

PROJECT KANGAROO

**'Video-on-demand' joint venture between BBC Worldwide Limited,
Channel 4 Television Corporation and ITV PLC**

Main submission to the Competition Commission from Virgin Media

24 July 2008

NON-CONFIDENTIAL VERSION

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1. INTRODUCTION AND SUMMARY

- 1.1 This memorandum, prepared on behalf of Virgin Media, Inc ("**Virgin Media**"), sets out Virgin Media's views on the proposed video-on-demand ("**VOD**") joint venture between BBC Worldwide Limited ("**BBCWW**"), Channel 4 Television Corporation ("**Channel 4**") and ITV PLC ("**ITV**") (together, the "**JV Parties**"), referred to as Kangaroo (the "**Kangaroo JV**").
- 1.2 Virgin Media is very well placed to comment on the likely effects of the Kangaroo JV, given that it is, by turns, a customer of, and competitor and supplier to, the JV Parties.
- 1.3 This submission is structured as follows:
- (a) section 2 provides basic background information on Virgin Media;
 - (b) section 3 provides an overview of VOD content in the UK, including how this content is produced, delivered and consumed, Virgin Media's VOD business, and Virgin Media's understanding of how the Kangaroo JV will operate;
 - (c) section 4 considers the appropriate market definitions for reviewing the Kangaroo JV and sets out the market positions of the JV Parties;
 - (d) section 5 sets out the horizontal effects of the Kangaroo JV on competition and identifies the areas in which the Kangaroo JV will give rise to a substantial lessening of competition ("**SLC**");
 - (e) section 6 describes the vertical effects of the Kangaroo JV on competition and identifies the areas in which the Kangaroo JV will give rise to an SLC; and
 - (f) section 7 sets out Virgin Media's concluding remarks on the Kangaroo JV, including:
 - (i) a discussion on why Virgin Media considers the Competition Commission ("**Commission**") needs to exercise particular caution in relation to a growing, nascent service in an industry beset by long-running competition and regulatory issues; and
 - (ii) a discussion on why Virgin Media considers that it would not be appropriate for the Commission to give credence to the JV Parties claims that the Kangaroo JV will give rise to efficiencies that will be passed on to consumers.

EXECUTIVE SUMMARY

- 1.4 The Kangaroo JV gives rise to very material horizontal and vertical competition concerns and, as a result, may be expected to result in a SLC within a market in the UK within the meaning of Section 36 of the Enterprise Act 2002 ("**EA**").

Horizontal concerns

- 1.5 BBC, ITV and Channel 4 account for in aggregate:
- (a) 68.8 per cent share of all adult viewing in all homes in the UK¹; and
 - (b) 64.4 per cent share of all viewing in all multi-channel homes²;
- 1.6 In relation to the supply of VOD content by the JV Parties³:

¹ BARB data for September to November 2007.

² BARB data for September to November 2007.

- (a) BBCWW and Channel 4 content accounts for a [CONFIDENTIAL] per cent share of all VOD views on the Virgin Media platform (including both catch-up and archive) and a [CONFIDENTIAL] per cent share of all VOD views, excluding the BBC iPlayer, on the Virgin Media platform;
 - (b) Channel 4 content accounts for a [CONFIDENTIAL] per cent share of views of catch-up VOD on the Virgin Media platform (and a [CONFIDENTIAL] per cent of catch-up VOD views excluding the BBC iPlayer); and
 - (c) BBCWW and Channel 4 content accounts for a [CONFIDENTIAL] per cent share of all views of archive VOD on the Virgin Media platform⁴.
- 1.7 The Kangaroo JV Parties own and broadcast content representing a very high share of viewing in the UK. Moreover, they account for [CONFIDENTIAL] of VOD TV content viewed on the cable platform. Regardless of the precise scope of the market definition for the wholesale provision of VOD content in the UK, Virgin Media considers that the JV Parties are each other's closest competitors for a wide range of content supplied on a VOD basis.
- 1.8 As a consequence of consumers' increasing demand for choice and flexibility as to what content they wish to view, and at what time, Virgin Media expects there to be a rapid growth in the demand for, and supply of, content delivered on a VOD basis. Accordingly, absent the Kangaroo JV, it would have been very likely for each of the JV Parties to have sought to develop and grow their own VOD services. In consequence, the Kangaroo JV has removed the prospect of competition between the JV Parties in the supply of the VOD services that will be provided through the Kangaroo JV. This represents a very substantial lessening of competition in a newly developing, but growing, market.
- 1.9 In addition to providing their own VOD services, the JV Parties (or at least BBCWW and Channel 4) currently make [CONFIDENTIAL] content available to other VOD service providers. Accordingly, in the event that the JV Parties continue to be willing to make available VOD content rights to other VOD service providers (see Virgin Media's concerns in relation to vertical foreclosure below), the Kangaroo JV has removed the prospect of competition between the JV Parties in the supply of those rights to third party VOD service providers. Given the proportion of [CONFIDENTIAL] VOD content accounted for by the JV Parties this represents a very substantial lessening of competition.

Vertical concerns

- 1.10 Virgin Media's primary concern relating to the creation of the Kangaroo JV stems from its position as a customer, or potential customer, of each of the JV Parties in relation to the supply of VOD content for Virgin Media's own VOD service, and the increase in market power that the JV Parties will obtain over the supply of VOD content as a result of the transaction.
- 1.11 [CONFIDENTIAL].
- 1.12 As a consequence of the Kangaroo JV, the JV Parties will have both the **ability** and **incentive** to engage in input foreclosure by:
- (a) [CONFIDENTIAL];
 - (b) [CONFIDENTIAL].
- 1.13 [CONFIDENTIAL]

³ ITV does not currently supply VOD content to Virgin Media.

⁴ Virgin Media internal data for the period September to November 2007. Excluding movies and music content.

Ability to foreclose

- 1.14 In this context, there can be no doubt that the JV Parties have the ability to engage in input foreclosure.
- 1.15 As mentioned above, the JV Parties own and control [CONFIDENTIAL] of all attractive TV VOD content in the UK, and they collectively account for just under 70 per cent of all adult viewing on linear channels in the UK. As the main driver for VOD take-up is the content provided on linear TV channels, the JV Parties have significant market power in relation to the supply of content for VOD services in the UK. Further, there are no effective substitutes for the JV Parties' content because:
- (a) US originated content would not be considered to be an acceptable substitute by customers for the type and range of content provided by the JV Parties.⁵ [CONFIDENTIAL];
 - (b) [CONFIDENTIAL];
 - (c) premium and older movies are not close substitutes for the type and range of TV content provided by the JV Parties; and
 - (d) [CONFIDENTIAL].
- 1.16 As Virgin Media is currently a customer of both BBCWW and C4, and a potential customer of ITV, [CONFIDENTIAL]. Further, the OFT's reference decision confirms that "[o]ther than content supplied through the carve-outs, the joint venture will assume responsibility for the syndication of its VOD service and associated content to third parties".⁶ There can be no doubt, therefore, that the JV Parties have the ability to foreclose access to content to Virgin Media and other VOD service providers.
- 1.17 In addition, as set out further below, there is clear evidence of the behaviour of the JV Parties changing as a direct result of the Kangaroo JV. [CONFIDENTIAL]. Such evidence of the JV Parties' behaviour changing as a result of the Kangaroo JV further demonstrates the ability of the JV Parties to foreclose access to content to Virgin Media and other VOD service providers.

