's General Election, rather than engage in second-order rewriting of its present Rules.

Secondly, although Ofcom says its review of the current Rules aims "to provide greater clarity and flexibility where necessary in certain areas", we believe the new draft Rules are in several respects less clear, less flexible and more restrictive than the current Rules. We do not see the new Rules as an improvement, and question the rationale behind several of the proposed changes. We set out our views in the remainder of this response; covering substantive issues first and more detailed and drafting issues after that.

## Broadcaster Decisions Subject to Dispute

Draft Rules 3 and 4 suggest that decisions about length, frequency, allocation and scheduling are capable of dispute by political parties and appeal to Ofcom. Five believes firmly that this should not be the case, as each of these decisions is different.

- The Rules already constrain broadcasters as to the lengths of broadcasts they can offer (current rule 14; draft Rule 20). It is for parties to choose the length of broadcast they want; broadcasters have no decisions to make.

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<sup>1</sup> Ofcom press release, *Viewer attitudes to television coverage of the 2005 General Election*, 9 September 2005, [http://www.ofcom.org.uk/media/news/2005/09/nr\\_20050909](http://www.ofcom.org.uk/media/news/2005/09/nr_20050909)

<sup>2</sup> Joint Response of Channel 4 Television Corporation and Channel 5 Broadcasting Ltd (Five) to Ofcom's Consultation on its proposed Rules on Party Political and Referendum Broadcasts, page 1

- The Rules set out no minimum requirements about how frequent broadcasts need to be. Therefore, there is no basis for any dispute or appeal by political parties. For the avoidance of doubt, all references to frequency should be removed in the absence of Rules.
- Broadcasters are already constrained as to when they can schedule broadcasts (current Rules 15 and 16; draft Rules 21 and 22). Within these constraints, broadcasters need the freedom to schedule PPBs at times that suit their overall schedules and obligations to their viewers. It is not appropriate or practical for detailed scheduling decisions to be subject to dispute by the parties. They have not been up to now, and it would be a major departure for such a change to be introduced.
- Therefore, the only broadcaster decisions that should be capable of dispute by the parties are about the allocation of broadcasts.

It is allocation decisions about which parties may disagree legitimately with the judgements exercised by broadcasters. Therefore, parties should be able to dispute with broadcasters only allocation decisions and, if still not satisfied, appeal to Ofcom.

### **Allocation Criteria**

Draft Rule 13 keeps intact the basic criterion for General Elections and other first-past-the-post (FPTP) elections (the “one sixth” rule), but expands on the current wording for proportional representation (PR) elections in a way that fails to address the real issues that need to be looked at when deciding how to allocate broadcasts for such elections.

In all elections, broadcasters need to limit the number of parties that can qualify for a broadcast for two reasons. Firstly, because there is limited broadcast time available due to other pressures on their schedules. Secondly, to ensure that the parties allocated PPBs are electorally credible, and that the airwaves are not flooded with fringe or marginal parties that are not mounting a serious electoral challenge.

In FPTP elections, these requirements are met by the need for parties to stand in at least one sixth of constituencies to qualify for a broadcast. This ensures that only parties that are mounting a serious electoral effort can claim a broadcast.

However, the arrangements for PR elections are clearly unsatisfactory. Broadcasters require parties to stand as many candidates as there are seats in all contested constituencies to qualify for a broadcast. But there is no compelling electoral reason for parties to stand a full slate of candidates in a PR election; even the major parties know they can only win some of these seats, while the limit of smaller parties’ ambitions is to win a single seat in each multi-member constituency. So parties stand a full slate of candidates, not as a sign of their electoral credibility, but in order to gain a PPB. However, broadcasters would be opposed to reducing the present requirement unilaterally, as this would enable a host of minor, fringe and even frivolous parties to gain a broadcast through standing a minimum number of candidates.

We are not suggesting this issue is easy to resolve. But we do believe it needs to be addressed properly, through a full review of Ofcom's Rules. As no PR elections are scheduled until the elections for the Scottish Parliament and the Welsh Assembly in May 2011, we believe there would be plenty of time for Ofcom to conduct the full review of its PPB rules that we are advocating.

### **Five, Channel 4 and Wales (Rule 12)**

Draft Rule 12 maintains the current position, of requiring Five to offer broadcasts to both the SNP and Plaid Cymru while requiring Channel 4 to offer broadcasts only to the SNP. This position is clearly based on the historic division of analogue broadcasting between Channel 4 and S4C, with the latter broadcasting on the fourth channel in Wales while Channel 4 broadcast to the rest of the United Kingdom.

However, from 3 March 2010 digital switchover will be completed in Wales<sup>3</sup>. This means that at the next General Election Channel 4 will be as widely available in Wales as Five. Therefore, we cannot see any continuing justification for the requirement for Five to show PPBs from Plaid Cymru not to apply to Channel 4 as well.

We do not believe a major burden need be placed on Channel 4 by putting them on the same basis as Five. In 2005, Five offered Plaid Cymru a series of three broadcasts. If in the 2010 election, Plaid Cymru was to be allocated one broadcast on Five and one on Channel 4 this would be broadly proportionate to what it received in 2005 (given that Channel 4 commands a larger audience share than Five).

Therefore, we propose that draft Rule 12 be amended, firstly to require Channel 4 to broadcast a Plaid Cymru broadcast and secondly to remove the obligation to show that party "a series of two or more" broadcasts, so that a single broadcast on each channel could suffice.

