Tuesday 13 November 2007

RE: Response to the proposed BSkyB digital terrestrial television services consultation

I wish to start by personally thanking you for allowing me to respond to the plans that British Sky Broadcastings plans to launch their Picnic platform on Digital Terrestrial Television, including the launch of the following services:

- Sky Sports One;
- A children's channel/Sky Movies SD One;
- A factual channel/Sky News/Sky One;
- Sky News (if BSkyB is given permission to launch a fourth service on DTT using MPEG-4 encoding);
- Broadband up to 16Mbps and a telephony service.

I wish to begin by giving an idea of my thoughts on the proposal by BSkyB before I answer the questions in the consultation document.

Introduction

1. Regarding the use of by BSkyB and NDS Group, the VideoGuard conditional access technology for its pay television services. According to the press release that was released by BSkyB on the 8th of February 2007,[1] the service will use a highly secure conditional access system similar to the one BSkyB uses for its digital satellite services, Sky Digital and FreesatFromSky. I also understand that Sky has also stated that viewers will require a new set-top-box to access the new service. In the past, since the launch of the Sky satellite television service in February 1989 via the Astra satellite, BSkyB have always used NDS Group technology to encrypt and protect their own branded services, with both the VideoCrypt and VideoGuard conditional access systems for their Sky analogue and digital satellite services respectively.

   Indeed, in the Culture, Media and Sport select committee hearing on public service media content held on May 8, 2007, chief operating officer of BSkyB, Mike Darcey, said that, and I quote: “When you are thinking about a channel like Sky Sports and premiere (sic) league content where we, for example, recently concluded a deal at around £1.3 billion for the next premiere (sic) league contract, we are talking about very expensive premium content; and in that environment you have to be very careful about the security of that content. It is a very important part of your pay subscription operation on satellite, and it would be on DTT. You must have great confidence in the security of that; that it cannot be had. We prefer, as we have always done, to use conditional access technology provided by NDS, which I think around the world has shown itself over many years to be by far the most secure, and most other systems have had problems at various times. That is what we want to do to ensure the integrity of our content.”[2]

   The background information released by BSkyB on October 1, 2007 also confirmed

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1 **http://phx.corporate-ir.net/phoenix.zhtml?c=104016&p=irol-newsArticle_Print&ID=960773&highlight=** - British Sky Broadcasting press release - Sky to launch new service on digital terrestrial television.

2 **http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcumeds/uc316-v/uc31602.htm** - Uncorrected minutes of evidence taken from the Public Service Media Content for the Culture, Media and Sport select committee on May 8, 2007.

that NDS technology (VideoGuard) would be the conditional access used for the Picnic service.[3]

This indicates to me, alongside NDS Groups concerns regarding the security of its conditional access system, that conditional access modules (CAMs) incorporating MPEG-4 technology for the new service will not be made available to the general public as Top Up TV has had to do for its former linear channel digital terrestrial pay television service. This could be seen as a way for Sky to control its pay television service and stifle competition from Top Up TV and rival sports channel, Setanta Sports (by not allowing support for customers to add a second CAM to receive their service). This would be confusing and annoying for a good number of the general public as people who wish to get pay television would be required to purchase two subscriptions and possibly (though certainly for Top Up TV Anytime, because they could not afford to subsidise set-top-boxes, and for branded Setanta Sports set-top-boxes which include the CAM as standard) two set-top-boxes for either the Top Up TV Anytime service or a Setanta Sports branded set-top-box and the BSkyB pay television service. This would be especially true for fans of FA Premier League football, who will now find that they may be paying significantly more for two sport subscription channels than they were when the right to show live Premiership football were under the sole rights to BSkyB.

Furthermore, the licence requirements for Multiplex C (variation one) under part 2, index 11, section 6 requires National Grid Wireless to "not show undue undue discrimination against the development, kite-marking, sale or use of pay-upgradeable receivers". This would require the new pay service to have a way for viewers to add a CAM to their set-top-box to receive the service, which NDS Group would not allow if the VideoGuard conditional access system is used as per the above paragraph. Essentially, National Grid Wireless, and indeed, the Freeview consortium, would be in violation of its broadcast licence.

I believe that BSkyB should, at the very least, be required to provide fair, reasonable and non-discriminatory (“FRND”) access to its conditional access system to manufacturers and the public as a conditional access module for set-top-boxes and IDTVs. If NDS Group is not prepared to release the VideoGuard system in the form of a MPEG-4 CAM, then BSkyB should be required to use a different conditional access system which conforms to FRND, just like Top Up TV used to for its linear streaming service and may need to for its Top Up TV Anytime service, subject to the conclusion of the consultation already in progress. Sky confirmed in its background information for the Picnic service that it would allow manufacturers to produce set-top-boxes with NDS technology placed in, and this is welcome, but there is still no plans, for the reasons of security of the conditional access system as stated above, for a CAM to be produced for individual users who wish to use their existing set-top-boxes for the Picnic service.