Incentive to foreclose

- 1.18 In addition to the ability to engage in input foreclosure, either through refusal to supply or to supply content on uneconomic terms, the Kangaroo JV will also have both short-run and long-run incentives to do so.
- 1.19 This is best demonstrated by the behaviour of the JV Parties both prior to the announcement of the Kangaroo JV, and subsequent to the commencement of discussions relating to the Kangaroo JV. The following examples are noteworthy:
- (a) [CONFIDENTIAL];
 - (b) [CONFIDENTIAL];
 - (c) [CONFIDENTIAL].
- 1.20 [CONFIDENTIAL].

⁵ As set out in paragraph 23 of the OFT's reference decision "*the term US TV content serves as a short-hand to cover Australian and other English-language TV content produced outside the UK, because US-origin content is the dominant non-UK origin content viewed on UK television*".

⁶ Paragraph 113.

1.21 [CONFIDENTIAL].

Effects of the transaction

1.22 As set out above, the JV Parties account for a significant proportion of [CONFIDENTIAL] TV VOD content in the UK. As a result of the increase in concentration brought about by the Kangaroo JV, the JV Parties will have the ability [CONFIDENTIAL], as the Kangaroo JV has removed the prospect of competition between the JV Parties. This in itself represents a very substantial lessening of competition in the market for the wholesale supply of VOD content.

1.23 In addition, Virgin Media agrees with the OFT that absent the Kangaroo JV, it would have been very likely for each of the JV Parties to have sought to develop and grow their own VOD services. However, the Kangaroo JV has removed the prospect of competition between the JV Parties in the supply of retail VOD services to viewers. This will result in a substantial lessening of competition in the growing retail market for VOD services.

1.24 In relation to the vertical effects of the Kangaroo JV, it is likely that, if the Kangaroo JV were to proceed as envisaged, the JV Parties would [CONFIDENTIAL] VOD content accounted for by the JV Parties this would be likely to have the following consequences in the short to medium term:

(a) [CONFIDENTIAL];

(b) [CONFIDENTIAL];

(c) [CONFIDENTIAL].

1.25 [CONFIDENTIAL]. This would be likely to lead to a number of consequences:

(a) the Kangaroo JV would be able to increase retail prices for VOD services to customers above the competitive level. Even if the Kangaroo JV was prepared to supply wholesale content to rival VOD suppliers, it would be able to increase wholesale prices for content so that rival VOD service providers would be unable to compete effectively with the JV's VOD service;

(b) a larger subscriber base will confer on Kangaroo a material bidding advantage when looking to secure content thereby raising barriers to entry at the upstream level;

(c) even if the Kangaroo JV was prepared to offer content from other content providers, the Kangaroo JV would have very considerable purchasing power such that those content providers may not be able to make an economic return on the value of their rights. In turn this might be expected to undermine the incentive on third parties to bid for VOD content (thereby reducing competition for rights);

(d) the JV Parties will benefit from an additional advantage when bidding for linear content rights. [CONFIDENTIAL]; and

(e) quite apart from the above points, as in all cases in which a service provider faces insufficient competitive constraints there should be expected to be less investment, less innovation, less development, reduced quality and levels of service, and a reduced choice of providers than would be the case in a more competitive environment.

Conclusion

1.26 Against the above background, Virgin Media has a very real concern that in what is a relatively undeveloped market, the creation of the Kangaroo JV will concentrate so much

[CONFIDENTIAL] content in the hands of one entity that it will be able to dictate the form and structure of the market going forward. This would lead to very detrimental outcomes for retail competition and for consumers.

1.27 By way of analogy, Sky's ability to obtain a stranglehold on the rights to premium movie and sports content has led to Sky holding leading market positions at all key levels of the pay TV supply chain whereby it controls the most attractive pay TV content, the largest pay TV platform and the largest base of pay TV subscribers. Sky's control of these mutually reinforcing upstream and downstream market positions has resulted in a vicious circle for its competitors (by significantly increasing barriers to entry both upstream and downstream). These are precisely the issues that are being considered in detail by Ofcom in the context of its ongoing market investigation into the Pay TV industry. Virgin Media considers that if the OFT were to approve the Kangaroo JV, it would be conferring on Kangaroo the same type of control over VOD content that has led, in the analogous case of premium sports and movie content, to the failings in the pay TV industry currently being investigated by Ofcom.

1.28 Given the severity of the potential adverse consequences of the Kangaroo JV, Virgin Media considers that the Commission must take a cautious approach and, in the absence of suitable remedies to address the relevant concerns, should not permit the Kangaroo JV to proceed.

2. **VIRGIN MEDIA**

2.1 In March 2006, NTL Incorporated merged with Telewest Global, Inc, bringing together their cable networks under common ownership. In July 2006, NTL Incorporated acquired Virgin Mobile Holdings (UK) plc. On 8 February 2007, NTL Incorporated rebranded its UK business as Virgin Media, whereupon NTL Incorporated was renamed Virgin Media Inc. Virgin Media owns and operates the vast majority of the UK's cable network⁷.

2.2 Virgin Media is active in the provision of five principal communication and media services in the UK:

- (a) multi-channel television;
- (b) fixed telecommunications;
- (c) mobile telecommunications;
- (d) Internet access; and
- (e) production and supply of TV programming and related services (through Virgin Media Television Limited ("**VMTV**")).

2.3 In its activities across these markets, Virgin Media has a number of competitive interactions with the JV Parties. In particular, Virgin Media is:

- (a) a customer of all of the JV Parties in relation to the supply of linear TV channels⁸;
- (b) a customer of BBCWW and Channel 4 in relation to the supply of VOD content and a potential customer in relation to ITV;
- (c) a competitor of all of the JV Parties in relation to the retail supply of VOD content, TV channels and in the sale of advertising;

⁷ Wightcable and Wightcable North provide cable services to the Isle of Wight, the west coast of Scotland and Lancaster.

⁸ A linear channel is a TV channel broadcast on a traditional scheduled basis.

