



Consultation on Ofcom's rules for PPRB, and procedures for determination of disputes

Summary of consultation responses

Statement

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Section 1

Introduction

- 1.1 On 16 September 2009 Ofcom published a consultation on proposed new rules for party political and referendum broadcasts and on procedures for the determination of disputes between broadcasters and political parties (or designated referendum organisations).
- 1.2 We received 12 responses to the consultation. One of these was confidential. The most detailed responses were from major broadcasters, and the most detailed of these from Channel 4.
- 1.3 We sought comments from the Electoral Commission which welcomed the incorporation of suggestions made at an earlier stage in the process (the views of the Commission were considered as required under Section 333(5) of the Communications Act (“the Act”). The Commission offered no further suggestions for change to the proposals in our consultation document. We contacted the Electoral Commission a second time for its views on further issues raised by Plaid Cymru and Five about carriage of Plaid Cymru broadcasts on Channel 4. See paragraphs 2.12 to 2.19 below.

General issues

- 1.4 In addressing the general issues, Channel 4 said that any requirement for a broadcaster to carry PPBs/PEBs represented an interference with editorial independence and rights to freedom of expression – even though carrying such broadcasts was recognised as necessary and a public service. Decisions about allocation, frequency and/or scheduling should remain with broadcasters and regulation should be strictly limited to what is necessary to ensure compliance with Section 333 of the Communications Act. (This section of the Act requires commercial public service broadcasters to include party and referendum broadcasts in their services and to observe rules made by Ofcom.)
- 1.5 Channel 4 argued that broadcasters should always have an opportunity to re-consider decisions about allocations etc. in the light of new information, or as the result of an alternative interpretation of the rules by Ofcom, before a new decision is imposed. The regulator should not be seen as an alternative primary decision maker.

Ofcom response: We agree with Channel 4’s view that the allocation of broadcasts is a matter for the broadcaster, and Ofcom should only be involved in determining the outcome if a dispute between the broadcaster and a political party cannot be resolved. We would encourage both parties to continue to seek mutually agreed resolution even after a complaint has been referred to Ofcom. However, if the dispute is not resolved it will be necessary for Ofcom to determine it.

Channel 4’s argument is inconsistent, in that it both asserts the broadcaster’s sole right to determine the channel’s schedule, whilst also recognising the role of Ofcom in determining disputes. It is likely that disputes will arise during actual election periods. In those circumstances, timely resolution of disputes is required and it is entirely appropriate that the process of determination by Ofcom is initiated as soon as a disagreement between broadcaster and party is referred. This in no way inhibits the two sides in resolving the dispute

between themselves. Ofcom will undertake to ensure that any material relevant to a dispute is made available to all parties (see also comments under paragraph 3 below).

As per paragraph 15 of the procedures, Ofcom may consult relevant third parties (such as the Electoral Commission) in order to obtain or confirm factual or contextual information. Where appropriate, such information will be given to the Party and/or Licensee for the opportunity to comment. However Ofcom must retain the discretion to make timely decisions, and there may be occasions where it is not appropriate to delay a decision awaiting a response to purely factual information

- 1.6 ITV said the proposed new rules and guidelines imposed a greater burden on broadcasters than previously - both in terms of the administration of a more detailed system and in the amount of time potentially allotted to election broadcasts. The proposed rules fetter the discretion of broadcasters to a greater extent than was previously the case, even though that discretion has been exercised responsibly and largely without incident.

Ofcom response: We believe the obligations placed on broadcasters are reasonable and proportionate to the administration of a fair system for transmitting party broadcasts. We do not believe the burden on broadcasters is very much greater than has applied until now, except in requiring better communication to parties of the reasons for particular allocations.

- 1.7 Five believes Ofcom should have conducted a more wide ranging review of the rules governing party political broadcasts in the aftermath of the 2005 general election. Having failed to do so, Ofcom should have committed to make such a review after this year's general election, rather than conduct a "second order rewriting of its present rules".

- 1.8 The Conservative Party also called for further reforms to the system in due course. In particular, they called for the allowance of shorter, more frequent broadcasts with a reduced 'health warning' introduction. Similar points were made by the SDLP in Northern Ireland.