I believe that Sky Sports and Setanta Sports should complete fairly. As things stand, the requirement of two set-top-boxes and the complication of being unable to access one service with a Top Up TV Anytime, Setanta Sports branded box or a BSkyB controlled box is anti-competitive to consumers. Although it was also mentioned in the aforementioned select committee and the aforementioned background information for the Picnic service that Sky will allow manufacturers to

3 **http://media.corporate-ir.net/media_files/irol/10/104016/press/PR011007_background_Document.pdf** - British Sky Broadcasting background information on the Picnic service.

produce set-top-boxes with a CAM slot for Mediaguard to allow the reception of Setanta Sports, however, if Sky still uses VideoGuard as its chosen conditional access for its proposed DTT service, it will be unfair to expect Top Up TV subscribers to pay out twice for another set-top-box to view Picnic. As well, the boxes provided by Sky may not work with Top Up TV's Anytime service, rather, they may only allow access to Setanta Sports and any linear Top Up TV services which are still broadcasting.

2. Regarding the use by BSkyB of the MPEG-4 encoding standard for its pay television broadcasts. I understand though, in an Ofcom news release in June 2007, that Ofcom states that BSkyB will not be using MPEG-4 encoding for its proposed channels,[4] BSkyB is still intent on seeking approval for using MPEG-4 encoding,[5] so I will still include my thoughts on this part of BSkyB's proposal.

   Although there are benefits in being able to fit in more channels into a multiplex, this has three concerns with me. Firstly, for the same reason as above, the use of a technology not supported by any current digital terrestrial set-top-box, which requires viewers wishing to purchase the Sky television service to purchase a set-top-box developed with approval by BSkyB. Secondly, with the transition of television moving from standard definition television using the MPEG-2 standard to high definition television using the MPEG-4 standard. If and when the digital terrestrial platform does move to high definition broadcasting, this leaves BSkyB in a dangerous position to be able to run and dominate any high definition digital terrestrial platform from day one as BSkyB have the encoding infrastructure in place to provide high definition broadcasts at a much reduced cost to its user base than the BBC and other commercial broadcasters could do.

   Thirdly, there are concerns about the effect of MPEG-2 and MPEG-4 encoded channels on the same multiplex may affect certain set-top-boxes and IDTVs, to the point that multiplex C and its free-to-air channels, UKTV History, E4+1, Smile TV, talkSPORT, 3C and Premier Christian Radio will not be available to some consumers. Sadly, I cannot personally comment on the technical aspects of this concern. All I am aware of is that the French digital terrestrial platform, Télévision Numérique Terrestre, uses a combination of MPEG-2 encoding for its free-to-air television channels and MPEG-4 for its pay television channels, and that channels encoded in MPEG-2 and MPEG-4 operate on the same multiplex. I cannot comment on whether set-top-boxes and IDTVs sold in the United Kingdom could cope with two encoding systems, in particular the older ON/ITV Digital boxes still in use.

   If it is shown that there will be problems for some people whose set-top-boxes of IDTVs will not be able to receive the services on multiplex C as a result of dual encoding standards on the same multiplex, then this will also fit in with the concerns of Ofcom that a variety of tastes and interests will be unavailable to those individuals whose set-top-boxes are affected, and in turn reduce the range of free-to-air channels available to the affected people as a result, in addition to the channels being replaced by Sky. This will also have the adverse effect of reducing the viewing audience for the affected channels, and as a result, reduce advertising

4 **http://www.ofcom.org.uk/media/news/2007/06/nr_20070626** - Ofcom - Ofcom to consult on BSkyB's proposed digital terrestrial television services

5 **http://media.guardian.co.uk/broadcast/story/0,,2111863,00.html** - Guardian (free subscription required) - Sky challenges Ofcom over DTT plans

revenue or in the case of Smile TV, callers to their participation services.

Although I accept that the use of a more efficient MPEG-4 encoding system will have benefits to allow more channels to launch on the digital terrestrial platform, this should, in my opinion, firstly be saved for any high definition service which does launch and secondly, not be in the sole control of BSkyB. I also believe any planned migration of other services that may be upgraded from MPEG-2 to MPEG-4 would have to be over a long time frame. A percentage of set-top-box owners will not wish (even regardless of the price of set-top-boxes now being as low as £20) to replace their functional set-top-box for a few extra channels, especially for those who only wish to receive the main five terrestrial channels. This will be especially true for those who are on low incomes, benefits or a pension.

