Department for Culture, Media and Sport
Broadcasting Policy Division

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To SECRETARY OF STATE Cc PS/Patricia Hewitt
PS/Stephen Timms
PS/Dr Kim Howells
PS/Baroness Blackstone Bill Bush
Andrew Ramsay Sarah Hunter

From [redacted]

File Ref

Date 28 April 2003

[redacted]

LETTER TO SKY RE. "ECONOMIC REGULATION" OF BROADCASTING & PLURALITY

Issue

1. Letter to Sky following your meeting on 2 April.

Timing

2. Routine, but helpful to write to Sky before third day of Lords' Committee (13 May) when the relevant clauses on Broadcasting Act competition powers could be discussed.

Recommendation

3. That you send the attached draft letter, at Annex A, to Tony Ball.

Summary

4. At your meeting with Sky you discussed "economic regulation of broadcasting; OFCOM's 'plurality' duty; and Recognised Spectrum Access (RSA). You promised to write to Sky about "economic regulation" of broadcasting, and it would be helpful, at the same time, to clarify how the new plurality duty will be applied in relation to mergers.

5. As Sky's points about RSA require policy agreement with OFCOM, DTI colleagues will draft a letter for Stephen Timms to send to Sky on that issue.

Economic Regulation of Broadcasting

6. Sky left with you a paper on this issue (attached at Annex B), which does not raise new issues, and have subsequently e-mailed officials with their summary of the meeting. Sky's concerns are threefold:

(i) *Sky claim that when OFCOM uses its Broadcasting Act competition*

powers when the Competition Act would have been the more appropriate route, broadcasters would not have grounds for judicial review since OFCOM does not have a duty to use the Competition Act where it would be more appropriate.

a. During Committee, Dr Howells said that "Broadcasters can apply for judicial review if they consider that OFCOM has wrongly used its sector-specific powers when the Competition Act powers would have been the more appropriate route". Sky are implying that this is incorrect. I have sought legal advice on this, and can confirm that the availability of judicial review does not depend on there being a duty to use the Competition Act. A broadcaster can, for example, challenge OFCOM over their decision whether or not the Competition Act is "more appropriate", or if they reach a perverse view on that question.

(ii) *Sky are concerned that if OFCOM undertakes "economic regulation" other than for a competition purpose e.g. to promote the interests of consumers, broadcasters would not have a route of appeal to the Competition Appeal Tribunal.*

a. OFCOM does not have a duty to regulate the economics of broadcasting *per se*, but has two objectives for regulating broadcasters' economic arrangements: competition and consumer interest. Sky consider that an intervention, which to them is "clearly economic regulation" (such as pricing/packaging of channels) but made in the interests of consumers, should be treated in the same way, in terms of route of appeal, as a competition intervention.

b. By way of example, OFCOM may wish to intervene in Sky's packaging of channels so that consumers could have more choice of packages (without having to buy a lot of unwanted channels as a minimum). Such an intervention would have a significant economic impact on Sky, but the purpose of the intervention would be a subjective question of what represented an acceptable amount of consumer choice.

c. However, OFCOM's duty "to further the interests of consumers" is qualified by the parameter: "where appropriate by promoting competition". It is therefore difficult to see that OFCOM could justify intervening in the packaging of channels in the consumer interest, without first having exhausted all the options open to it (via the extended competition powers that OFCOM will have) to resolve the issue by encouraging more competition in the pay-TV market. If Sky thought that OFCOM had not exhausted these options, it could challenge OFCOM under judicial review that it had not used its powers properly.

(iii) *Following on from (ii), Sky say that if OFCOM were to undertake "economic regulation" claiming that it was not for a competition purpose (e.g. to promote the interests of consumers), not only would broadcasters not have a route of appeal to the Competition Appeal Tribunal, neither would they be able to apply for judicial review on the basis that OFCOM's intervention was, in*

fact, for a competition purpose.

a. This argument suggests that OFCOM have an unfettered power to use the Broadcasting Act powers or Competition Act powers at their discretion. However, Clause 310(2)[1] of the Bill has the effect that OFCOM's initial step before using any Broadcasting Act power must be to see whether it is being used "for a competition purpose". Some Broadcasting Act conditions (e.g. content matters) could never be considered to be made for a competition purpose. However, in the case of the kinds of "economic regulation" that Sky are concerned about, OFCOM would need to assure themselves that they were not wrongly characterising their intervention as (say) consumer protection when, in fact, it served a competition purpose. This decision would be subject to judicial review.

