

1 May 2009

James Allister QC MEP
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Ref: JA/KC/Electoral/4246-1

PHILIP GRAF
Deputy Chairman

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Dear Mr Allister,

Ofcom Election Committee's Determination of the TUV's Party Election Broadcast Dispute with UTV

I am writing to inform you that Ofcom's Election Committee ("the Committee") met on Monday 27th April 2009 to determine the dispute which you referred to us on 21st April 2009 against the decision of UTV in Northern Ireland to allocate the Traditional Unionist Voice party ("the TUV") one party election broadcast ("PEB") ahead of the European Parliamentary Elections on 4th June 2009.

In short, and for the reasons set out below, the Committee has determined that the TUV should be allocated one PEB in time for the European elections.

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, UTV).

For these purposes, Ofcom has applied its *Rules on Party Political and Referendum Broadcasts*¹ (October 2004) ("the PPRB Rules").

In seeking to determine your dispute promptly and fairly in time to coincide with the start of the election period, the Committee has carefully considered the contents of your letter to Ofcom dated 21st April 2009 ("the referral letter"), enclosing a letter from Ivor McConnell to

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

UTV / BBC dated 28th January 2009, and the further correspondence which you supplied on 22nd April 2009.

The Committee has also considered the letter of response to your dispute from UTV (dated 23rd April 2009), together with your letter dated 27th April 2009 commenting on UTV's response (including a letter from the BBC dated 18th February 2009).

The Dispute

You made clear in your referral letter and subsequent correspondence that you disputed the allocation of one PEB to the TUV. Your primary position was that UTV should have allocated three PEBs to the TUV, equal to the number allocated to the major parties of Northern Ireland, and specifically to the other currently sitting MEPs. In particular, you submitted that it was not reasonable or rational for UTV to allocate the TUV with one PEB, when the Alliance Party had been granted two.

Part of your complaint was also that UTV followed what you considered was a flawed process in allocating you one PEB. Specifically, you complained that during a meeting of the Broadcasters' Liaison Group ("the BLG") on 28th January 2009 UTV did not outline the criteria against which they would allocate PEBs, and that they did not give you an opportunity of commenting on any draft criteria and intended allocations after that BLG meeting. However, you supplied the Committee with a letter from the BBC, dated 18th February 2009, which did set out criteria materially similar to those applied by UTV.

The Committee's Decision

The PPRB Rules

Rule 1 of the PPRB states that "*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*".

In relation to the allocation of PEBs, Rule 11 states that "other registered parties" (those not defined as "major parties" in Rule 8) "*may qualify for a broadcast on the basis of contesting one sixth or more of the seats up for election, modified as appropriate for proportional representation systems.*"

UTV's response to your dispute made clear that they had modified the minimum requirement expressed in Rule 11 by applying two specific criteria adapted to the circumstances of this proportional representation election. In particular, UTV applied a basic "threshold criterion" that:

“Political parties which are standing at least one candidate for the European Parliament and which have current representation in the European Parliament, the House of Commons or the Northern Ireland Assembly will qualify for a minimum of ONE broadcast in Northern Ireland”.

UTV also applied an additional discretionary criterion for the allocation of further PEBs which parties could satisfy *“if they can demonstrate substantial levels of past and/or current electoral support at a national level.”*

On that basis, UTV decided to allocate the TUV one PEB.

UTV's Specific Criteria

The Committee considered whether the specific criteria relied on by UTV were rational and appropriate within the terms of Rule 11.

The Committee considered the criteria were rational and appropriate as they:

- (a) Related the issue of PEB allocation to parties, rather than individuals, which is what the PPRB Rules contemplate;
- (b) Adapted a minimum requirement in the PPRB Rules which applied to elections generally, having regard to the fact that in this election there is only one constituency returning just three seats, and parties generally nominate one candidate each to contest those seats; and
- (c) Obligated UTV to grant at least one PEB to a non-major party if it was contesting one of the three seats available for election for Northern Ireland and had current representation in the European Parliament, whilst retaining an additional measure of discretion to the broadcaster in allocating further PEBs where that non-major party could demonstrate “substantial levels of past and / or current electoral support at a national level”.

In the Committee's view, given that there are a small number of seats (three) available for the single constituency of Northern Ireland in these European Parliamentary Elections, it was rational and fair to apply an additional discretionary criterion for the allocation of further PEBs by reference to any evidence of substantial past and / or current electoral support on a national, if available.

Application of the UTV Criteria

Having reached that view, the Committee was concerned by your complaint about the process which UTV adopted in applying their election specific criteria, and specifically your complaint that you had not had an opportunity to address the content of those criteria at the meeting of the BLG on 28th January 2008.

Having reviewed the correspondence which you provided to the Committee with your referral letter, the Committee considered that UTV did not give sufficient reasons for their decision in their letter to you dated 19th March 2009, and their subsequent letter which you received only on 17th April 2009.

However, having then considered the representations you put to the Committee, we noted that you did not raise any specific points of objection to the content of UTV's criteria, your letter to the Committee dated 27th April 2009 having had a chance to consider UTV's letter of response to this dispute. Paragraph 1 of your letter merely reiterated your complaint that UTV did not give you an opportunity of commenting on any draft criteria in the first place, and the main points of substance which you set out at paragraph 4(a) to (d) focused on why UTV's allocation was not correct for reasons of electoral fact under the criteria which they had applied.