3. Regarding the purchase of 17.9% of ITV plc by BskyB (I am currently aware of talks between BSkyB, ITV and RTL for a swap of the 17.9% stake of ITV for Five). At the moment, ITV plc has half a multiplex gifted to them (on Multiplex 2) and own S4C Digital Networks (Multiplex A), I have concerns that BSkyB, through its interests with ITV plc could use capacity on these two multiplexes to expand its pay television service, one of which is a designated public service multiplex at digital switch-over, to further stifle competition and to the detriment of the Freeview platform and viewers. A report in Broadcast in July 2007 stated concerns from the BBC in a response to a consultation to the Competition Commission that Sky could exert pressure onto ITV to make their current free-to-air channels into subscription channels and further stifle Freeview. The BBC also raised concerns that this move would also see ITV drop their support for an open standard and move towards BSkyB's own proprietary technology.[6]

4. The possibility of other commercial broadcasters who currently broadcast on the Freeview platform to join the Picnic service with existing Freeview channels or other pay channels from other platforms replacing existing Freeview channels. A similar situation occurred on September 1, 1993 on the Astra fleet of satellites when BSkyB launched its Sky Multi-channels package. Previous to this, a number of channels from other broadcasters were available free-to-air or free-to-view (using a VideoCrypt decoder but no viewing card) to UK and for some channels, also European viewers before joining the Sky Multi-channels package, including UK Gold (now UKTV Gold), MTV, Bravo, The Discovery Channel and The Children's Channel (since replaced by Trouble).

   My intinal fears of channels joining the BSkyB pay service is heightened due to the ease and quickness of a number of Freeview channels which were and in some cases, still are running a good number of hours of participation television and teleshopping to make up for the shortfall in advertising revenue, including ITV1, ITV2, Five, More4, The Hits, Virgin 1, TMF (until recently), Film4, Five US and Five Life. It would be hard not to suggest that some of these channels may be tempted or even encouraged to either join the BSkyB pay television service or change to their pay television equivalents (to give an example, changing to the more efficient MPEG-4 encoding technology, Viacom could change TMF, which in turn could easily become MTV and Nickelodeon. These two channels are major draws on the Sky Digital service).

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6 **http://www.broadcastnow.co.uk/broadcastnowarticle.aspx?intStoryID=169961** – Broadcast - Rivals attack Sky's ITV stake

I believe that there should be some control to prevent channels which are part of the Freeview platform at the moment to join the BSkyB pay television service. I am unhappy with the current situation where BSkyB were gifted 75% of multiplex C as part of the Freeview consortium to originally provide free-to-air channels who are now changing their channels to pay services. I believe that as Top Up TV have had to do, that any extra channels which are added to the pay television service, should be added through free space on the digital terrestrial platform in a fair and equal auction as ITV and Channel Four have had to do for their channels, without further deteriorating the number of free-to-air channels on the Freeview platform.

And I also believe, if channels did lose revenue on digital satellite and cable platforms, if Picnic does goes ahead and is popular, then there may be more pressure for channels which already exist on Freeview to join the Sky service or for channels to buy space from other channels already broadcasting on Freeview to launch pay services. This in turn could further undermine the choice to free-to-air viewers.

5. The danger that is already occurring where the new BSkyB pay television service will become confused and inter-tangled with the Freeview platform. This is also becoming true for Top Up TV and Setanta. I have read a number of on-line news articles which have made the suggestion that the new pay television service is to be a part of the Freeview service, and indeed, media coverage of Ricky Hatton's fight on Setanta this year has highlighted incorrectly that the fight is on “Freeview”.[7] Although the pay television service is on a multiplex licensed to the Freeview consortium, it is not part of the Freeview service because the new BSkyB pay service will feature no free-to-air channels.

   This is being further compounded by news reports who have written that the ASA banned a number of BSkyB's advertisements for Whitehaven residents who were being told that "terrestrial" television will not be available at their switch-over of October 2007, with no indication that Freeview would be available at the time of the switch-over.[8]

   To add to this, a number of forum users on the Digital Spy forums have also reported that the Sky sales team are telling people when they call to cancel their contract to switch to Freeview that E4 will switch from being a free-to-air channel to a subscription channel.[9] The tactics of the Sky sales team is further undermining consumer confidence in Freeview and the digital switch-over if a consumer does not wish to subscribe to a pay television service.

   As well, a number of viewers on comment boards and Internet forums are forming the idea that Freeview is changing to a pay television platform, which BSkyB will have control of. This sort of misinformation will only cause damage to digital take-up as people who have no wish or cannot afford pay television will be more likely to hold off and keep their analogue television sets, which they know for sure will have a guarantee of staying free-to-air until the analogue signals are switched off, which for many people, will not be for years to come. The whole situation of confusion and

7 **http://gb.setanta.com/portal/article/football::spl?open&articleid=14c21a67f3f75539802572df004e7b06** Setanta Sports - Hatton fight LIVE on Setanta

8 **http://www.digitalspy.co.uk/broadcasting/a42480/sky-tv-ads-banned-by-asa.html?rss** Digital Spy - Sky TV ads banned by ASA

9 **http://www.digitalspy.co.uk/forums/showthread.php?t=538806** Digital Spy forums - Told by SKY that E4 will be coming off Freeview

misinformation is damaging consumer confidence in the digital terrestrial platform and the Governments plans for digital switch-over. I would urge Digital UK, the organisation that is overseeing the digital switch-over, to address this confusion as a matter of urgency.