- (d) a potential competitor of all of the JV Parties in relation to the supply over Internet of TV content; and
 - (e) a supplier to ITV (including a provider of channels to the DTT platform).
- 2.4 As a result of its numerous competitive interactions with all the JV Parties across the television supply chain, Virgin Media considers that it is well placed to comment upon the effect of the Kangaroo JV.

3. OVERVIEW OF VOD SERVICES

- 3.1 This section provides an overview of VOD content in the UK. Specifically, it describes:
- (a) the development and supply of VOD content
 - (b) Virgin Media's VOD business; and
 - (c) Virgin Media's understanding of how the Kangaroo JV will operate.

VOD CONTENT

Overview of VOD content services

- 3.2 Traditionally, TV content has been distributed to viewers on a linear basis, i.e. a scheduled channel broadcast that is streamed to viewers. This is the means by which the vast majority of channels are currently broadcast, including on digital terrestrial television ("**DTT**") by Freeview, digital satellite ("**DSat**") by Sky, Virgin Media's cable platform and Internet protocol TV ("**IPTV**") by Tiscali (formerly HomeChoice).
- 3.3 The major limiting factor of a linear broadcast from a viewer's perspective is that the viewer does not have flexibility as to when to watch individual programmes. In other words, individual programmes are only available at the time slots determined by the broadcaster (i.e. viewers must make an "appointment to view" the programme at the scheduled time).
- 3.4 A VOD service addresses this issue by enabling viewers to access individual programmes and content when they wish to watch it (hence its description as "video on-demand"). True VOD, such as that provided by Virgin Media, uses technology whereby a "return path" from the service provider to the viewer can be used by the service provider to stream content requested by the viewer directly to the customer's television. This is often referred to as "pull" VOD as the viewer is able to "pull" content and programmes directly from the service provider. The viewer is also able to fully interact with the content streamed to it and can therefore pause, rewind, fast-forward while watching the content. Virgin Media offers a true/"pull" VOD service to all its digital TV customers on the cable platform.
- 3.5 In contrast, some TV service providers offer a near-VOD service which uses technology whereby there is limited ability to stream content to viewers' reception equipment when they want it. Accordingly, viewers cannot "pull" content from the service provider; rather the service provider streams the content at a number of different intervals, with each stream actually being a separate linear channel which viewers can access (for example, the same content is streamed at 15 minute intervals and the viewer can chose to watch the content from the start of any 15 minute interval). Viewers cannot interact with the content and therefore cannot pause, rewind, fast-forward while watching the content. This technology is often referred to as near VOD. Currently Sky offers a near VOD service over the DSat platform in relation to its Sky Box Office movie service.
- 3.6 In addition, new technology, that combines the functions of a personal video recorder ("**PVR**") in a customer's set top box ("**STB**"), has recently been introduced. In this

service, content chosen by the broadcaster is "pushed" to the viewer's PVR (where it is typically recorded for a short period on the hard drive) and viewers can then interact with the recorded version of the content as stored on their PVR (i.e. including pausing, rewinding and fast-forwarding). This type of service is typically known as "push VOD" and is currently offered by Sky+ Anytime⁹ and Top Up TV's service on the DTT platform.

- 3.7 Further, the JV Parties also make some of their content available on a VOD basis over the Internet via a proprietary website, such as BBC's iPlayer service (www.bbc.co.uk/iplayer), Channel 4's Watch Online service (www.Channel4.com/watch-online) and ITV's Catch Up service (www.itv.com/CatchUp). Viewers can stream content from these websites onto their computer. Viewers are able to interact with the content on their computer, including pausing, rewinding, etc.
- 3.8 In addition to the VOD services described above, the following services/technologies are currently available in the UK to enable a customer to view VOD content delivered by broadband on his or her television:
- (a) **Tiscali TV:** formerly known as HomeChoice, this service is the most well known that enables VOD content delivered by broadband to be viewed on televisions. Tiscali offers 75 linear channels, over 1,000 movies on demand, a range of TV series on demand, a 7-day catch-up service and music on demand. Viewers are able to access the VOD content and view it on their television via a proprietary interface;
 - (b) **BT Vision:** this service provides digital terrestrial channels using a Freeview decoder, but also offers VOD movies, TV and music content via a broadband connection. This is achieved through a set top box which connects both to a television aerial and to the BT Home Hub Modem (via an Ethernet port);
 - (c) **Apple TV:** this is a set top box with a hard disk which enables the customer to access home user content (e.g. pictures and music) or Apple provided VOD content on his or her television set. This is achieved either by streaming/"caching" content from a networked computer or directly from the Internet using a broadband connection;
 - (d) **TV linked to a home computer:** this method of viewing VOD content uses a television connected to a computer (in place of a traditional monitor) to view VOD content delivered over a broadband connection;
 - (e) **Games consoles:** the newest generation of games consoles (including Microsoft Xbox, Nintendo Wii, and Sony PlayStation 3) are all capable of accessing VOD content over the Internet thereby enabling customers to view VOD content on their television. In this context, the BBC has recently launched a version of the iPlayer that is capable of being accessed through the Nintendo Wii. In addition, BT Vision VOD content is expected very soon to be capable of being viewed on television via a broadband connection through Microsoft's Xbox.
- 3.9 In addition to the services and technology currently available (described above), the following services/technologies will be able to enable VOD content delivered by broadband to be viewed via a television in the immediate future:
- (a) **Freeview:** in addition to the "push VOD" service expected to be launched by Freeview in the very near future, certain variants of Freeview set top boxes will have an Ethernet port enabling VOD content delivered by broadband to be viewed

⁹ In this context, Virgin Media is referring to the Sky Anytime service which downloads content to a partitioned Sky+ hard drive and not to the download to PC service (recently re-branded Sky Player) which allows a customer to watch content streamed to the PC.

on the customers' television set (in addition, linear channels will continue to be delivered through the television aerial);