Ofcom response: A wide ranging review of the rules governing party broadcasts was not within the remit of this consultation. Instead, the purpose was to introduce greater clarity and flexibility in the light of recent experience in relation to the European Parliamentary Elections in June 2009. In particular, we proposed rule changes to give greater regard to the circumstances surrounding a particular election. We were mindful of the need to have these clearer rules in place before the next general election, which must take place on or before 3 June 2010.

The current rules have worked well until now and we consider that the proposed rules are fit for purpose. However, as explained at paragraph 2.19, we recognise the need to conduct a more broad ranging review of the rules which we intend to conduct after the General Election this year.

Section 2

Ofcom's rules for Party Political and Referendum Broadcasts

Summary of consultation responses

Paragraphs 3 and 4 (taken together)

- 2.1 Five believes it is wrong for the rules to suggest there could be dispute about each of length, frequency, allocation, and scheduling of broadcasts. The only grounds for dispute are about allocation. Length is a matter for a political party's sole discretion within the rules (i.e. not relevant for a dispute process); there are no rules on frequency (so not relevant); scheduling rules are clear, and there should be no further grounds for appeal about detailed scheduling within those rules. So, references to length, frequency and scheduling should be removed.

Ofcom response: The Act (Section 333(1b)) provides that the regulatory regime for every licensed public service channel includes conditions requiring the licence holder to observe rules made by Ofcom in relation to party political and referendum campaign broadcasts. Section 333(2) includes provision for Ofcom to set rules determining the length and frequency of broadcasts. To that extent, the rules reflect the wording of the Act.

In practice, any dispute is likely to be about the number of broadcasts allocated to a particular party – in particular, a party may feel entitled to more broadcasts than have been allocated by the licensee.

The rules governing length and scheduling are unlikely to lead to dispute because they are precise and allow appropriate flexibility – the party to determine length, and the broadcaster to determine detailed scheduling within the rules. So long as all decisions are made within the rules, there should be no grounds for dispute and such a complaint is not likely to be made. However, it is appropriate that the rules follow the wording of the Act.

Paragraph 3

- 2.2 Channel 4 reiterated its general comment (see above) that all decisions on the allocation of broadcasts are the responsibility of licensees. Ofcom's role is to review those decisions and see whether the broadcaster has complied with the rules. If the regulator considers the rules have not been followed, the decision should always be referred back to the broadcaster for re-consideration – alongside any new information or advice.
- 2.3 Ofcom's role should be as an advisor and a supervisor of the rules – and not as a primary decision maker. It is not for Ofcom to "command broadcasts to take place". In particular, it would be wrong for Ofcom to replace decisions on the basis of evidence not first seen by the broadcaster. Accordingly, Channel 4 says use of the phrase "in the first place" is unhelpful in reference to broadcasters as decision makers.
- 2.4 Five said decisions about length, frequency, allocation and scheduling are not taken at the same time. The word "decision" (line 5) should therefore be in the plural.
- 2.5 ITV welcomed the explicit recognition that disputes should be a matter for the broadcaster and party to deal with initially. ITV believes that any explanation given to political parties about the reasons for allocation decisions should be brief and via

direct relevance to criteria previously given to broadcasters. Licensees should not be obliged to get into detailed correspondence with a number of parties. A simple explanation should suffice.

Ofcom response: As already indicated (see comments under General Issues above), we agree that these are decisions primarily for broadcasters. We would encourage broadcaster(s) and political parties to seek to resolve any dispute between themselves. However, if disputes remain unresolved, Ofcom will determine them. For that reason, we do not consider it necessary to remove the words “in the first place”. We agree it is helpful for broadcasters to be in receipt of all relevant information and advice in order for them to reconsider disputed decisions.

We see no reason to change any wording in Paragraph 3. In relation to “decisions” the wording actually reads: “When licensees make such decisions they should notify the relevant political party setting out the basis of the relevant decision”. This incorporates already the point made by Five.

In response to the point made by ITV, we believe it is inappropriate for Ofcom to be overly prescriptive about the notification of decisions. That is a matter for broadcasters within the rules set out. We do not propose to change the wording. However, it is important that parties are made aware of the reasons for particular allocations. This may be helpful in avoiding disputes or in resolving disputes more quickly.

