

21 May 2009

Mr John Bufton
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Philip Graf
Deputy Chairman

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Dear Mr Bufton

**Ofcom Election Committee's Determination of the UKIP Wales's Party Election
Broadcast Dispute with ITV**

I am writing to inform you that Ofcom's Election Committee ("the Committee") met on the afternoon of Tuesday 19 May 2009 to determine the party election broadcast ("PEB") dispute which you referred to us on behalf of the UK Independence Party in Wales ("UKIP Wales") by letter dated 13 May 2009 ("your referral letter").

You complained against the decision of ITV in Wales to allocate UKIP Wales a single PEB ahead of the European Parliamentary Elections on 4 June 2009 (in which you are UKIP Wales's lead candidate) and asked for an equal number of PEBs to those allocated to the Welsh Liberal Democrats. You also asked that at least one PEB be scheduled for as soon as possible to coincide with postal voters receiving their ballot papers around 21 May 2009.

For the reasons set out below, the Committee has determined that UKIP should be allocated two PEBs in this election, to be scheduled fairly and appropriately by ITV having regard to the election timetable in Wales, and to the timing when postal voters receive and complete their ballot papers.

Background

The Committee has determined this dispute under section 333 of the Communications Act 2003, which requires Ofcom to ensure that party political broadcasts (including PEBs) and referendum campaign broadcasts are included in the services of every 'licensed public service channel' (here, ITV Wales).

For these purposes, Ofcom applies its *Rules on Party Political and Referendum Broadcasts*¹ (October 2004) (“the PPRB Ofcom Rules”).

As Ofcom stated in its letter dated 14th May 2009, the Committee met to determine this dispute urgently because the election period started on 27th April 2009 and part of your complaint was that a PEB should be broadcast for UKIP Wales around the 21st May, two days after the Committee’s meeting.

In that context, and in seeking to determine the dispute fairly to you and ITV, the Committee carefully considered the contents of your initial referral letter; ITV’s letter of response to your dispute dated 15 May 2009 (enclosing its UK-Wide schedule for PEBs); and your further email of 18 May 2009 in reply to ITV’s representations.

The Dispute

Your Representations

It was clear from your referral letter that your dispute had two aspects. First, you complained that UKIP Wales was entitled to be allocated the same number of PEBs as the Welsh Liberal Democrats (i.e. three) on the basis that UKIP Wales received more votes than the Welsh Liberal Democrats in the European Parliamentary Elections in 2004. You supplemented this aspect of your complaint with further points in your email of 18 May 2009.

Second, your referral letter complained that ITV should schedule at least one PEB for UKIP Wales before postal voters in Wales receive their ballot papers around 21 May 2009, as ITV has done for the Welsh Liberal Democrats. You then indicated in your email on 18 May 2009 that you thought it appropriate for a PEB to be broadcast “*as soon as possible to reach at least some of the postal voters before they return their ballot papers*” (which you understood would be sent to voters on 20 May), and that UKIP Wales would “*like to keep the [PEB] already scheduled by ITV for 27th May 2009.*”

Finally, in your email on 15 May 2009 you stated that you had not received any indication as to what PEB allocation ITV was going to grant UKIP Wales.

ITV’s Response

In its letter of response to your dispute dated 15 May 2009, ITV stated that its decision to allocate UKIP Wales one PEB, and to schedule it on 27 May 2009, complied with the PPRB Ofcom Rules (and the Broadcasting Code). In summary, it relied on the following points:

- (i) The Liberal Democrats are defined as a “major party” under the PPRB Rules (and the Broadcasting Code) whereas UKIP is not. Therefore, UKIP is not automatically entitled to three PEBs – its minimum entitlement (if it has one) is a single PEB.

¹ Available at <http://www.ofcom.org.uk/tv/ifi/guidance/ppbrules/ppbrules.pdf>

- (ii) The PPRB Ofcom Rules give broadcasters discretion in relation to allocation of PEBs to parties. ITV exercised its discretion in compliance with the PPRB Ofcom Rules.
- (iii) Although UKIP did receive the same percentage of the vote as the Welsh Liberal Democrats in the 2004 European Elections, neither party won any seats in that election. Furthermore, UKIP (unlike the Welsh Liberal Democrats) “*has not enjoyed substantial levels of past and / or current support in Wales*”, as is clear from the results of the three elections held in Wales since 2004 (i.e. the Westminster Election 2005 and the Assembly (Constituency and Regions) Elections 2007.)
- (iv) By contrast, the Liberal Democrats are a major party which has enjoyed “*sustained and substantial support in Wales*”, and is therefore entitled to 3 PEBs.

In relation to its scheduling of one PEB for UKIP Wales, ITV stated that neither the PPRB Ofcom Rules nor the Broadcasting Rules specifies the date(s) upon which a PEB must be scheduled. Whilst ITV understood UKIP’s point about the return of postal ballots before the 27 May, it emphasised that the PEB comes a week before polling day and the voting deadline, and there is surely a benefit to UKIP Wales in having the PEB broadcast closer to polling day “*when it will be fresher in viewers’ minds.*”

In an email on 18 May 2009, ITV confirmed that it did not have any written correspondence with UKIP Wales or UKIP head office in relation to its PEB allocation for UKIP Wales. The only correspondence which it appeared to have had was with UKIP central office confirming PEB allocations in England.

The Committee’s Decision

Since your dispute raised the distinct but related issues of allocation and scheduling by a broadcaster which are addressed under separate parts of the PPRB Ofcom Rules, the Committee considered those issues in turn.