- (b) **Freesat:** the set top box specification for the Freesat service recently launched by the BBC and ITV includes an Ethernet connection. Whilst not currently activated, these Ethernet connections are expected in the very near future to enable customers to access, and view on their television, VOD services delivered by broadband. It is this functionality to which Mark Thompson, the BBC Director General was referring when he indicated at the launch of Freesat that Freesat customers would be able to access on-demand programming via broadband TV services including Kangaroo¹⁰;
 - (c) **Sky DTH service:** the most recent generation of Sky set top boxes all have a built-in Ethernet port which will enable Sky to offer a true VOD service delivered via Sky Broadband to complement the range of linear channels delivered by Sky's DTH satellite service (and the "push VOD" Sky Anytime service).
- 3.10 The success of any VOD service largely depends on the quality of the content available over the service. Just as quality programming drives viewing of linear channels, quality programming drives VOD viewing. Regardless of the VOD technology being used, the service will not be expected to gain a large share of VOD views unless it includes a range of quality and attractive programming.
- 3.11 VOD content service providers make a range of content available on a VOD basis including movies (both recent releases and a range of older movies such as classics), music and general entertainment programmes, documentary and educational programming, news, and reality programming). In relation to TV content, this is usually made available on either a "catch-up" or "archive" basis.
- 3.12 A catch-up service is limited to allowing customers to view content that has been recently broadcast on a linear channel (in the previous 7 days in relation to all catch-up content on the cable platform¹¹). In essence this allows the customer to view his or her favourite shows recently broadcast on a linear channel at a more convenient time. Catch-up VOD services are almost invariably free (with the BBC's iPlayer having determined the "market" price) and are largely limited to content from UK independent production houses and the broadcasters' in-house producers (which produce key content such as Coronation Street, EastEnders and Doctor Who). Due to rights limitations, catch-up services do not typically include movies, sports or content from US studios.
- 3.13 In contrast, archive VOD services allow customers to choose from a wide range of attractive back catalogue content which may have originally been broadcast a number of years previously (i.e. anything from attractive older programming such as "Friends" and "Basil Brush" to more recent programming which has been broadcast as little as 6 months previously¹²), and often includes multiple episodes of a single series. Rather than being offered for free, archive VOD services are generally available to customers only on a subscription or PPV basis. Finally, archive VOD services tend to offer a wider range of content (including some of US origination).

¹⁰ As reported in The Guardian on 6 May 2008, "Freesat aims to link up with broadband" by Mark Sweney, see <http://www.guardian.co.uk/media/2008/may/06/bbc.itv1>.

¹¹ However ITV and Channel 4 catch-up content is available on their websites for 30 days.

¹² This six month delay generally arises from the requirement for a "black out" period between catch-up availability and archive availability. However, in relation to content produced in-house by broadcasters and US content, there may not be a requirement for a "black-out" window.

The growth and development of VOD services

- 3.14 The development and offering of VOD services is part of a general, and continuing, trend to provide consumers with more choice and flexibility as to the entertainment options available to them. Consumers are increasingly demanding the ability to choose what they wish to view, and at what time. Simultaneously, the historic focus on creating an "appointment to view" (i.e. the efforts on the part of broadcasters to induce viewers to organise their activities around the broadcaster's schedule) is being eroded. Accordingly, Virgin Media expects VOD services to become an increasingly important means by which to deliver content to customers. In this respect, while the amount of TV being watched in the UK has been relatively constant in recent years the viewing share and reach of terrestrial channels has been decreasing, demonstrating that consumer demand for "appointment to view" linear TV is waning¹³. It is against this background that terrestrial channels have considered it necessary to launch their own branded VOD services and thereby meet the growing consumer demand for VOD services.
- 3.15 VOD services are a relatively recent innovation in the UK TV industry. Virgin Media's VOD service, the most developed in the industry, was launched three years ago in 2005. Tiscali's commercial service, the first commercial VOD service launched in the UK, was first launched in late-summer 2004 in the Greater London area.¹⁴
- 3.16 Since the launch of VOD services in the UK in 2004, the consumer experience of VOD services has also improved significantly. In 2004 the VOD services available to viewers were relatively rudimentary. First, there was a limited range of content available on a VOD basis and speed of delivery and picture quality were considerably lower than is now the case. Second, the interface technology viewers used to find and access content was basic (without search functions) and slow to load, frustrating the consumer experience. Further, the reach of VOD services was relatively limited.
- 3.17 Since 2004, VOD services have become more widespread and the quality has improved. The major improvement in the VOD service available to consumers during this period has been the increasing amount of content available to consumers. This greater range and depth of content has been the key factor in driving the growth of VOD services in the UK.
- 3.18 Another important development in relation to VOD services in the UK has been the launch of the Internet based VOD services by the public service broadcasters ("**PSB**"). The most significant development in this respect is the launch of BBC's iPlayer service. iPlayer is an Internet based service that enables viewers to watch catch-up programmes broadcast by the BBC during the preceding 7 days. iPlayer content can also be accessed by Virgin Media customers via the TV VOD service (see from paragraph 3.40 below for a detailed discussion of the iPlayer status on the cable platform). However, Channel 4 and ITV also have their own Internet based VOD service, and the importance of those services in growing demand for VOD content should not be understated.
- 3.19 Against this background of significant innovation in relation to VOD services, Virgin Media makes the following general observations that need to be taken into account when assessing the Kangaroo JV:
- (a) first, just as linear TV watching is driven by the quality and attractiveness of the content on the channel, VOD content services are also driven by the quality and attractiveness of the content available. Access to content is central to the development and promotion of an exciting range of VOD services from a number of

¹³ In this connection, for the period September to November 2001, the JV Parties had, on an aggregated basis for all their channels, a [CONFIDENTIAL] per cent share of viewing in all homes. This decreased to [CONFIDENTIAL] per cent for the same period in 2007.

¹⁴ Tiscali's service was originally launched under the HomeChoice brand. HomeChoice was bought by, and rebranded to, Tiscali in 2007.

competing providers. In the TV industry, access to attractive content is decisive in a provider's ability to supply a desired and economically viable proposition;

- (b) second, the high level of innovation experienced over the last 3 years is a direct result of a number of VOD content providers and service providers competing in relation to the supply of VOD content and VOD content services; and
- (c) third, Virgin Media expects this trend of development and growth in VOD services to continue, so long as there continues to be both a range of VOD service providers and a range of VOD content providers competing with each other to provide the best and most attractive service to viewers.

VIRGIN MEDIA'S VOD BUSINESS

3.20 Virgin Media is a VOD service provider and a VOD content provider.

VOD service provider – overview of current offering

3.21 Virgin Media considers the cable platform is very well placed to offer a high quality TV VOD service and believes that its service offers a better quality consumer experience than VOD services offered by its retail competitors in the supply of entertainment and communication services (such as Sky, Tiscali and Orange). **[CONFIDENTIAL]**.

3.22 Virgin Media currently has the largest installed base of TV VOD enabled customers in the UK and each of its digital customers has access to "on-demand" programming. As at June 2008 Virgin Media has **[CONFIDENTIAL]** million digital TV customers, each with access to "on-demand" programming.