Paragraph 4

- 2.6 Channel 4 would like an explicit reference to the fact that issues of content may not be referred to Ofcom. Parties should be compelled to nominate a single officer responsible for referrals to Ofcom and subsequent correspondence.
- 2.7 Five would like the provision for disputes to be referred to Ofcom by broadcasters to be removed. It is unnecessary and confusing – broadcasters should make decisions and then consider further representations from parties. It should be for the party alone to refer matters to Ofcom if they remain dissatisfied (see also comments relating to paragraphs 4 and 5 of proposed guidelines on disputes).

Ofcom response: the rules are clear that referral of a dispute may be on the grounds of length, frequency, allocation and/or scheduling. We do not believe it is necessary to make reference to matters that may not be referred. We agree it is unlikely that licensees would seek to refer their own decisions to Ofcom. However, it is fair and equitable that they have the possibility to do so – for example, if they are confident about an allocation decision but become involved in protracted argument or are threatened with legal action.

Paragraph 6

- 2.8 Channel 4 would like the footnote advising political parties and designated organisations that broadcasters may seek indemnities to be incorporated into the rules. The same point is made by Five, who said the proposed wording suggests indemnities are voluntary, and this could place broadcasters in a difficult position if a party refused to provide them. They prefer the wording of the previous rule which stated: “Broadcasters are advised to seek legal indemnities from parties...”
- 2.9 ITV said there should be no burden on broadcasters to provide detailed guidance on content to parties. Instead, there should be simple reference to the Broadcasting Code.

Ofcom response: in view of the points made, we will reinstate the line about indemnities into the main rules to continue with the current wording. On the matter of giving advice to parties about content, we do not intend to be prescriptive about the form this should take. However

we believe it is helpful for broadcasters to offer the advice they feel appropriate in order to facilitate a smooth process for the transmission of party broadcasts. It is a long standing feature of the process that this is done, jointly by all relevant broadcasters.

Paragraphs 12, 13, 15, 17 (taken together)

- 2.10 Channel 4 said these paragraphs are confusing for broadcasters which only transmit on a UK-wide basis. For example, the statement in paragraph 15 that “the four nations of the UK should be considered separately” could be read to imply a party may qualify for a broadcast on Channel 4 (or on Five or UK national commercial radio) by fielding candidates in one sixth of the seats in any one nation. It should be made clear that this applies to Channel 3 only, because other broadcasters transmit only on a UK-wide basis.
- 2.11 Five made similar points and stated there are, in effect two sets of allocation criteria: one applying to Channel 3 and another for those broadcasters transmitting on a pan-UK basis. The distinction needs to be more clearly drawn. As with Channel 4, there is particular concern about paragraph 15, which Five says is of no relevance to anyone other than Channel 3 licensees. There should be two clear sets of criteria and further consultation on the precise wording.

Paragraph 12

- 2.12 Plaid Cymru said that Channel 4 - in addition to Five (and S4C) - should be required to carry the party's election broadcasts. They said that digital switch-over in Wales meant that many viewers now make a choice between watching Channel 4 and S4C and a significant number of viewers do not receive S4C at all. Any past designation of S4C as the fourth channel in Wales was now irrelevant.
- 2.13 Five also said Channel 4 should be required to carry election broadcasts for Plaid Cymru after digital switch-over in Wales – but that Five's own obligations should be reduced. Channel 4 will be as widely available in Wales as S4C – and Five - after switch-over and C4, and Five should therefore be treated equally. Five argued that obligations to carry Plaid Cymru broadcasts should be shared between Channel 4 and Five. In that context, it would be appropriate for a single Plaid Cymru broadcast to be transmitted on each of Channel 4 and Five. This would be roughly equivalent to the exposure afforded the party in the 2005 general election (when Five showed three Plaid Cymru broadcasts). Accordingly, the rule should be amended to reflect both the new requirement on Channel 4, and to remove the requirement for a “series of two or more broadcasts” in relation to Plaid Cymru.