It will also bring into question BSkyB's dominance and control in the digital television market, as if the pay television service is given the go ahead, BSkyB will have pay television services it owns on the two most popular and dominant digital platforms, digital satellite and terrestrial television, and is also requesting allowing open competition to sell its channels directly to viewers on analogue and digital cable.

6. BSkyB's decision to remove the three Freeview channels it operates to accommodate its new pay television service, which are currently Sky Three, Sky News and Sky Sports News.

   In addition to this, I am concerned with the following statement in the background information for Picnic, which indicates that the channels may be removed, even if the proposal for Picnic to launch on DTT is rejected by Ofcom:

   "Sky has decided to cease broadcasting its channels on DTT on a free-to-air basis."

   The removal of these three channels, in particular Sky Sports News has been met with disappointment and even anger by a growing number of the public on Internet discussion boards and forums. This decision by BSkyB to replace the above channels with a pay television service can only confuse members of the public more in the run up to digital switch-over and devalue the Freeview platform further. This is especially true in the case that programmes which BSkyB have bought all out rights for (for example, Lost and 24) will have no second run on any digital terrestrial channels, including Sky Three. People may then be more encouraged to download the programmes illegally for free from peer-to-peer networks. This, alongside the obvious illegal complications, will also add extra pressure on broadband providers who will have to deal with more traffic.

   This has been confirmed by many disgruntled Virgin Media customers who have resorted to either illegal means of seeing popular programmes (for example, by using peer to peer technology to watch popular shows as soon as they are broadcast in America) which were recently lost when many of the Sky channels stopped broadcasting on their platform on March 1st, or by switching to the Sky Digital service.

   Further information from Virgin Media's press release during the negotiations of BSkyB's basic channels on cable also state that Virgin Media were requested by BSkyB to remove Sky services from its basic (free to customers who also take out a phone package to Virgin Media) package of channels, or "Size M".[10]

   The loss of these three channels to the Freeview platform however, may bring some positives. With less free-to-air channels competing for viewers, the advertising revenue will be less spread around and channels on Freeview may have more money from advertising to spend on programmes. Furthermore, there will be people

10 **http://pressoffice.virginmedia.com/phoenix.zhtml?c=205406&p=irol-newsArticle&ID=967679&highlight=** Virgin Media press release - Sky Remain Intent on Doubling Price of Declining Basic Channels

who welcome the choice of additional premium channels from BSkyB, especially if they are unable to have a satellite dish erected and cannot receive cable and/or IPTV (which may include BSkyB services) in the future, and indeed, the choice of channels, particularly for a new factual and a children's channel in addition to BskyB's original plans will be welcomed by a number of consumers of DTT.

7. The possibility of Setanta launching further channels on DTT (ie. Setanta Sports 2, Setanta Golf or NASN taking over the current live streams for UKTV Gold and Style on Top Up TV, or these channels becoming part of Top Up TV Anytime) might encourage BSkyB to launch their other sports channels on DTT. Due to space on DTT for new channels being unavailable at the present time, the likelihood would be that BSkyB would have to buy out channels currently broadcasting on DTT in order to launch these new services. This again would have a detrimental effect on the choice of channels on DTT being reduced further for premium pay television services.

8. BSkyB's removal of Sky News from the Freeview platform, of which Sky News was the commercial competitor in terms of news channels to the BBC on the Freeview platform, since the closure of the ITV News Channel. As I believe this is a specific public policy concern which must be made known in the response to question six of this consultation response. I have gone into this further in the aforementioned question.

   BSkyB confirmed their decision to change Sky News to a subscription channel in the background information released for the Picnic service.

9. The launch of the BSkyB's pay television service and the effect of any possible churn rate for its Sky Digital service, as well as possibly for Virgin Media, Top Up TV and BT Vision. Depending on the price BSkyB set for their new digital terrestrial service, there could be an increase in the churn rate on both platforms. This in turn, would reduce the amount of the slice of subscription revenue non-Sky channels receive. This may increase financial pressures on non-Sky pay television channels. BSkyB will need to make sure not only that its pay service is priced so that it does not increase churn rate, but to ensure and calm any fears of other broadcasters that viewers will cancel their subscriptions from Sky Digital and in return, receive less money from subscribers of the Sky Digital service. Main examples of broadcasters who could lose out if churn rate increases include Discovery, Viacom and Virgin Media Television.

   BSkyB have set themselves two main targets:

   - Decrease the churn rate of their satellite service to 10% or less;
   - Increase average revenue per user (ARPU).

   Any impact that BSkyB's service will have on their targets will need to take these two factors in account.

Response to the consultation questions

Competition Assessment

Question 1: To what extent do you consider that DTT, DSat, cable and IPTV are in

competition with one another for subscribers of pay TV services – either at present or in the future?

At the moment, there are a number of companies offering pay television to consumers via a number of platforms. Out of all the services available, Sky's digital satellite service, (it is worth noting Sky's own Freesat from Sky service) provide the greatest coverage area, followed by BT Vision, Top Up TV via digital terrestrial television and Virgin Media via analogue and digital cable. Smaller cable and IPTV firms follow behind.