3.23 Virgin Media's current VOD services comprise the following:

- (a) **Catch-up TV** – this is free to all customers, and offers the ability to catch up with programmes broadcast on linear channels in the preceding 7 days from BBC, Channel 4 and Virgin Media TV ("**VMTV**") channels such as Virgin1, Bravo and Living. In total, currently **[CONFIDENTIAL]** hours of programming content (**[CONFIDENTIAL]** individual programmes) are offered at any one time across all of Virgin Media's VOD services. Within catch-up, Virgin Media currently offers approximately **[CONFIDENTIAL]** hours at any one time (building to more than **[CONFIDENTIAL]** hours over the next 12 months) with over **[CONFIDENTIAL]** titles currently being offered per annum;
- (b) **TV Choice** – this service is available without an additional charge to Virgin Media's top tier (XL package) TV customers¹⁵ and provides the ability to choose from amongst **[CONFIDENTIAL]** titles of premium TV shows including: Life on Mars, Doctor Who, Grand Designs, Sopranos, Lost, and the West Wing. This content is offered some months after the catch-up window;
- (c) **Music On Demand** – this service is, again, available without an additional charge to top tier (XL package) TV customers and offers up to **[CONFIDENTIAL]** music videos. Other subscribers on M and L packages can view videos on a pay-per-view ("**PPV**") basis at 20p per view;
- (d) **Movies On Demand** – this service is a PPV service offering all Virgin Media's customers the ability to choose from up to **[CONFIDENTIAL]** movie titles at any one time for which they will typically pay between £2 and £3.95 (£4.50 for high definition movie content); and

¹⁵ This service is also available to subscribers with an M or L package for a supplementary charge of £7.

- (e) **More On Demand** – this is a mix of free and PPV content, including: (i) free non-premium lifestyle and educational programming from providers such as Baby TV, Current TV, Real Estate TV and Teachers TV; (ii) premium US series where PPV-only rights are available to Channel 4 and includes such shows as Desperate Housewives, ER and Smallville (priced at 99p per 24 hour viewing period); (iii) free HD content such as [CONFIDENTIAL] HD programming supplied by BBCWW such as Blue Planet; and (iv) adult programming priced between £2.49 and £5 per view.

3.24 The growing importance of VOD is demonstrated by the fact that Virgin Media has experienced steady growth in demand for its VOD services since the launch of the service in 2005 (see tables in Annex A). In this connection, in June 2008, monthly views of VOD content were the highest since launch, at [CONFIDENTIAL], with more than [CONFIDENTIAL] subscribers using Virgin Media's VOD service.

3.25 Virgin Media's VOD service is currently only offered over Virgin Media's cable TV platform. [CONFIDENTIAL].

VOD content service – suppliers of VOD content

3.26 Virgin Media acquires VOD content from a number of third party VOD content providers, including BBCWW, Channel 4, BBC, HBO, Warner, CBS/Paramount, Discovery, VMTV, Viacom, National Geographic, History Channel, Entertainment Rights and Hit Entertainment. Table 3.26 below sets out aggregate views of content supplied by different VOD content providers on the Virgin Media platform for the period September to November 2007.

- (b) BBC3 and BBC4 titles which were broadcast on the linear channels more than [CONFIDENTIAL] ago; and
- (c) kids titles which were broadcast on the linear channels more than [CONFIDENTIAL] ago.
- 3.30 As explained above and in paragraphs 4.62 to 4.65 below, BBCWW content makes up a significant proportion of the VOD content viewed by Virgin Media customers.
- 3.31 [CONFIDENTIAL].
- ITV
- 3.32 Virgin Media has been unable to acquire VOD content rights from ITV, [CONFIDENTIAL].
- 3.33 [CONFIDENTIAL]¹⁶
- 3.34 [CONFIDENTIAL].
- (a) [CONFIDENTIAL];
- (b) [CONFIDENTIAL].
- 3.35 [CONFIDENTIAL].
- 3.36 [CONFIDENTIAL].
- (a) [CONFIDENTIAL];
- (b) [CONFIDENTIAL].
- Channel 4
- 3.37 Virgin Media has a [CONFIDENTIAL] contract with Channel 4 expiring on [CONFIDENTIAL] for a 4 On Demand ("4OD") service comprising:
- (a) 7 days catch-up service of a minimum of [CONFIDENTIAL] hours of shows from the last 7 days to all VOD enabled customers (the shows are primarily from Channel 4 but also including More4 and E4 programmes);
- (b) [CONFIDENTIAL] hours of TV library content to subscription VOD customers; and
- (c) limited PPV titles (as selected by Virgin Media).
- 3.38 [CONFIDENTIAL].
- BBC¹⁷
- 3.39 Virgin Media has been providing VOD services with content from the BBC on a catch-up basis (for a 7 day, post-linear transmission window) since the launch of the predecessor ntl and Telewest VOD services. Until the launch of iPlayer (see paragraph 3.40 below), BBC provided for free [CONFIDENTIAL] hours per week of 7 day catch-up general entertainment VOD content.

¹⁶ [CONFIDENTIAL]

¹⁷ Although the BBC is not a party to the Kangaroo JV, Virgin Media has provided a summary of its relationship with the BBC in order to provide the OFT a full understanding of Virgin Media's commercial relationship with key providers of VOD content.

- 3.40 The launch of BBC's iPlayer dramatically changes the nature of the BBC catch-up service on Virgin Media's cable platform. iPlayer is a broader catch-up VOD service incorporating over [CONFIDENTIAL] hours of 7 day catch-up BBC programming at any one time (compared with the approximately [CONFIDENTIAL] hours that was available previously, see above). [CONFIDENTIAL].
- 3.41 [CONFIDENTIAL].
- 3.42 [CONFIDENTIAL].
- (a) [CONFIDENTIAL];
- (b) [CONFIDENTIAL];
- (c) [CONFIDENTIAL];
- (d) [CONFIDENTIAL];
- (e) [CONFIDENTIAL];
- (f) [CONFIDENTIAL].

VOD content business

- 3.43 Virgin Media is also a supplier of VOD content to VOD content service providers via its channel distribution business, VMTV. Although VMTV has a stake, with the BBC, in the UKTV joint venture, this submission does not address UKTV.
- 3.44 The content broadcast on the VMTV portfolio of channels¹⁸ comprises a mixture of bought in programming and commissioned programming. [CONFIDENTIAL].
- 3.45 VMTV estimates that it has the VOD rights to approximately [CONFIDENTIAL] per cent (in terms of hours broadcast) of the content broadcast on the VMTV channels. [CONFIDENTIAL]. Accordingly, VMTV estimates it has VOD rights in relation to content that accounts for less than [CONFIDENTIAL] per cent of aggregate share of viewing of the VMTV channels.
- 3.46 To date, VMTV has supplied content for VOD distribution only to Virgin Media's TV VOD service. [CONFIDENTIAL].
- 3.47 In relation to the VOD content supplied to Virgin Media, on average VMTV supplies [CONFIDENTIAL] hours of VOD programming content per month under the LIVING, Virgin1 and Bravo brands. The catch-up VOD content supplied under the LIVING, Bravo and Virgin1 brands is mainly restricted to programmes commissioned by VMTV such as "Most Haunted", "Extreme", "Caribbean Cops" and "MacIntyre's Underworld". The archive VOD content supplied to Virgin Media is heavily skewed towards programmes commissioned by VMTV, but also includes some US content such as "Kill Point", "Star Trek" and "CSI".
- 3.48 For completeness it should be noted that VMTV content has previously been made available to be downloaded from the Internet, such as episodes of Gray's Anatomy from the LIVING website. In addition, VMTV provides some VOD content (generally short-form, although some limited long-form content is included) to certain social networking sites (such as Bebo). In each case, however, rather than being a constituent part of a VOD service, this content is normally available on a VOD basis only for promotional purposes. In other words, it is designed to promote the relevant shows on the main VMTV linear channels. Further, even in circumstances in which content is made available on a