Ofcom response: in light of the comments from Plaid Cymru and Five, we sought the further views of Channel 4 on a proposal for the channel to carry Plaid Cymru election broadcasts, as well as Five. We also sought the opinion of the Electoral Commission, as is required under Section 333(5) of the Communications Act. Ofcom must “have regard” to the views of the Commission in drafting the rules.

- 2.14 In its supplementary response, Channel 4 accepted it was appropriate to consider the impact of the end of analogue broadcasting in Wales. However, it argued that it should not be a consequence of this development that Channel 4 should have to provide airtime for Plaid Cymru broadcasts. Instead, it provided an opportunity for

Ofcom to revisit the designation of both Plaid Cymru and the SNP as 'major parties' for the purposes of UK-wide broadcasters such as Channel 4 (and Five).

- 2.15 Channel 4 also said the original requirement for party broadcasts stemmed from a pre-internet era when there were limited outlets for political parties to reach the electorate. This was no longer the case. Further, the obligation to carry broadcasts for nationalist parties which stood candidates only in their particular nations was not required by statute. It made no sense for UK-wide broadcasters to be compelled to carry these broadcasts because they were irrelevant to the majority their audience. The fact that Channel 4 has become more available in Wales does not mean S4C has ceased to exist, they argued, and so the Welsh service will continue to carry the Plaid Cymru broadcasts as before. Channel 4 said what Plaid Cymru was seeking was an increase in its coverage which would provide no benefit whatever to the overwhelming majority of Channel 4's UK-wide audience.
- 2.16 In direct response to Five's submission, Channel 4 said it was a flawed argument that started from the incorrect premise that just because Five was obliged to carry Plaid Cymru broadcasts, so should Channel 4. Five was simply seeking to offload some of its own current obligations by imposing them on Channel 4.
- 2.17 Channel 4 submitted that overall, the current and proposed approaches to the allocation of broadcasts for parties in the UK nations were inconsistent. There was no justification for the SNP and Plaid Cymru to be treated as special cases compared, for example, to the Northern Ireland parties. Channel 4 also queried why there had been no research on what the electorate wanted. In conclusion, the channel said UK-wide broadcasters should only be obliged to carry broadcasts for parties which addressed a UK-wide audience. If Ofcom was not willing to accept this proposal, there should be no change to the rules until after the General Election.
- 2.18 The Electoral Commission was supportive of a change to the rules in order to require carriage of Plaid Cymru broadcasts on Channel 4. The Commission said Plaid Cymru had raised a legitimate point and that it now seemed appropriate, in the light of digital switchover in Wales, that they should be entitled to broadcasts on Channel 4 as well as S4C. The Commission also agreed with Plaid Cymru that it was an anomaly that the party was currently seen on Five, but not on Channel 4.

Ofcom further response: We consider that the initial consultation responses we received from Plaid Cymru and Five presented arguments about the changing media landscape in Wales that warranted further consideration. In particular, the arguments relating to the much wider availability of Channel 4 post digital switch-over. Therefore we decided to consult further with Channel 4 on the proposal that the channel should, in future, carry Plaid Cymru broadcasts.

The supplementary response from Channel 4 raised some important counter arguments including a questioning of the obligations on UK-wide broadcasters in general; the designation of 'major parties' in a nations context; the continuing role of S4C; and the potential inconsistencies with other localities (such as Northern Ireland).

Having considered all the issues carefully, we believed the arguments to be finely balanced. However, there is currently a clear discrepancy between the obligations placed on Five and those placed on Channel 4. In addition, and in the light of digital switch-over, there is no longer a logical reason why Plaid Cymru should be excluded from Channel 4 when broadcasts by the rival 'major parties' in Wales are carried on the channel. Accordingly, we have decided to change the rule for the forthcoming election to require a series of broadcasts for Plaid Cymru on both Channel 4 and Five in order to iron out this anomaly.

However, we do not believe this 'tidying up' of the current rules should fetter a future consideration of the broader points raised by Channel 4. We believe a more fundamental

review of the rules is warranted, and we intend to conduct such a review after the General Election. In the meantime, we consider that the rules for party political broadcasts – with the minor amendments we are now endorsing – remain perfectly fit for purpose, having served both broadcasters and political parties well until now.

