

## Freeview Response to OFCOM Consultation

### Proposed BSkyB Digital Terrestrial Television Service Second Consultation on Sky's Picnic Proposal

#### Introduction

This document outlines Freeview's response to the Ofcom consultation on Sky's Picnic proposal. Freeview's response has been prepared by the company's management team and does not necessarily represent the views or opinions of Freeview's shareholders, who have not been involved in this response. It is submitted in confidence.

In writing this response our focus has been to comment on the proposals from the perspective of Freeview's current and future consumers – in line with our objective of continuing to drive take up and enjoyment of a vibrant free broadcast proposition on DTT.

**1. Do you agree with our current view that under the Proposal, Sky would be likely to emerge as the sole or main retailer of pay TV services on DTT, given its market power in the wholesale markets for Core Premium channels and its incentives to withhold its Core Premium channels from other retailers of pay TV services?**

It is Freeview's view that if Sky were to get unconditional permission to launch pay services on the DTT platform it is highly likely that Sky would emerge as the sole or main retailer. Freeview agrees with Ofcom's view that Sky's market power and sole access to premium content (especially Premiership football) would result in its potentially dominating the platform. A monopoly position does not represent the best outcome for citizens in any sector.

**2. Do you agree with our current view that the emergence of Sky as the sole or main retailer of pay TV services on DTT and the consequent adverse effects on competition would be likely to occur in a relatively short timeframe?**

We cannot speculate as to how long it would take Sky to emerge as dominant on DTT. This would depend on marketing commitment, the strength of content available through Setanta at that time and other factors. However, Sky has proven a formidable competitor in other markets and has a significant marketing budget which one would expect to be put behind Picnic, to which it has made repeated commitment. Whether it takes a short time to happen or not, however, the negative impacts of a monopoly situation are still relevant.

**3. Do you agree with our current view that Sky should not be prohibited from retailing pay TV services on DTT provided that its Core Premium channels on DTT are made available to its retail competitors on a suitable wholesale basis?**

We agree with this view. Choice is good for consumers and in our research on the subject 84% of Freeview consumers indicated that they would like to have the choice of additional pay services on DTT – although only 22% indicated they would probably or definitely take it up<sup>1</sup>. In a separate recent study, between 12% and 14% of Freeview homes indicated they were interested in Picnic<sup>2</sup>.

We welcome the opportunity for Freeview viewers to access Sky's very attractive content. For that choice to be fully realised, and on the best terms for consumers, we agree with Ofcom that it should be offered by a number of retailers.

**4. If we were to consent to the Proposal, subject to a condition that Sky must make its Core Premium channels available to competing retailers on a suitable wholesale**

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<sup>1</sup> TNS / Freeview, Pay on DTT Quant, 2007

<sup>2</sup> Oliver and Ohlbaum Associates, TV enters the on demand age, December 2008

**basis, do you agree that it would not be necessary to impose additional conditions addressing the provision of TPS by Sky?**

To this we would make a general point. The success of Freeview has been derived in large part from the open nature of the platform which has led to much innovation, low prices, wide distribution and a good deal of product choice for consumers. We think it is important that this is preserved and that no one retailer should have exclusive access to boxes in homes. Any development of the Freeview platform should be open to preserve the unique ecology of the Freeview offering. From the evidence and Sky's commitment to an open specification we would say it is not necessary to impose conditions addressing the provision of TPS by Sky.

**5. Do you agree with our current view that the Proposal is unlikely to have a significant adverse effect on the DSO process or the appeal of Freeview to consumers?**

In Freeview's response to the first Picnic consultation we made it clear that we thought the simultaneous removal of Sky's three channels from Freeview would be detrimental to the brand and the platform. Whilst we accept that overall viewing share of these channels is very limited at around 2%, we do however contend that viewers' perception of the platform is diminished by removal of content and the faith they have in the Freeview brand is adversely affected to some degree. People invest in Freeview equipment to access particular free content, and the value of the investment is reduced when that free content is reduced.