¹⁸ Which consist of: LIVING, LIVING2, Bravo, Bravo2, Trouble, Challenge and Virgin1.

promotional basis this is only in the limited circumstances where the content provider is prepared to sanction this type of promotional activity.

KANGAROO JV

- 3.49 It is difficult to determine from the limited publicly available information the structure and content of the Kangaroo JV. However, it appears that the Kangaroo JV will offer:
- (a) an archive VOD service (providing access to content from each of BBCWW, ITV and Channel 4);
 - (b) a catch-up service (providing content from ITV and Channel 4 but **not** from BBCWW); and
 - (c) a link to the BBC's iPlayer (albeit that the iPlayer will not be an integral element of the Kangaroo JV). From the consumer's perspective it may well seem that iPlayer is part of Kangaroo.
- 3.50 Virgin Media understands from its discussions with the JV Parties that the Kangaroo JV may also be responsible for negotiating with VOD content service providers the supply of the JV Parties' VOD content.
- 3.51 Accordingly, it appears that the Kangaroo JV will control the rights to a large amount of **[CONFIDENTIAL]**, TV VOD content as well as offering a downstream TV VOD service business. This is analogous to the position enjoyed by Sky in relation to Pay TV and the supply of premium sports and movies channels (see further paragraph 7.4 below). This analogy is particularly pertinent to the review of the Kangaroo JV because Sky was able to acquire control over a new form of TV content when demand for that content was relatively nascent. The Kangaroo JV would similarly enable the JV Parties to acquire control over a substantial majority of the content currently viewed on the emerging TV content VOD services.

4. MARKET DEFINITION

- 4.1 Virgin Media considers that the relevant markets by reference to which the Commission should carry out its analysis are:
- (a) the wholesale supply of UK TV content for VOD services; and
 - (b) the retail supply of TV content VOD services to viewers.
- 4.2 Although the OFT's reference decision also refers to the product market for "*the supply of internet display advertising*"¹⁹, Virgin Media does not express any material concerns regarding the impact of the Kangaroo JV on this market. Accordingly, internet display advertising is not considered any further in this memorandum.
- 4.3 In relation to the market for the wholesale supply of UK TV content for VOD services, the following issues are addressed in turn below:
- (a) why US-originated content is not a close substitute for the type and range of UK content provided by the JV Parties;
 - (b) why long-form and short-form VOD content are not close substitutes;
 - (c) why film VOD content is not a close substitute for the type and range of TV content provided by the JV Parties; and

¹⁹ Paragraph 17.

- (d) why pulling together a portfolio of content from independent production houses does not represent an effective alternative to the TV content provided by the JV Parties.

Regardless of the precise scope of the product market definition for the wholesale supply of UK TV content for VOD services, Virgin Media considers that the JV Parties are each other's closest competitors for a wide range of content supplied for VOD services in the UK. Accordingly, although market definition provides a framework for assessing the proposed Kangaroo JV, it is important to consider the extent to which the JV Parties are close competitors in relation to the wholesale supply of UK TV content for VOD services.

- 4.4 In relation to the market for the retail supply of TV content VOD services the following issues are addressed in turn below:
- (a) the interaction between Internet VOD and TV-platform VOD;
 - (b) the interaction between catch-up and archive VOD services;
 - (c) why linear and VOD services are not directly substitutable, but are complementary in the sense that linear channels are the main driver behind demand for VOD services;
 - (d) why the use of PVRs and other recordable equipment are not substitutable with "true" VOD; and
 - (e) why DVD rental and retail sales of DVDs are not close substitutes for VOD services.

THE WHOLESALE SUPPLY OF UK TV CONTENT FOR VOD SERVICES

UK and US-originated content are not close substitutes

- 4.5 The OFT's reference decision states that "*the OFT considers it an open question as to whether US TV content should be considered a sufficient constraint on UK TV content to warrant inclusion in the same product market*".²⁰ Contrary to the OFT's noncommittal finding, Virgin Media considers that US-originated content is generally not a close substitute for the type and range of UK content provided by the JV Parties.
- 4.6 **[CONFIDENTIAL]**.
- 4.7 Although US content is provided by Virgin Media on its VOD service **[CONFIDENTIAL]**²¹, this is because, as a service provider, Virgin Media wishes to offer as full a range of attractive content to its customers as is possible so as to increase the attractiveness of the overall VOD service offering. In other words, Virgin Media considers US-originated content to be complementary to the UK-originated content provided by the JV Parties, and not a close substitute.
- 4.8 **[CONFIDENTIAL]**.
- 4.9 **[CONFIDENTIAL]**. The channels with the highest share of viewing and highest rating shows (including in multi-channel homes) tend to be the incumbent terrestrial channels (BBC, ITV, Channel 4 and Channel 5). The majority of the output of those channels is UK originated, reflecting the status of the BBC, ITV, Channel 4 and Channel 5 as PSBs. One of the key PSB purposes, as defined in Ofcom's PSB Review 2004 is "*to reflect and strengthen our cultural identity through original programming at UK, national and regional level, and by occasionally bring audiences together for shared experiences*". This is

²⁰ Paragraph 29.

²¹ **[CONFIDENTIAL]**

reflected in Ofcom's research in the 2008 Public Service Broadcasting Annual Report (at page 47) whereby 72 per cent of those surveyed rated the importance of PSBs showing new programmes made in the UK as 7, 8, 9 and 10 (based on a scale of 1 to 10, where 10 is the most important and 1 is the least important).²²

4.10 [CONFIDENTIAL]

4.11 Moreover, even if it were the case that there was a degree of substitutability for VOD service providers between UK and US-originated content, [CONFIDENTIAL]. Further, the majority of programming broadcast on the principal channels in the UK is UK-originated, but also because most US providers of general entertainment content are [CONFIDENTIAL].