- 2.19 Additionally on Paragraph 12, the SDLP said all the main parties in Northern Ireland should be given an equal number of broadcasts, with the current “quota” being maintained, if not increased. In addition, the main parties of Northern Ireland should also qualify for a UK-wide broadcast, including on Channel 4 and Five. Likewise, they should receive broadcasts on UK-wide radio stations.

Ofcom response: The designation of ‘major parties’ for Northern Ireland and the suggestion that additional obligations should be placed on UK-wide broadcasters raise some similar issues to those addressed above in relation to Plaid Cymru, Five and Channel 4. However, there are some important differences. For example, in recent years, none of the main Great Britain parties has put up candidates in Northern Ireland, and the rules have reflected this position. Any alteration to the obligations placed on channels now would represent a more fundamental change in policy than was ever intended for the current review. There are also counter arguments to be considered (such as those raised by Channel 4 above). For reasons already expressed, we believe these are matters that should be considered in a more broad-ranging review of the rules after the General Election.

Paragraphs 13 and 14 (taken together)

- 2.20 The Conservative Party expresses concern that these rules would give more broadcasting time – and possibly greater prominence in peak-time - to those other than designated major parties. They say one of the main beneficiaries would be the British National Party, who would have more airtime to “peddle their propaganda”.
- 2.21 The Conservatives believe minor parties already have sufficient access to broadcasts and there is no case for further airtime. Under proportional representation, in particular, minor parties gain a prominence not justified by their lack of broad support. Free airtime should be linked to having a significant degree of political support.

Ofcom response: the revised rules reflect the views of the Electoral Commission in allowing for a more flexible approach to the allocation of broadcasts, to reflect the different circumstances of different elections. For example, non-major parties have attracted greater popular support in European elections over the last decade than in general elections. It is right that this should be considered in the allocation of broadcasts. However, there is no departure from the currently applied principle that allocation is linked to actual levels of electoral support.

Overall, the proposals do not represent a significant change to the current rules. It is important that the precise allocation of broadcasts remains a decision for the broadcasters. The rules must be fair and impartial, and not designed to include or exclude particular parties.

Paragraph 13

- 2.22 Five said the wording in relation to elections under proportional representation failed to address the real issues. Broadcasters need to limit the number of parties qualifying for elections because of pressure on schedules and to ensure airwaves are not flooded with fringe and marginal parties who are not making a serious electoral challenge. The wording leaves it open to minor, fringe and frivolous parties to seek a broadcast through standing a minimum number of candidates. It is not an easy issue to resolve but should be subject to a full review of PPB rules before the next PR elections (Scottish Parliament and Welsh and Northern Ireland Assemblies in 2011).

- 2.23 ITV said the wording fetters discretion in relation to non-major parties. They object to the word “should” in relation to qualification for a broadcast instead of the current “may”. Ofcom should take this opportunity to reconsider the “one sixth” criterion in relation to nations outside England. Whilst it is an appropriate figure for England, the threshold is too low in the nations, particularly Wales. A party can qualify for a broadcast in the Wales by fielding only 7 candidates. ITV faces an unreasonable pressure on its schedules to accommodate a large number of minority parties who need not have any connection with Wales but who can, potentially, stand a minimal number of candidates just to secure a broadcast. They point to a party based in Norwich which qualified for a broadcast in Wales during the 2005 general election.

2.24

Ofcom response: The proposed changes to the rules represent a ‘tidying up’ of the current rules, which have worked well until now. We believe this minor change is appropriate ahead of the next general election. In particular, we believe there should be greater flexibility within the rules to reflect the fact that parties perform differently at different elections. It is not appropriate to devise detailed and prescriptive rules for proportional representation because different PR systems are used in different elections. The allocation of broadcasts remains a matter for licensees’ discretion, subject to the minimum criteria set out in the rules, having regard to particular circumstances.

The points about qualification for broadcasts in Wales and Scotland are outside the remit of this consultation. As stated above, Ofcom will conduct a fuller review of all the rules governing party broadcasts after the next general election.