The Committee also noted that the criteria were similar in material respects to those criteria outlined to you by the BBC in its letter dated 18th February 2009, and so far as the Committee is aware from the evidence you provided to us, you have not sought to object to the BBC about the content of those criteria.

Taking all this into account, the Committee considered that the appropriate course in resolving this particular dispute was for it to re-apply UTV's election specific criteria, having regard to all the relevant facts and circumstances of this case, and the evidence put before the Committee.

In conducting that exercise, the Committee carefully addressed the substantive points advanced in your referral letter (including that of Ivor McConnell dated 28th January 2009), and in your reply letter dated 27th April 2007, as weighing in favour of allocating the TUV further PEBs. In particular:

- (a) the fact that candidates stand for election in Northern Ireland under their individual names, rather than by party list;
- (b) the exceptional circumstance of your being a currently sitting MEP who topped the European Parliamentary Election poll in 2004 over the other currently sitting MEPs;
- (c) the performance of the TUV in the Dromore by-election for Banbridge District Council (February 2008) where it polled 19.6% of valid first preference votes, compared to the Alliance Party's 9.2% result;
- (d) the fact that the Alliance Party itself received an allocation of two PEBs for this European Parliamentary Election, when it received 3.8% in the Fermanagh by-election (September 2008) and 5.2% in the 2007 Assembly elections.

The Committee then considered these points against the reasons relied on by UTV in their letter dated 23rd April 2009 for granting you one PEB under their specific criteria. For the reasons set out below, the Committee reached the view that it was appropriate on the evidence to grant the TUV one PEB.

First, whilst the Committee noted the submission (made in Ivor McConnell's letter to UTV / BBC dated 28th January 2009) that electors in Northern Ireland vote for individual candidates and not for parties on a party list system, you were originally elected for a major party in Northern Ireland (i.e. the DUP) and will be standing on behalf of a different party, the TUV, for the first time at this election. So whilst you personally may have topped the European Parliamentary Elections in 2004, the Committee considered that you are likely to have benefited from particularly strong support because you were the candidate for the DUP at that election, and cannot necessarily rely on a comparable level of support at this election in June 2009.

Second, the Committee weighed the relevant evidence of the result in the Dromore local by-election in February 2008, being the only election which the TUV has contested, and acknowledged that the TUV polled 19.6% of the total first preference votes (as set out in your referral letter). However, in the Committee's view, it is not possible to extrapolate the extent of the support which the TUV currently enjoys (or has recently enjoyed) across the whole of Northern Ireland purely from the result of a single local council by-election (with an eligible electorate of 9688 but a turnout of 3793 votes polled, according to the Electoral Office for Northern Ireland). The Committee noted that the TUV did not contest the later Fermanagh District Council by-election in September 2008 which you mentioned in your referral letter in connection with the Alliance Party's support. Accordingly, the Fermanagh by-election result gave the Committee no indication of the more recent level of support for the TUV.

In your letter of reply dated 27th April 2009, you accepted that Dromore was not "a microcosm of all of Northern Ireland, by reason of its higher preponderance of Unionist voters", but went on to assert that it was "very representative of the Unionist community" across Northern Ireland "by virtue of its socio-economic mix and rural / urban blend".

In this respect, the Committee noted UTV's statement that they would be prepared to reconsider their allocation decision if provided with evidence of "a credible opinion poll or some other reliable measure" to show substantial levels of current national support; yet you did not provide any evidence of this nature to the Committee for it to take into account. The Committee also noted that you did not provide it with any further evidence of the TUV's size or level of popular support.

Third, the Committee carefully considered your specific comparison with the Alliance Party's performance in the Dromore by-election (and other subsequent elections). However, in the Committee's view, it is relevant to the differential allocation of PEBs to the Alliance Party that (as set out in UTV's letter dated 23rd April 2009) this party is recognised as a medium-sized party, with seven Members of the Legislative Assembly ("MLAs") and 34 local councillors

elected for that party, which has consistently contested elections. You did not dispute this when it was raised by UTV. By comparison, as you confirmed in relation to the BBC's letter dated 18th February 2009, the TUV has the support of less than half the number of local councillors of the Alliance Party, on the basis of those who have either joined the TUV or pledged support for it.

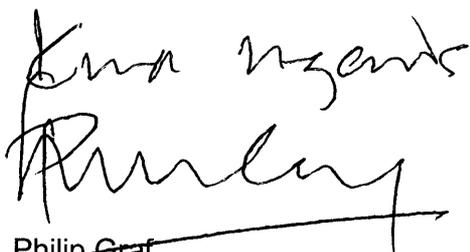
In considering this last point, the Committee appreciated that the specific issue is the level of past or current support for the TUV among electors, rather than among elected representatives. Nevertheless, the Committee considered that this was a relevant consideration in the comparison of the TUV's overall support with that of the Alliance party.

Conclusion

For these reasons, the Committee has resolved this dispute by determining that the TUV should be allocated one PEB for the 2009 European Parliamentary Elections in Northern Ireland.

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 4pm on Tuesday 5th 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: Rob Morrison, UTV