4.12 [CONFIDENTIAL]. This is because as customers increasingly embrace the flexibility that VOD services can provide, they will be looking for access to the most popular UK originated content, the vast majority of which is owned and controlled by the JV Parties.

4.13 In addition, Virgin Media disagrees with the evidence submitted by the JV Parties that DVD sales of television content could be used as a proxy for evidence of substitution between UK and US television content.²³ This is for the following reasons:

- (a) there are many programmes that are top rated UK produced VOD programmes that are not released on DVD. These include soaps (such as Eastenders, and Hollyoakes), reality shows (such as Big Brother), and general entertainment (such as Britain's Got Talent, and "I'm a Celebrity Get me Out of Here"). [CONFIDENTIAL]. This means that an analysis of DVD sales will significantly understate the importance of UK-originated content on VOD services in the UK;
- (b) viewing habits of DVDs are different to the viewing of content provided on VOD (i.e. DVDs have to be physically purchased in advance in contrast to VOD services which are available at the click of a button);
- (c) DVD sales include programmes that are not broadcast in the UK and/or are not available on catch-up TV. This means that an analysis of DVD sales is not representative of the content available on VOD services; and
- (d) differences in the "windows" between when content is available on DVD and VOD also indicates that sales of DVDs is not a good proxy of the demand for VOD content.

As mentioned above, Virgin Media considers that a much better proxy for the demand of VOD services is to consider the viewing habits of linear channels, as this ultimately drives the demand for VOD services.

Long-form and short-form VOD content are not close substitutes

4.14 As set out in paragraph 35 of the OFT's reference decision, "*Short form content generally refers to VOD content approximately 5 to 10 minutes in duration. The primary example of this type of VOD content is user-generated content, or clips from professionally produced shows, found on YouTube (www.youtube.com).*" Virgin Media agrees with the OFT's conclusion that "*the evidence available does not persuade the OFT that a hypothetical*

²² The regulatory regime attaches great importance to the content of the PSB channels and has therefore protected and promoted them in a number of ways. For example, Virgin Media as a cable platform "must carry" the list of PSB channels as defined by the Communications Act 2003 and is required to give "appropriate prominence" to all PSBs in the EPG. As a result, BBC1, BBC2, ITV1, Channel 4 and Channel 5, occupy the first five slots on the Virgin Media EPG, which increases the number of viewers to their channels.

²³ See paragraph 24 of the OFT's reference decision.

monopolist of long-form VOD content would be constrained by consumer switching to short-form content".²⁴

- 4.15 In this regard, Virgin Media considers that short-form VOD content is not substitutable with traditional long form content (such as TV programmes, etc.) either from a customer's perspective or from the perspective of Virgin Media as a VOD service provider:
- (a) from the customer's perspective, the viewing experience of short-form content is completely different to the viewing of long form content, not only in terms of the duration of the content but also in terms of the types of programming and the differences between professional and non-professionally produced content. It is extremely unlikely that a hypothetical monopolist VOD supplier of long-form VOD would be constrained by a sufficient number of viewers switching to short-form content in response to a relative increase in prices of 5-10 per cent; and
 - (b) from the perspective of Virgin Media as a VOD service provider, with the exception of music videos, Virgin Media does not offer any short-form VOD content on its TV VOD service, nor does it consider short-form content to be an alternative for the traditional long form content that it currently provides. Short form content is also significantly more difficult to manage, both in terms of potential copyright infringements (as recently experienced by youtube.com), and in terms of the availability of rights (as highlighted by the Viacom lawsuits against youtube.com and Google). In this regard, Virgin Media would not consider switching to provide additional short-form content in response to a hypothetical increase in the price of wholesale long-form VOD content of 5-10 per cent.

TV VOD content and movie VOD content are not close substitutes

- 4.16 Virgin Media notes that the OFT left open the question as to whether movie VOD content is substitutable for TV VOD content. In this regard, the OFT's reference decision states that *"while intuitively there are appealing arguments that a rigid TV/film distinction may not be appropriate, it is equally possible that the weight of VOD will be consumption of shorter – say, 25 minutes to one hour – programmes consistent with most TV content, rather than film content which is typically between one and a half and three hours in length, and which may primarily be viewed by other delivery means, such as linear broadcast, subscription channels, and DVD rental or purchase."*²⁵
- 4.17 The OFT's reference decision also notes that the JV Parties *"cite the OFT's BBCW/Woolworths decision which stated that the evidence in that case did not point towards a distinction between television and film content DVDs"*.²⁶ In this connection, Virgin Media notes that for the reasons discussed in paragraph 4.13, DVD sales are not informative in relation to VOD consumer behaviour. Further, in any event, it is worth reiterating that in considering the inter-relationship between film DVDs and TV DVDs, the OFT ultimately concluded in the BBCWW/Woolworths decision that *"[i]t is unnecessary to decide this point conclusively, as no party raised substantiated horizontal concerns, and resolution of the vertical concerns discussed below does not depend on a firm conclusion in this respect."*²⁷
- 4.18 Virgin Media considers that TV VOD content and movie VOD content are generally not substitutable and therefore should not be considered to compete in the same market. First, from a viewer's perspective, there is a clear distinction between TV VOD content and

²⁴ Paragraph 37.

²⁵ Paragraph 34.

²⁶ Paragraph 31.

²⁷ OFT Decision in relation to the Anticipated joint venture between BBC Worldwide Limited and Woolworths Group plc, 19 September 2004, paragraph 10.

movie VOD content. In particular, the decision to watch a movie is perceived as being a leisure choice that might be made in the alternative to going to the cinema or renting a movie DVD and is distinct from the decision to choose between a range of TV content. As correctly identified by the OFT, the weight of television VOD consumption is towards much shorter length programmes than is the case for film content, which is typically between one and a half and three hours in length. Further, film content does not cater for several genres that have significant, popular TV VOD content such as soaps, reality shows and documentaries.