Paragraph 14

- 2.25 Channel 4 suggested replacing the term “other registered parties” with the phrase “non-major parties” to assist clarity. Five suggested replacing the word “particular” with “previous corresponding” to more clearly cater for the tendency of some parties to gain far larger shares of the vote in some elections compared to others.
- 2.26 ITV can see “no reason” why broadcasters should have to consider peak-time scheduling of broadcasts for other than major parties.

Ofcom response: We do not consider it necessary to change the wording of this paragraph. The phrase “other registered parties” encapsulates the notion that parties must be registered with the Electoral Commission before they can be considered for a broadcast. Nor do we believe it is necessary to replace the word “particular” with “previous corresponding”. To do so could limit flexibility. It is important that allocations reflect all the circumstances pertaining to a particular election, and not merely performance at the same election in previous years. In response to ITV’s point, we believe it would be wrong not to consider allocations in peak time for non-major parties, in response to particular circumstances.

Paragraph 17

- 2.27 Five pointed out that its own criteria are more liberal than this rule. In any case, the word “additionally” is unnecessary.
- 2.28 Plaid Cymru said that, the phrase “national radio services” should be changed to “UK-wide services”, in the interests of clarity and to avoid confusion with references to individual UK nations.

Ofcom response: Five’s comments are noted. These are minimum criteria which do not fetter the licensee’s discretion to allocate more broadcasts to the political parties. It is a matter for broadcasters to apply their own criteria within the rules. We agree with Plaid Cymru’s point –

the phrase “national radio services” will be changed to “national (i.e. UK-wide, commercial) analogue radio services and their digital simulcast services”.

Paragraph 18

- 2.29 Channel 4 suggested this paragraph should be reworded to make it clear this is a Channel 3 obligation only.

Ofcom response: This paragraph refers back to paragraph 9, which already makes it clear this applies to Channel 3 only.

Paragraph 19

- 2.30 Channel 4 said this paragraph should be tied to paragraph 8 to make it clear that it applies only to UK-wide broadcasters in the case of a UK-wide referendum.

Ofcom response: This paragraph needs to take account of the possibility of referendums in particular nations or particular regions. Paragraph 9 already makes it clear that nations/regions referendum broadcasts need only be carried on Channel 3, and not on channels which only broadcast on a UK-wide basis.

Paragraph 21

- 2.31 Five said use of the phrase “the relevant nation” lacks clarity. If it is meant to mean the UK as a whole, it could be read to imply that Five (and Channel 4) must carry SNP and Plaid Cymru broadcasts in peak-time. Conversely, if it does *not* refer to the whole of the UK it could be interpreted as saying there is no compulsion to carry *any* broadcasts in peak time. The wording in the current rules is much clearer.

Ofcom response: We will change the wording to make it clear that the requirement for peak-time scheduling applies to broadcasts throughout Great Britain for the major parties in Great Britain, as defined in paragraph 11, and also, on Channel 3 only, to other major parties as defined in relation to Scotland, Wales and Northern Ireland. This is to aid clarity, and there is no change to the current scheduling requirements.

Paragraph 22

- 2.32 UTV Media asks that the scheduling restrictions for broadcasts are relaxed for national radio. They seek freedom to schedule broadcasts between 10pm and 11pm, which is outside peak time. Another broadcaster, in a confidential response, sought freedom to schedule broadcasts between 6pm and 11pm for major parties and between 6am and midnight for minor parties.

- 2.33 Both broadcasters argue that rival broadcasters – including relevant BBC radio stations – have no obligation to carry party broadcasts and that this places the commercial stations at a disadvantage. The most important BBC service - Radio 4 – carries party broadcasts at 10.40 pm.

- 2.34 The commercial broadcasters also suggested later scheduling would provide a more coherent schedule, allowing party broadcasts to be slotted into more complementary programming. UTV Media runs current affairs programming on talkSPORT after 10pm, for example. Audiences remain high for radio stations in the later evening.

Ofcom response: The proposed rule reflects the status quo and we may return to this issue in a full review. Any such significant changes would require further consultation. As stated elsewhere, Ofcom intends to conduct a full review of all the rules governing party broadcasts after the next general election to determine whether or not further changes might be desirable.