In many areas of the UK, indeed where I live, there are only a limited number of options for pay television. Sky and Top Up TV are available to everyone in my area.

Although IPTV is expanding, Tiscali TV requires a Tiscali broadband connection and cannot be used aside another ISP's broadband service. IPTV and BT Vision are also limited by the requirement for a consistent speed to meet the bitrate requirement for the stream being broadcast to the end user. Areas a few kilometres away from a BT exchange may not be able to get the IPTV service. This may improve in the future, but with more restrictions being imposed as well as increased costs of delivering video over broadband due to the cost of BT's central pipes, IPTV is limited to the major players in the broadband market who can afford to expand, as well as to those customers whose exchanges are LLU enabled for Tiscali TV.

With the introduction of Picnic, should the proposal go ahead, I can see a situation where it would be more difficult for Top Up TV, BT Vision and Virgin Media to compete. Picnic would require people to purchase a new box, if VideoGuard conditional access and/or MPEG-4 are used. With increased pressure on budgets for households across the UK, it is unlikely that people will wish to subscribe to more than one pay TV platform. The reduction in revenue for Top Up TV and BT Vision might make them reconsider whether their pay services are viable enough to continue to operate. It is possible that Sky could buy out the Top Up TV service and migrate customers on the Top Up TV Anytime service to their Picnic service.

As well, should Sky consider the option of encouraging other broadcasters on DTT to change to pay services or buy out channels from their contracts, the selling point of being able to access Freeview channels for both BT Vision and Top Up TV (as well as through Virgin Media's V-box, as part of their triple play package for non-cable customers as well as Freeview itself) would diminish the attractiveness of all these services in favour of BSkyB's pay service.

Worryingly, should Sky be the gatekeepers of pay television on two platforms, I could see it looking more likely that Sky would have a significant stranglehold to reduce the price it pays to channels which are part of its platform, encourage exclusivity deals to channels to only broadcast on its own platform and reduce choice on other pay and free-to-air platforms.

Sky's basic channels were pulled from Virgin Media due to their ongoing dispute in March 2007. Virgin Media still has access to Sky Sports and Sky Movies due to a ruling made by the Office of Fair Trading. For a lot of people, Sky's basic channels are only available through Sky, Tiscail TV (where available) or small cable operators. Considering Sky's deals with major broadcasters in the US for exclusive showing of popular American shows, and the unlikely prospect of these programmes ever being shown on terrestrial television, Sky could be seen to use its dominant position already to restrict competition and make rival platforms (both pay and free-to-air) less attractive for its own benefit.

Question 2: To what extent do you consider the Proposal is likely to deliver benefits to the consumer?

At the moment, considering Sky's almost total coverage of the UK population by satellite, it is unlikely that the proposals by Sky will deliver benefits to the consumer. Indeed, because of the loss of Freeview channels to a far greater number of people, it is likely that the proposal will be of detriment to the consumer, and to the goal of digital switch-over. This is especially true of a number of programmes that BSkyB have the exclusive rights to which would no longer get a delayed showing on terrestrial television on Sky Three. As well, the loss of Sky News will mean that free-to-air DTT viewers will no longer have access to a commercial 24-hour news channel, leaving the BBC with a monopoly on news reporting on Freeview.

The only people who may benefit would be a very tiny fraction of the UK population who may be restricted from having a satellite dish installed, for example, because of physical constraints such as trees or landlords who may not allow dishes to be erected. These people may have more choice from existing DTT services, IPTV or cable where available.

Question 3: To what extent do you consider that there is scope for sustainable competition in pay TV on the DTT platform and, more broadly, across all pay TV platforms?

History has shown that where there has been competition on one platform between companies, then one company will usually merge into another company.

For example, British Satellite Broadcasting (BSB) was merged into Sky Television to form British Sky Broadcasting in 1990. NTL and Telewest merged and bought up other cable providers across the UK before merging themselves under the Virgin Media brand.

It is likely, therefore, that Picnic and Top Up TV on the DTT platform will eventually see the same fate. In my view, Top Up TV would be the platform that would be merged into Picnic to form a greater service for Picnic, with existing streams used by the Top Up TV Anytime service being redeployed to expand the Picnic service.

This scenario could also have implications for Setanta, which currently uses Mediaguard to encrypt its service in co-operation with Top Up TV. Should any merger occur, it is likely that Setanta would change to using VideoGuard encryption on Sky's security recommendations. This would mean the loss of service to current Setanta standalone subscribers as well as BT Vision subscribers. Neither would have the option of using a conditional access module for VideoGuard channels, due to the security concerns of NDS. Therefore, a new set-top-box with VideoGuard conditional access built in would be the only option for consumers.

Competition between pay services have always been between different platforms. This is of course restricted somewhat by the physical access to different platforms. In reality, most people will only have access to a maximum of two or three different pay television companies, usually digital satellite, digital terrestrial and digital cable.

