



QUEEN ANNE'S GATE LONDON SW1H 9AT

5 March 1990

Mr Norman,

BROADCASTING BILL

Thank you for sending me a copy of your minute of 2 March to the Prime Minister, commenting on my own minute of 22 February. I have also just seen Nicholas Ridley's letter of 5 March.

I think it important to stress that the proposals I set out in my earlier minute do not in any way change the philosophy or underlying principles on which we have based our decisions. They are aimed only at what is already implicit in the Bill as drafted. Unless we are able to demonstrate a degree of flexibility on these very limited issues we shall undoubtedly face very serious problems with the Bill, particularly in the Lords.

I was glad to see that you and Nicholas are able in principle to support my proposals that the diversity requirement should be expanded to include children's and religious programmes, and that the regional news required of Channel 3 licensees should be of high quality. There is obviously a tactical question as to whether the necessary amendments should be put down now or later. My judgement is that if we delay doing so, the momentum of the campaign against our proposals will grow, to the point where the concessions we presently envisage would no longer be seen as sufficient. From discussions David Mellor and I have had with those who will be concerned with these issues in the Lords, I am confident that, with well-timed amendments at Commons Report stage, we will be able to resist demands for further concessions later in the Bill's passage.

You and Nicholas saw difficulties with my other two proposals, which were to amend the Bill so as to make clear that the "exceptional circumstances" provision could include circumstances where there was an exceptional quality difference; and to make clear that the high quality requirement should apply across the range of main programme types.

On the issue of exceptional circumstances, I must make it clear that there is no question of extending the discretion which the Bill already gives the ITC. MISC 128 recognised that there might be exceptional circumstances, of which quality was one, where the ITC ought to have a discretion to award the licence to a bidder other than the one offering the highest bid. The Bill accordingly provides for this. For the reasons set out in my earlier minute,

The Rt Hon Norman Lamont, MP.
Chief Secretary
Treasury Chambers
Parliament Street, S.W.1.

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however, we need, in my judgment, to be able to demonstrate that the "exceptional circumstances" provision can indeed be used, as we all along envisaged, in relation to quality, amongst other things. I therefore think it important that we should make this clear on the face of the Bill.

You suggest that to go down this road would, in effect, mean that Channel 3 franchises would be awarded on the basis of quality rather than the cash bid. I do not accept this. In a case where the exceptional circumstances provision was invoked, the highest bidder could be expected to apply for judicial review. If he could demonstrate that the difference in the quality was anything other than truly exceptional, he would have a good case for having the ITC's decision set aside. Just because quality is not defined in the Bill does not mean that the ITC would be able, unchallenged, to act on the basis that minor quality differences were in fact "exceptional" and hence within the scope of their discretion to override the highest bid. To suggest that the ITC could find exceptional quality differences in the case of most or all franchises is therefore highly implausible. Were they to do so, this in itself would be an argument that failed applicants could be expected to use in judicial review proceedings.

Nor do I think that you are right to say that the ITC could not ensure that promises to deliver quality programmes were honoured. The Bill is clear that such promises will constitute enforceable conditions of licence, and we have deliberately equipped the ITC with a wide range of sanctions, culminating in licence withdrawal, to ensure that these conditions are maintained. Unlike the IBA, the ITC will not be a broadcasting authority, and I have little doubt that they will be prepared to act decisively where necessary to enforce standards.

Nicholas made two further points on this matter. First he pointed out that the amounts of the respective cash bids should be considered alongside the difference in quality. I quite agree. The circumstances may well be exceptional precisely because a substantial quality difference exists as between two fairly similar cash bids. That would be implicit in the concept of exceptional. But I am anxious to avoid any formal requirement on the ITC to offset price against quality, because I simply do not see in practice how this would work. How much quality would outbid how much money? Were we to make any explicit statutory reference to the difference in the value of the cash bid, we would, I believe, be drawn down a road which it would be much better to avoid.

Secondly Nicholas suggested that my proposal would favour the existing ITC companies who would be led to put in minimal cash bids in the expectation that they would ultimately win on quality. This it seems to me would be an exceptionally risky strategy for any applicant to follow. It assumes that the company concerned could demonstrate a quality of service exceptionally better than that of the applicant submitting the highest bid.

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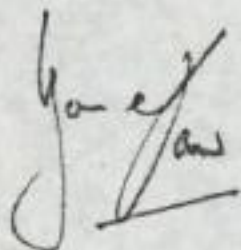
This would be extremely difficult to count upon. Moreover, our proposals for multiple bidding and dual ownership of franchises mean that incumbent ITV companies are in any case liable to find other ITV contractors bidding against them for their own franchise. In these circumstances the only safe strategy would be for companies to aim to compete both on money and quality, as we of course intend they should.

Turning now to my proposal to apply the high quality requirement across the range of main programme types, this is intended to avoid the absurd situation where a licence applicant could circumvent the requirement by purporting to confine it to an unacceptably narrow range of popular programming. That is not what we intended in introducing this provision, and I believe therefore that we must reformulate the requirement so as to meet this difficulty by saying clearly that some programmes of each main type should be of high quality.

You and Nicholas argue that it would not be possible to define programmes of high quality. I acknowledge that quality is very much a subjective matter, but we have to accept that a requirement for high quality programmes is already a feature of the Bill. It is implicit in the way the Bill has been drafted that the ITC will have to determine whether this requirement has been met. I do not, therefore, think that we can argue that it would not be possible for the ITC to determine whether an applicant had offered high quality programmes in each of the main programme types. Nor do I think that the change I propose would in practice give the ITC more discretion to rule out bidders for failing to cross the quality threshold. The object is rather to make clear to applicants exactly what is expected of them in relation to this requirement.

I shall be putting forward a separate minute shortly in relation to the point raised by Nicholas about cross-ownership restrictions between terrestrial television licensees and providers of non-domestic satellite services.

I am copying this letter to other members of MISC 128, to Kenneth Baker, Malcolm Rifkind and Peter Brooke, and to Sir Robin Butler.

A handwritten signature in dark ink, appearing to read 'Geoffrey Howe', is written over the typed name 'Geoffrey Howe'.