In terms of the impact on DSO, we do not feel the proposal will impact negatively on the DSO process, so long as the marketing from any pay provider on DTT is clear and their claims and propositions do not mislead consumers in any way. Equipment should be sold with no obligation to take out a long term or open-ended subscription and that should be made clear.

**6. Do you agree with our current view that the extent to which the Proposal may increase complexity in the decision-making process for consumers wishing to buy DTT reception equipment, this issue can be managed effectively without the need for imposing relevant conditions on Sky?**

The proposal may increase complexity in the decision making process, but with that complexity comes choice that many Freeview consumers would welcome. Ofcom's proposed remedies will increase that choice and hence complexity further as more retailers offer the premium content proposition. We do not feel that it is appropriate to impose regulatory constraints in this area, but we will at all times seek to encourage clarity and accuracy in marketing claims in relation to DTT which helps consumers navigate this complex category.

**7. Do you consider that to the extent the Proposal may lead to a (greater) conflict of interests between Sky and the other members of DTVSL (the company which operates Freeview), this is a matter which in the first instance should be resolved by the relevant parties through commercial negotiation?**

Freeview's mission is to champion great free TV. The free nature of Freeview's proposition – offering a strong line up of high quality channels available to watch with no subscription, just by buying the equipment – has been at the heart of Freeview's exceptional consumer appeal and will remain central to future strategy. It is vital for Freeview, as in any organisation, that its shareholders act in such a way as to best support achievement of that mission, whatever their own core business or long term strategic aims.

**8. Do you agree with our current view that a wholesale must-offer arrangement, under which Sky must provide wholesale access to its Core Premium channels on DTT, is the most appropriate solution for us to pursue to address the competition concerns we have identified?**

Yes.

**9. Do you agree that simulcrypt is the most appropriate means of allowing multiple retailers to have access to Sky's Core Premium channels on DTT?**

We agree with Ofcom's choice of a method which is cost effective and allows multiple operators to transmit the premium content to consumers. Again a general point, it is not in consumers' interest to buy new equipment if they want to change supplier. This is particularly important in the current economic climate.

**10. Do you consider that Sky or relevant third party retailers on DTT would be provided with an incentive to reduce the effectiveness of a wholesale must-offer arrangement? If so, in what ways might they seek to achieve this?**

We do not feel it is appropriate to comment on whether any party would seek to reduce the effectiveness of the remedy. We would expect Ofcom to structure the arrangement in such a way as to prevent this.

A specific point that we would like to raise is that switching in this category is already being disincentivised by the bundling of TV services with broadband and phone services, by Sky among others – making it even more important to ensure that further lock-ins are avoided.

**11. If we were to consent to the Proposal subject to a suitable wholesale must-offer arrangement being put in place, do you consider that any ancillary conditions would be required to ensure that it was workable from a commercial and technical perspective? If so, please explain: (i) the ancillary conditions that would be required and the specific concern(s) they would seek to address and (ii) why there would be no other practicable and less restrictive means of addressing the concern(s) in question.**

The ancillary condition which we consider important is that relating to the need for a simulcrypting trial, which should be prerequisite to any technological introduction of this scale. It may be appropriate for Ofcom to impose a structure on this trial which limits the ability of any third party to stall progress to launch.

Regarding potential commercial conditions, we feel that the structure of the wholesale arrangement, in terms of incentives, access and pricing should be such that pre-emptive ancillary conditions are not required to ensure a healthy, competitive market.

**12. Do you consider that our indicative analysis, summarised at paragraphs 4.7 to 4.12 and set out more fully in Annex 6, supports our current view of whether we should opt for Option 1, Option 2 or Option 3?**

We cannot comment on the assumptions but the logic of the choice of Option 2 (wholesale content as a condition) is evident from the rest of the document.