Section 3

Procedures for determination of disputes

Summary on consultation responses

- 3.1 Channel 4 reiterated its view that the disputes process should not create a process whereby Ofcom became a primary decision maker (see above). They would like the “guidelines” changed in order to make it clear these are firm rules and are not open to *ad hoc* alteration.

Ofcom response: We agree that broadcasters should be the primary decision makers but we refer back to our earlier responses which explain that if necessary and a dispute is unresolved, Ofcom will determine it. In relation to the further point made by Channel 4, we will remove the word “guideline” so that the title of the proposed disputes process now reads: ‘Procedures for the determination of disputes under the PPBR rules’.

Paragraph 2

- 3.2 Channel 4 objected to the statement that unresolved disputes will be “determined” by Ofcom. They propose a two stage process whereby either the broadcaster or the party can refer the matter to Ofcom.
- 3.3 Ofcom may then consider that the decision has not been reached correctly under the rules, based on analysis of initial evidence. Alternatively, Ofcom can review any additional evidence supplied by the parties - or evidence that it collects itself. But in all cases, the decision – together with any advice – should then be referred back to the broadcaster for re-consideration.
- 3.4 In the event of continuing dispute, either party could then refer the matter back to Ofcom’s Election Committee, who could change it if there was an error in law or an unreasonable use of the broadcaster’s discretion. Ofcom should not make any primary decision on the basis of evidence not first considered by the broadcaster.
- 3.5 Channel 4 said the membership of Ofcom’s Election Committee members should be published well in advance of elections to guard against conflicts of interest. Five also said the membership of Ofcom’s Election Committee should be included in the guidelines or – at the least – the guidelines should include a reference to a relevant page on the Ofcom website.

Ofcom response: Ofcom’s role is one of dispute resolution. We do see dispute resolution as the last resort and are keen that broadcasters should seek to resolve any potential issues with individual parties if at all possible. However, if the broadcaster and a party are not able to resolve a dispute, the Election Committee will determine the dispute.

We believe it should be open to either party to refer a dispute to Ofcom at any stage following the initial allocation decision. This allows Ofcom the maximum time to complete an initial assessment of evidence and prepare for consideration by the Election Committee, should this prove necessary.

We propose to add the words “if no agreement can be reached between the broadcaster and the party”. We will post the terms of reference of the Election Committee on our website.

It is not practical for the published procedures to include advance details of the precise membership of the Election Committee, because this will depend on the availability of particular individuals. However, in relation to Channel 4’s concerns about potential conflicts of

interest, we undertake to publish the names of Election Committee members on our website, once the committee is convened.

Paragraph 3 and 4

- 3.6 Five said the guidelines should refer only to disputes about allocations and not to length, frequency or scheduling.
- 3.7 Channel 4 said there should be an element of compulsion placed on a political party to *require* referral of unresolved disputes to Ofcom. This could prevent costly and unnecessary court action. ITV referred back to comments made about Paragraph 3 of the rules relating to allocation.

Ofcom response: The proposed procedures refer to the full range of possible disputes covered by the rules, although it is unlikely that there will be any dispute about issues other than allocation. As already stated, this reflects the wording of the Act. We do not believe it is possible for Ofcom procedures to constrain political parties from resorting to the courts by stating a requirement for referral of unresolved disputes to Ofcom. However, we see no reason why a party would adopt that course of action without first exhausting Ofcom's practical (and cheaper) procedures.

Paragraph 5

- 3.8 Channel 4 said the wording should be adapted to explain how the rules would apply if the licensee referred the matter to Ofcom, rather than the broadcaster. There should be no ad hoc procedures.
- 3.9 Five took the opposite view. They suggested it was unnecessary and confusing to allow broadcasters to refer their own decisions to Ofcom

Ofcom response: We believe it is unlikely that broadcasters will refer their own decisions to the regulator. However, we believe it is self evident that "appropriately modified" means the same process would be adopted, but with different initial referral, if such an event occurred. For reasons already stated (see Ofcom response under Paragraph 4 of section on rules) we believe the opportunity for broadcasters to refer matters to Ofcom should remain, however unlikely it is to be used.