7. Sky's paper, as expected, raises two peripheral objections to our policy:

i) *Part 2 of the Bill (networks and services) allows appeals for most of OFCOM's decisions to the Competition Appeal Tribunal.*

Part 2 of the Bill deals with completely different matters to those under Part 3. There are, for example, no content issues in the regulation of Networks and Services. In regard to broadcasting, by contrast, many of the issues for decision will involve an assessment of a wide range of public interest issues, many of them not related to competition or other economic matters. Since the duties on OFCOM under Part 3 of the Bill are quite different in nature to those under Part 2, the appeals mechanisms are necessarily different.

ii) *OFCOM can intervene in the packaging of licensed satellite channels, but not in the packaging of channels by cable operators who are not licensed.*

As retailers of channels, neither satellite nor cable are licensed. Therefore, Sky are correct that cable packagers do not require a licence under Part 3 of the Bill, but neither does Sky as a packager of satellite channels. Since Sky operate a vertically integrated platform in which they both package channels and own Broadcasting Act licences to provide content in their own channels, they consider that they are singled out from cable operators. However, if a cable operator were to own their own channel, then they would be treated in precisely the same way as any other licence holder.

8. These points have been raised by Sky before (in the case of (ii), during Commons Committee), and I propose that we stick to your assertion that we would only consider new arguments. I have not therefore referred to these in the draft reply.

[1] (2) Before exercising any of their Broadcasting Act powers for a competition purpose, OFCOM must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998.

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Plurality

9. With regard to Sky's concern about the application of OFCOM's plurality duty, there is certainly no intention that the duty could be used to block a merger. If a merger is compliant with the rules, the decision to prevent it from going ahead could only be taken on competition grounds.

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Broadcasting Policy Legislation Team

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During our meeting on 2 April, I promised to consider your paper on the regulation of the Broadcasting sector, and to write to you to clarify our policy.

Having reflected further on the arguments in your paper, we think that the main difference of view between us derives from the references in it to 'economic regulation'. In our view, regard needs to be paid when considering appeal mechanisms to the purpose of the regulator's intervention, as well as to its effect. Almost any intervention in the commercial affairs of a business is likely to have an economic effect. However, the intervention may in some instances be aimed at a different objective.

For example, although we consider this an unlikely scenario, OFCOM might seek to regulate the packaging of channels, with the aim of ensuring an appropriate level of consumer choice. However, since OFCOM has a duty "to further the interests of consumers, where appropriate by promoting competition", they would only be able to intervene in this way if they were satisfied that promoting competition – by using the various general and sectoral competition powers available to them – was not appropriate to achieve the desired outcome.

Any subsequent intervention on that basis (satisfactorily justified) would undoubtedly have an economic effect, but would not have been undertaken for an economic (or competition) purpose. Consequently, it would not be appropriate for an appeal against such a decision to be dealt with by the Competition Appeal Tribunal (whose expertise is in competition matters). It would however be an appropriate matter for the courts, via judicial review.

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Having received legal advice on your concern that broadcasters could not apply for judicial review against a decision by OFCOM wrongly to use its Broadcasting Act competition powers when its Competition Act powers would be more appropriate, I can confirm that Kim Howell's statement to the House was correct.

A broadcaster can apply for judicial review if, for example, it alleges that OFCOM have not properly considered whether the Competition Act would be more appropriate than Broadcasting Act competition powers, or have irrationally concluded that Competition Act powers would not be more appropriate, or have wrongly used their Broadcasting Act competition powers where they have concluded that the Competition Act would be the more appropriate route. OFCOM rightly does have discretion in this matter, but the option of judicial review for broadcasters means that OFCOM cannot choose the sector-specific powers over the Competition Act without well-founded arguments.

In addition, in the event that OFCOM chose to use its Broadcasting Act powers for (in your words) "economic regulation" other than for a competition purpose, broadcasters would be able to apply for judicial review if they considered that it was, in fact, for a competition purpose. Clause 310, subsection 2, of the Bill has the effect that OFCOM's initial step before using any Broadcasting Act power must be to see whether it is being used "for a competition purpose". In the case of the kinds of "economic regulation" that you are concerned about, OFCOM would need to assure themselves that they were not wrongly characterising their intervention as (say) consumer protection when, in fact, it served a competition purpose. This decision would be subject to judicial review.

With regard to our discussions about plurality, there is certainly no intention that the plurality duty in clause 3 could be used to block a merger. If a merger is compliant with the rules, the decision to prevent it from going ahead could only be taken on competition grounds.

I understand that Stephen Timms will write to you about Recognised Spectrum Access, the policy on which, as I explained, is lead by DTI.

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TESSA JOWELL