Sustainable competition would only be possible between different companies where an open platform can be offered, within the constraints for space for channels to broadcast. At the moment, there is capacity on digital satellite and cable for channels to broadcast. IPTV has virtually unlimited capacity for channels to broadcast.

However, DTT does not have significant capacity to offer a pay television service to rival that of other platforms. Until digital switch-over, a change back to 64-QAM on Multiplexes C and D would only yield four more additional channels for new services, unless the BBC are made to change to 64-QAM on their multiplexes and surrender existing space, which can be swapped for public service broadcasters Five and S4/C on Multiplex A. The problem at the moment with switching back to 64-QAM would be the loss of service to a number of the population where a switch to 16-QAM in 2002 was part of the Freeview consortium's licence application to increase the coverage of their digital terrestrial service, which would be lost with a switch back to 64-QAM.

There is the additional complication of viewers of DTT in areas where a reduced DTT service featuring three of the six multiplexes will be rolled out to relays across the UK. These viewers would not be able to receive the Picnic service.

Due to the limited scope for pay television on digital terrestrial television, only a lite pay DTT service can and have launched. In both cases, the service was reduced or closed. Compared to the more substantial offerings from satellite, cable and IPTV, cheaper running costs and better value for money for subscribers, I believe that DTT should be left to a limited free-to-air offering which can make money from advertising, which has been proven to be popular with the success of Freeview.

Question 4: What are likely to be the key aspects of competition between providers of retail pay TV services on the DTT platform? E.g. what is the role of premium sports and movies content?

As I mentioned in my answer to question three, it is likely that more than one provider of pay television on any platform is likely to merge together to become one company offering pay television on DTT. Therefore, competition of pay services will be between platforms. It is worth mentioning at this point that premium sport and movie content is already provided on the DTT platform, through Setanta Sports and Picturebox on Top Up TV Anytime. I believe, as I will answer in question five, BSkyB would be the gatekeeper to any premium pay service on DTT, if the plans for Picnic are approved.

Pay television compete for viewers by offering popular entertainment, usually from overseas and America in particular, niche programming and premium events such as live Premiership football or UK movie premières to audiences. Pay television also competes with free-to-air television, particularly the major broadcasters of the BBC, ITV, Channel 4 and Five as well as their digital channels. Pay television services also promote choice over value for money.

Sky's plans do show that they would provide premium sport, movie and entertainment content in their plans. However, I believe that due to the limited capacity of DTT, it would be likely that unless companies with Freeview channels decide to join the Picnic service, Sky cannot operate an fully open market to allow other broadcasters to offer pay services through the Picnic service like it can afford to do with its digital satellite business. Therefore any company without access to a channel currently broadcasting on Freeview is unlikely to obtain carriage for Picnic unless they buy out a channel already broadcasting, which would cause further reductions in the Freeview service thereby further diminishing Freeview's appeal.

Question 5: Do you consider that if Sky were to become the only provider of pay TV on the DTT platform it would be likely to have a significant detrimental effect on competition in the long term? How might this affect the development of other platforms for the delivery of pay TV services?

Sky's proposal would give them a foothold in the two platforms with the most coverage area in the UK. As I mentioned in question three, it would be likely that there will be only one provider of pay television on DTT. This would likely be BSkyB.

For a number of people, Sky would be the only provider of pay television. It is also likely that Sky would be able to negotiate a lower share of subscription revenue to channels whilst increasing prices for subscribers on both digital satellite and digital terrestrial platforms.

It is practically impossible for another pay television supplier to launch a service on digital satellite, either from the Astra 2/Eutelsat Eurobird fleet of satellites at 28.2/28.5°E because of the closed conditional access used by BSkyB, alongside BSkyB owning the vast majority of transponders at that location, meaning a competitor to launch there would only be able to offer a lite pay service, with no likelihood for simulcrypting to be supported to allow other broadcasters to join a competitor. Different problem applies to launching a competitor from a different satellite, and the expense of uplinking to two satellites would make it unlikely for channels to support two satellite competitors.

Cable, due to the expense of installing the network and current closed network would be unable to be open to competition. IPTV can expand, but only large companies which can cover the cost to deliver a constant bitrate to consumers and invest in the network will be able to compete.

There are problems regarding the channels which would be on the Top Up TV Anytime service as well as Setanta Sports, who use the Mediaguard conditional access system.

Other broadcasters currently on the Anytime service would not be able to broadcast on DTT, or be required to join Picnic on the terms set out by BSkyB. There is also the possibility that as Top Up TV provide the conditional access for Setanta, if BSkyB become the gatekeeper for pay television on DTT, Setanta would, if they wish to continue to broadcast on DTT, be required to use the VideoGuard conditional access system. This would in turn require existing customers to purchase a new set-top-box with VideoGuard built into the set-top-box. This would increase costs and waste from some subscribers who may not require the additional box for Freeview services.