Paragraph 6

- 3.10 Five said the word "normally" should be inserted ahead of the phrase "in writing by e-mail". Ofcom should not potentially turn down valid referrals because notification has been received in the wrong form. Five would also like a line calling on parties to refer disputes to Ofcom as soon as reasonably practical – and giving Ofcom discretion not to accept a dispute if this is not done. Parties should not hold off until an election date is looming because it causes unnecessary pressure.

- 3.11 Channel 4 said correspondence should be by hard copy letter as well as e-mail.

Ofcom response: We believe it is perfectly reasonable to request submission of disputes by e-mail. Broadcasters and registered political parties are organisations that can be expected to be familiar with use of e-mail. In circumstances where it will often be necessary to determine a dispute in a short time frame before an upcoming election, referral of a dispute to Ofcom by email will enable Ofcom to forward the information to the broadcaster for reply/comment as quickly as possible.

We believe the phrase urging referral “as soon as reasonably practicable” adequately addresses Five’s further point. This gives Ofcom discretion to consider the timeliness of any referral. However, in the interests of fairness, it would be inappropriate to rule out all late referrals. We see no reason to require hard copies of documents.

Paragraph 8

- 3.12 Channel 4 would like any information referred to Ofcom by the party to be clearly separated into matters already seen by the broadcaster and any new evidence. The latter should not form the basis of any decision considered by Ofcom, and should be referred back to the broadcaster.

Ofcom response: As stated elsewhere, we would prefer disputes to be settled between Licensee and Party without the need for intervention by the Election Committee. To that end, all documentation would be supplied to all parties. We see no reason why documents should be separated in the way suggested by Channel 4.

Paragraphs 10 and 11 (taken together)

- 3.13 Channel 4 feels strongly that the broadcaster should have an equal number of opportunities to submit evidence to Ofcom as the parties. The proposed rules allow a party a second opportunity to make representations after it has seen the arguments presented to Ofcom by the broadcaster. If the party is to have a further opportunity, so should the broadcaster.
- 3.14 ITV is in agreement with the arguments put forward by Channel 4. This would be in line with Ofcom procedures in relation to fairness and privacy complaints.
- 3.15 Five argued the same point and says it is inconsistent with Ofcom’s procedures for consideration of other types of complaint to allow a complainant two opportunities and the licensee only one.

Ofcom response: we agree that both sides should have an equal number of opportunities to respond. We will adapt the wording accordingly.

Paragraph 14

- 3.16 Five want the words “in which case both the party and the licensee will be invited to attend” any hearing added for clarity.

Ofcom response: we have no objection to the addition proposed by Five. We will adapt the wording accordingly.

Paragraph 15 and 18 (taken together)

- 3.17 Channel 4 believes the opportunity for Ofcom to gather additional information from third parties (such as the Electoral Commission) represents a further opportunity for decisions to be made on evidence not seen first by the broadcaster. Channel 4 says the notion of such a process resulting in unappealable decisions affecting a broadcaster’s airtime goes beyond the Act and is not consistent with Article 10 of the European Convention on Human Rights. No decision should be taken on evidence not first considered by the broadcaster. Ofcom should not be a primary decision maker.

- 3.18 ITV said there should be a right of appeal by both parties. Even allowing for the short timelines involved, it is both fair and practicable to include an emergency appeals procedure because the only other recourse would be judicial review, which is expensive, onerous and disproportionate.

Ofcom response: The proposed procedures allow for all evidence/information to be conveyed to all parties to the dispute “where appropriate” and as stated in our earlier response (see comments under General Issues) Ofcom will undertake to ensure that any material relevant to a dispute is made available to all parties. However, Ofcom must retain discretion to make timely decisions, and it would be inappropriate for a decision to be rendered inapplicable because of a delay in awaiting a response to purely factual information obtained from a third party, such as the Electoral Commission. We do not consider it necessary to change this wording.

We do not consider it necessary to provide for a decision of the Election Committee to be the subject of an internal appeal. Both the Party and the Licensee may appeal a decision of the Election Committee to the High Court by way of an application for judicial review.