Allocation

In considering the issue of allocation under the PPRB Ofcom Rules, the Committee had regard to the fact that Rule 1 states “*Within the terms of these Rules, the precise allocation of broadcasts is the responsibility of licensees*”, and Rule 2 states that the PPRB Rules “*reflect minimum requirements [which] are not intended to fetter broadcasters’ discretion to make additional allocations*”.

The Committee considered Rule 8 which defines “major parties” for Great Britain in elections generally, and includes the Liberal Democrats but not UKIP.

The Committee then considered Rules 10 and 11 which set out minimum requirements in relation to allocation of PEBs as between “major parties” and “other registered parties”.

Rule 10 states that “*Major parties will normally be offered a series of broadcasts before each election...* “. It does not define what number will constitute a “series” in a given election; but ITV made clear in its letter of 15 May (and attached PEB schedule) that for this election it decided to allocate the Welsh Liberal Democrats 3 PEBs.

Rule 11 then states that “*Other registered parties may qualify for a [PEB] on the basis of contesting one sixth or more of the seats up for election, modified as appropriate for proportional representation systems. The four nations of the UK will be considered separately...*”

In addressing ITV’s position on allocation by reference to Rule 11, the Committee had to rely solely on ITV’s letter of 15 May 2009 as setting out the basis and reasons for ITV’s decision on allocation, which ITV wrote in response to your dispute. That was because ITV had not written to you or UKIP head office at the time when it made the decision.

In the Committee’s view, it was implicit in ITV’s letter that it considered that UKIP Wales satisfied the minimum discretionary qualifying requirement for one PEB as expressed in Rule 11 because it had decided to allocate a single PEB to UKIP Wales for this election.

Furthermore, the Committee considered that the reference in ITV’s letter of 15 May 2009 to UKIP Wales not having “*enjoyed substantial levels of past and/or current support in Wales*” suggested that ITV had also applied an additional specific criterion against which ITV had considered whether UKIP Wales should be granted further PEBs by comparison with the Liberal Democrats. In this respect, the Committee noted that ITV’s reference to “substantial levels of past and / or current support” reflected the “additional criterion” for the grant of further PEBs adopted by the Broadcasters’ Liaison Group (“BLG”), of which ITV is a member, for the European Elections in June 2009.

In the Committee’s view, it was reasonable and appropriate for ITV to apply a specifically adapted criterion for the allocation of further PEBs in this election (over and above the minimum requirement expressed in Rule 11) which would be satisfied if a party could show substantial levels of past and /or current electoral support across the Welsh nation, as adopted by the BLG.

However, the Committee was concerned that since ITV had not informed you of its decision, and in particular of the basis on which it had applied any criteria, this meant you could not make any representations or points of complaint with ITV directly before referring your dispute to the Committee. Your first opportunity to make representations was at this stage.

In the light of this failure, the Committee considered that the appropriate course was for it to re-take the allocation decision itself clearly applying the additional criterion which the Committee understood ITV to have applied, which reflected the BLG criterion and which the

Committee decided was reasonable to apply. The Committee did so by reference to the evidence and representations now put before it by you and ITV.

In determining whether UKIP met the threshold for this additional criterion of “substantial levels of past and/or current support in Wales”, the Committee considered that the particular evidence of UKIP Wales’s performance in the 2004 European election (where it polled 10.5% of the vote and actually received more votes than the Liberal Democrats) did show substantial levels of past support in Wales sufficient to grant more than one PEB to UKIP Wales in this election.

The Committee then considered whether it was appropriate to grant UKIP two more PEBs as you requested by further reference to UKIP’s performance in the 2004 European Elections, giving UKIP Wales parity with the Welsh Liberal Democrats. In the Committee’s view, this would give undue weight to UKIP’s performance in that one particular election. The Committee considered it should look at that result in the overall context of UKIP Wales’s performance in other more recent elections in Wales, as set out by ITV in its letter of 15 May 2009, in which UKIP Wales polled significantly less of the vote than the Liberal Democrats and the other major parties.

On that basis, the Committee decided it was fair and appropriate to grant UKIP Wales one more PEB.

Scheduling

Having reached that decision in relation to allocation, the Committee then addressed your request in relation to ITV’s scheduling. In the Committee’s view, scheduling remains a matter for the broadcaster other than as set out in Rules 15 and 16 of the PPRB Ofcom Rules which relate to the viewing times in which PEBs should be carried. The PPRB Ofcom Rules do not specify the specific dates within an election period when PEBs should be broadcast.

However, in the light of the particular circumstances of this case, the Committee would expect ITV to schedule UKIP Wales’s two PEBs fairly and appropriately having regard to the election timetable in Wales, and to the timing of the receipt and completion of postal voters’ ballot papers. In this connection, the Committee has noted your preference (as set out in your email on 18 May 2009) for UKIP Wales to keep its scheduled PEB broadcast on 27 May 2009.

Next Steps

Please note that Ofcom intends to publish this decision on its website in accordance with its normal process and the principles of transparency and best regulatory practice under section 3(3) of the Communications Act 2003.

Ofcom does not consider that this decision contains any confidential information. However, if you disagree, please let us know which information you consider to be confidential and why by midday on 22 May 2009, sending your response to [REDACTED]. If we do not hear from you by then, Ofcom will assume that you are content for this decision to be published.

Yours sincerely

Philip Graf

Chairman of the Ofcom Election Committee

cc: Chris Wissun, Director of Programme Compliance at ITV plc;
Elis Owen, Managing Director of ITV Wales