### **Clarity of the Allocation Rules**

There are effectively two sets of criteria: one that applies to Channel 3 licensees, dependent on their ability to transmit different programmes in different nations; and another which applies to Five, Channel 4 and national commercial radio, all of which transmit their programme schedules on a pan-UK basis. We do not believe Rules 12-17 are sufficiently clear in distinguishing between these two criteria, and in some cases may be misleading (for example, draft Rule 15 makes no sense for pan-UK broadcasters, as by definition they are not able to consider the four nations of the UK separately).

Five believes it would aid clarity, and help political parties understand the Rules, if they were redrafted on the basis of two sets of criteria: firstly those applying to Channel 3 and secondly those applying to all other broadcasters obliged to carry PPBs. We would hope to be consulted on the exact wording of any such redraft.

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<sup>3</sup> See [http://www.digitaluk.co.uk/when\\_do\\_i\\_switch/wales](http://www.digitaluk.co.uk/when_do_i_switch/wales)

## **Broadcaster Appeals to Ofcom**

Draft Rule 4 (and points 4 and 5 of the guideline procedures) make provision for broadcasters to refer a dispute to Ofcom. This is unnecessary and confusing. Broadcasters should be responsible for making initial decisions and then considering representations from parties. It is then for parties to refer the matter to Ofcom if they remain dissatisfied.

## **Indemnities**

Five is concerned at the apparent downgrading of Ofcom's view on requiring indemnities from political parties. It is Five's practice to require written indemnities from all parties allocated broadcasts at each election. We feel supported in requiring this by current Rule 4, which states "Broadcasters are advised to seek legal indemnities from parties..." The replacement of this by a footnote to draft Rule 6 saying merely "Licensees may also wish to seek legal indemnities from political parties..." suggests that indemnities are voluntary and could put us in a difficult position if a party allocated a broadcast refused to provide an indemnity. In such circumstances, we would much prefer to rely on the more robust wording of the current Rule.

## **Scheduling**

Draft Rule 21 may make a material difference to the scheduling obligations on Five (and Channel 4). Current Rule 15 is explicit that in Scotland and Wales only ITV is obliged to carry PPBs by the SNP and Plaid Cymru respectively in peak time. The draft Rule says major party broadcasts in "the relevant nation" must be carried in peak; this could be interpreted as placing a requirement on Five to broadcast SNP and Plaid Cymru broadcasts in peak time, if for Five "the relevant nation" refers to the whole United Kingdom, in which the SNP and Plaid Cymru are major parties. If "the relevant nation" does not refer to the United Kingdom as a whole, it would mean there was no requirement on Five to show PPBs in peak time at all. Frankly, the current rule is much clearer.

## **Detailed Comments on Proposed Rules**

We have a number of observations on other aspects of the draft Rules, which we set out below.

**Rule 1 line 4** The word "every" should be removed and the word "channel" be put into the plural. The draft Rule implies that PPBs and RCBs must be shown by every licensed broadcaster, which is not the case. The Communications Act uses the word

“every”<sup>4</sup> to require the regulatory regime for all broadcasters to be governed by Ofcom’s Code, not to suggest that all channels should carry all broadcasts.

**Rule 3** This Rule implies that decisions about length, frequency, allocation and scheduling are all taken at the same time. In practice, because of uncertainties about which parties may qualify for broadcasts in an election and the corresponding need to schedule broadcasts at short notice, these decisions may be taken at different times. So “decision” (line 5) should be in the plural.

**Rule 14 line 3** It would be better if “particular” were replaced by “previous corresponding”. This would more clearly cater for the tendency of certain parties to gain far larger shares of the vote in some elections (such as European Elections) than in others (such as General Elections).

**Rule 17** Ofcom will be aware that these are not the criteria used by Five in practise although, as our criteria are more liberal, any party passing the test set out in the Ofcom rules would automatically qualify for a broadcast on Five. Also, the word “additionally” (line 2) is unnecessary.

### Detailed Comments on Proposed Disputes Guidelines

We have several observations on other aspects of the proposed Guidelines for dealing with disputes, in addition to those already mentioned. We set these out below.

**Guideline 2** The membership of the Elections Committee should be included in the Guidelines. At the very least, the Guidelines should cross-refer to the relevant page of the Ofcom website.

**Guidelines 3 and 4** In line with our proposed changes to the Rules, this Guideline should refer only to the allocation of broadcasts and not to length, frequency or scheduling.

**Guideline 6** The word “normally” should be added to the phrase “in writing by e-mail”; Ofcom should not put itself in the position of potentially having to turn down a referral because it arrived in a form other than e-mail. Secondly, a new second sentence should be added along the lines of “If a Party does not refer a matter to Ofcom as soon as reasonably practicable, then Ofcom reserves the right not to accept the dispute”: parties should respond promptly, and not hold off until an election date looms, which could put additional pressure on Ofcom and its Licensee.

**Guideline 9 line 8** “Very rapidly” should be replaced by “promptly”. We recognise that in the run-up to an election decisions need to be taken quickly, but we would not wish to be subject to having to respond to a complaint “very rapidly” when speed might conflict with thoroughness

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<sup>4</sup> Communications Act, 2003,s 333 (1)

**Guideline 11** Licensees should be given a further opportunity to respond to representations made by the party. It would be unreasonable, and out of keeping with Ofcom's procedures for considering content standards cases and fairness and privacy cases to allow a complainant (in this case, a political party) two opportunities to state its case and the Licensee only one.

**Guideline 14** Add at end for clarity "in which case both the party and the Licensee will be invited to attend".

*Channel 5 Broadcasting Ltd*

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