The condition that BSkyB would allow other CAMs to be used in VideoGuard embedded set-top-boxes would be defeated if VideoGuard was the only conditional access system used within boxes. The consultation does mention the possibility of simulcrypting in paragraphs 2.48 to 2.50. However, in my view, due to the security concerns that I mentioned earlier in the document that BSkyB have mentioned in the proposal and public consultation, it is likely that BSkyB will not wish to simulcrypt any programming from itself and other broadcasters in any other conditional access system other than VideoGuard, especially as stated in paragraph 2.50 of the consultation, the encryption of a channel is only as strong as the weakest conditional access system.

This would also have the side effect of making BSkyB the gatekeeper to not just pay television on the two platforms with the most coverage, but ensures that BSkyB keep control of the delivery and encryption of subscription sport channels, in particular Premiership football from both BSkyB and Setanta, even if Setanta is offered as a standalone package on DTT.

The same scenario with Setanta would be repeated if Sky required all Picnic channels to use MPEG-4 encoding.

If the proposal were to go ahead, BSkyB would have a monopoly for digital satellite and digital terrestrial pay television, which would have implications for consumers, manufacturers, the industry and other competitors as well as both free-to-air and pay channels and platforms.

Other Policy Considerations

Question 6: To what extent, if at all, do you consider that the Proposal would be likely to lead to any of the public policy concerns outlined at Section 4?

I believe that the proposal will significantly reduce the appeal of Freeview if the proposal is given the go ahead. The proposal as shown by BSkyB will remove their three channels on Freeview. Sky Three's removal would prevent a number of popular American shows which BSkyB have the exclusive rights to being shown on terrestrial television. The removal of Sky Sports News would also remove a unique service of a rolling sports news channel which is not only popular with sports fans, but is a service that is not covered by any other broadcaster in the UK.

My biggest concern, and one that I have gone into detail in section 8 of this document is the removal of the only commercial news channel on Freeview. The removal of Sky News from free-to-air digital terrestrial television now guarantees the BBC a monopoly in regards to news reporting on the Freeview platform. This is in contrast to the few hours of decreasing news coverage on the commercial news channels. This is not apparent on digital satellite and cable platforms, which contain a number of other commercial 24 hour news channels from other broadcasters.

Although BSkyB are free to state and market their news service as a premium pay channel, as they stated in the Culture, Sports and Media select committee in May, I do believe its removal from the Freeview platform will only be detrimental to viewers in terms of competition and choice for news coverage, as well as the digital terrestrial platform as a whole, where the service will only be available to what I believe will be a minority of subscribers on DTT.

Although I agree with the text of paragraph 4.5 that the general pattern of the migration of channels from pay to FTA has occurred, I believe that BSkyB's prominent position may encourage channels on the Freeview platform, especially if Picnic is successful and the sole provider of pay television on DTT, to become part of the Picnic service. I also expressed the possibility earlier in this document that BSkyB has the option to buy out channels on the DTT platform in the future. Both options would further reduce the appeal and choice for free-to-air consumers. This is explained further in section 4 of this document.

BSkyB has given no assurances in any of its press releases or background information that the Picnic service will not expand beyond the current plans of the proposal given to Ofcom.

The public policy concern of confusion to consumers in regard to the removal of Freeview channels will be explained in question seven.

Question 7: Specifically, to what extent do you consider that the Proposal would be likely to lead to consumer confusion?

It is already happening, through personal experience of members of the public who are posting on discussion forums. A number of people see the proposal as a greater threat than what BSkyB has presented to the public. There are a number of people who have posted messages along the line of “keep Freeview free” and one petition to 10 Downing Street has been started into the introduction of pay channels from BSkyB onto DTT.

In terms of confusion of having Freeview, Top Up TV and Picnic on DTT, I believe that although with the phenomenal success of Freeview, cheaper set-top-boxes will still be produced which just receive the free-to-air channels on DTT.

Where confusion may occur is with customers wishing to purchase pay television services on DTT. In my view, if we consider all the existing options on DTT at the moment along with the Picnic proposal, there are a number of options for consumers:

Option	Service Name	Conditional Access	Set-top-box required	Upgrade Options
1	Sky Picnic	VideoGuard	MPEG-4, VideoGuard set-top-boxes with an integrated CAM slot	Can be upgraded with a Mediaguard CAM to include option 3. Should also be able to access option 4
2	Top Up TV Anytime	Mediaguard	Thomson DTI-6300-16 only.	Can be upgraded to include option 3. Should also be able to access option 4
3	Setanta Sports	Mediaguard	Any set-top-box with an integrated CAM	May also be able to access option 4

			slot	
4	Television X/Red Hot	MHEG-5 “Xtraview” encryption system	Selected set-top boxes	May be able to access option 3 if the set-top-box has a CAM slot

Table 1: Comparison of pay television options on digital terrestrial television including the Sky Picnic proposal.

In particular, Top Up TV customers will be the people who will be most confused and likely to have to spend money. With the popularity of Sky channels, consumers will have to purchase a new set-top-box to receive the Sky channels which will not be available to Top Up TV customers. This will also apply to other customers. The reason I single out Top Up TV is because they are likely to get the most frustration and churn from customers who may wish to subscribe to Sky's channels but do not wish to purchase a new box or pay a separate subscription to two (or more) companies.

Where confusion is likely to occur for consumers is when people are purchasing new set-top-boxes for DTT. In particular for what channels they wish to watch. Although the Freeview channels will be available to everyone regardless of which pay service they subscribe to and Setanta can be subscribed to regardless of choice, confusion may occur when people go to decide on what channels they wish to receive and pay for for either Top Up TV Anytime and Picnic.

Top Up TV Anytime uses a proprietary way to push programming to customers which require its own set-top-box from Thomson. Likewise, Picnic will only be available on set-top-boxes which include MHEG-4 decoding (if given permission) and the VideoGuard conditional access system. Channels on Top Up TV Anytime's service will not be available to Picnic customers and vice versa. It is unlikely that customers will wish to pay out twice for pay channels on two incompatible options and in my view, because of the position and power, BSkyB would be the victor in any battle between pay television providers on DTT.

I also agree with paragraph 4.11 of the consultation regarding the introduction of high definition television on DTT. New set-top-boxes will be needed for any HD service, and it is likely that in line with other platforms, MPEG-4 will be used for HD broadcasts with DVB-T2. As BSkyB will have the infrastructure ready to broadcast MPEG-4, I believe that BSkyB would be able to provide a HD service on its terms and conditions if an HD service is to be broadcast on DTT. I also believe that this is a damaging prospect for the limited capacity on DTT, as BSkyB and Virgin Media have been quoted to be considering HDTV as a premium service which should be paid for by subscription and not be available free-to-air as well as be open to anyone who wishes to bid for spectrum.[11] Therefore in my opinion, BSkyB would have an easier task of launching their own HD subscription service with the likelihood that it would be under the control of BSkyB under their terms using their own standard and set-top-boxes. This would force a closed system where BSkyB could decide the price and channels for HD on DTT.

Question 8: To what extent do you consider that it is beneficial for consumers to be able to obtain Sky and existing DTT pay TV content without having to purchase

11 **http://www.broadbandtvnews.com/today/?p=2095** - Broadband TV News - Murdoch: gifted HD spectrum ‘preposterous’

separate STBs?

I mentioned earlier in my introduction under point 1 regarding BSkyB's desire to use the VideoGuard conditional access system as well as the proposal in point 2 regarding the use of MPEG-4 encoding for the channels, should Ofcom allow BSkyB.

I believe that it would be unlikely that BSkyB will use any other conditional access system other than VideoGuard, for the security as quoted from the chief operating officer of BSkyB, Mike Darcey, close co-operation with NDS and competition issues. Therefore, it would not be possible for consumers to have a secondary pay television service without having to purchase a new set-top-box for the proposed Picnic service, on both the competition and technological aspects of the proposal.

Question 9: Do you consider that the Proposal might lead to any additional public policy concerns?

I believe there are additional public policy concerns with this proposal. Depending on the success of the proposal should it be granted permission to launch, I believe that a number of channels on the Freeview platform may be encouraged to switch to subscription if it is successful. Although we can all agree that many channels (BBC One, BBC Two, ITV1, Channel 4, Five and the BBC's digital channels) are guaranteed free-to-air, many people welcome the additional choice of more niche and additional entertainment programming on the Freeview platform, for example, the transition of UKTV G2 to Dave has seen it become one of the largest digital channels, in comparison to ITV2, E4 and BBC Three.[12]

As I mentioned in point 4 of the introduction, I believe that channels may be tempted either by additional revenue or through incentives to join the Picnic service. If this were to occur, then there would be confusion and potentially fear that other channels may follow. This would in my view make Freeview lose some of the appeal and promise to provide more free-to-air choice to consumers.

I also share the concerns in section 4.6 of the consultation document regarding the stake that BSkyB has in DTV Services Limited (DTSL). Although BSkyB have stated that there would be no conflict of interest with their stake in DTSL, I believe that the core principal of marketing a free-to-air platform should not involve the inclusion of pay television services, which can add to confusion to consumers. Therefore, should BSkyB launch subscription services on DTT, I believe that BSkyB should be required to remove themselves from the Freeview consortium. The competition and other issues I have raised in my consultation response I believe is enough to cause a conflict of interest with DTSL, and the promotion of free-to-air television on DTT.

Options

Question 10: If Sky becoming the only provider of pay TV services on the DTT platform were likely to have a significant detrimental effect on competition, do you consider that it is possible to address this through a set of additional conditions and/or directions? If so, what form

12 **http://www.barb.co.uk/viewingsummary/monthreports.cfm?report=monthgmulti&requesttimeout=500&flag=viewingsummary** BARB – Monthly Viewing Summary

should those conditions/directions take?

Sadly, I believe with BSkyB's dominant position and competition issues within my consultation response that conditions, restrictions and/or additional rules would not ease my concerns with the proposal in order for me to suggest that the proposal should go ahead.

Therefore, I would urge Ofcom to go for option three: not consent to the proposal.

Yours sincerely

Gareth Hart