- 4.19 Further, movie and TV VOD content are generally made available on a different charging basis. VOD movies are charged for on a PPV basis (VOD service providers, including BT Vision and Virgin Media are unable to obtain UK subscription VOD rights for films as Sky has either secured these rights on an exclusive basis or otherwise ensured that these rights are unavailable to competing platforms). Only very limited TV VOD content is made available on a PPV basis by Virgin Media. Accordingly, customers of VOD movies demonstrate an additional willingness to pay compared to customers of TV VOD content.
- 4.20 In addition, at the wholesale level, broadcasting rights for films are typically licensed to one or more operators and distributors of TV channels over a period of years in a number of distinct TV "windows". After a roughly 6 month period of theatrical exhibition and distribution for home entertainment (e.g. DVD rental and sales), movies are first released for PPV. The PPV window is usually for a period of approximately three months. Following the end of the viewing period for PPV services, motion pictures may then become available for premium pay-TV. In this regard, UK regulators have consistently defined premium movie content as a distinct market to basic TV content. By way of example, in its recent consultation document on its pay TV market investigation Ofcom stated:

"The retailing of premium movies has been considered on a number of occasions by economic regulators in the UK. The consistent conclusion of those investigations has been that there is a separate market (both at the retail and wholesale level) for the provision of premium movie rights."²⁸

UK regulators have also consistently found that the price of premium movie rights is not constrained to a competitive level by the availability of content on "basic" channels.²⁹

- 4.21 In addition, in the recent SFR/Tele2 decision the European Commission concluded that *"the market survey carried out for the purposes of this case showed the relevance of defining a separate market for the acquisition of VoD broadcasting rights for recent films. Differences in terms of nature and especially of price compared with other types of VoD content (series, documentaries, etc.; see below) bear out the relevance of such a breakdown"*.³⁰ The European Commission went on to conclude that *"for the purposes of the competition assessment of the transaction, the analysis will be carried out on the market for the acquisition of film rights for VoD"*.³¹
- 4.22 In relation to the broadcasting rights for older library motion pictures, they are typically licensed on an exclusive basis by title (i.e. another TV channel operator cannot license the same title at the same time for the same territory). In other words, older films shown on a linear TV channel are unlikely to be available on rival VOD services, either in catch-up or in the archive due to licensing restrictions. Therefore, to the extent that programmes and movies on linear channels drive the demand for VOD take-up, the acquisition of old movie

²⁸ See paragraph 4.50 of Annex 13 of Ofcom's Consultation Document on its Pay TV market investigation published on 18 December 2007 ("Ofcom's Pay TV Consultation Document").

²⁹ See, for example, the Decision of the Director General of Fair Trading (case No. CA98/20/2002, BSKyB Investigation: Alleged infringement of the Chapter II Prohibition – 17 December 2002).

³⁰ Paragraph 30. Case No COMP/M.4504 - SFR/Télé 2 France, 18 July 2007.

³¹ Paragraph 36. Case No COMP/M.4504 - SFR/Télé 2 France, 18 July 2007.

content cannot be considered to be an alternative to the acquisition of TV content shown on a linear channel.

- 4.23 There is also a clear distinction between TV VOD and movie VOD content from a supply-side perspective. Movie VOD content is mostly provided by the six large Hollywood studios³² and involves a number of complex licensing restrictions. Even in the event that a VOD service provider wanted to switch to source additional movie content, it would find it difficult obtaining the rights to a sufficient volume of attractive movie content (particularly in the short-term) due to the complexities of the licensing system and the fact that rights are often tied-up for a significant period of time.
- 4.24 For these reasons, there is, in practice, limited substitutability between TV VOD content and movie VOD content. There is also limited substitutability, from the perspective of VOD service providers, between general TV VOD content and movie VOD content.

Content from independent production houses is not a substitute for content provided by the JV Parties

- 4.25 Virgin Media broadly agrees with the OFT's conclusion set out in its reference decision that *"it seems that there may be only limited potential for third party VOD service providers to obtain content from independent producers directly (four independent producers who responded to the OFT's investigation estimated that, between them, they had just 100 hours of content for which they held VOD rights), in particular with regards to the more popular and therefore valuable content."*³³ [CONFIDENTIAL].
- 4.26 In this connection, [CONFIDENTIAL].
- (a) the base of production companies is very fragmented, with very few production companies having any degree of scale in the supply of [CONFIDENTIAL] content. This means that in order to build up an effective range of content by securing content direct from production houses, it would be necessary to engage a large number of such companies. This would be time consuming and would lead to a significant increase in transaction costs. [CONFIDENTIAL].
 - (b) [CONFIDENTIAL] production houses [CONFIDENTIAL] have found it difficult to pull together propositions that are sufficiently attractive as many of their key programmes are subject to "hold back" rights exercised by the terrestrial broadcaster in connection with the supply of the relevant content for linear broadcast (i.e. the broadcaster has secured the VOD rights along with the linear distribution rights). Alternatively, even where this is not the case, the production house is reluctant to supply the content without securing very significant fees for fear of potentially damaging their relationship with their primary customers, which are the major broadcasters (e.g. BBC, ITV Channel 4 and Channel 5); and
 - (c) a number of production houses [CONFIDENTIAL] specialise in content that does not operate effectively in a VOD format (this would include producers of game shows, quizzes and live shows).
- 4.27 In addition, as noted by the OFT in paragraph 77 of its reference decision, *"the VOD rights covering programmes commissioned by the JV Parties involve a number of exclusive windows whereby the primary broadcaster can exploit VOD rights for the content while the producer cannot"*. In other words, the content commissioned by the JV Parties cannot

³² Buena Vista Pictures Distribution (The Walt Disney Company), Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century-Fox Film Corporation, Universal City Studios LLLP and Warner Bros. Corporation Inc.

³³ Paragraph 80.

be sold by the producer in competition with the JV Parties during these exclusive windows.³⁴ Only after the exclusive windows end can the producer sell the VOD rights.

- 4.28 Accordingly, Virgin Media does not consider that content produced by independent production houses provides a sufficient competitive constraint on the content provided by the JV Parties.

THE RETAIL SUPPLY OF TV CONTENT VOD SERVICES TO VIEWERS

The interaction between internet VOD and TV-platform VOD

- 4.29 Virgin Media considers that the TV platform VOD service offered over its cable platform provides a technically superior and richer customer experience than that offered by Internet VOD service providers. Nevertheless, Virgin Media recognises that certain Internet VOD services and, in particular, BBC's iPlayer have attracted significant levels of usage. **[CONFIDENTIAL]**.
- 4.30 Further, as a consequence of current developments in technology which enable content delivered by broadband to be viewed on a television (see paragraphs[3.8 to 3.9 above), there is already a very significant degree of convergence between VOD content delivered via broadband and VOD content viewed over TV. In practice, in the very near future all VOD content, however delivered, would be capable of being viewed on a television set.
- 4.31 In light of the above, it is clear that to the extent that there could ever have been a material distinction drawn between the VOD services made available over a broadband connection and those made available over TV, that distinction has in practice already become meaningless.

The interaction between catch-up and archive VOD service

- 4.32 While there are distinctions between catch-up and archive VOD services, there remains a significant degree of interaction between the two services such that they could be argued to be part of the same economic product market. Even if, however, it were to be concluded that they are in separate product markets, each service will nevertheless exert a considerable competitive constraint on the other, both from a demand and supply side. This is for the following reasons.
- 4.33 As explained in paragraph 3.12, a catch-up service is limited to allowing customers to view content that has been recently broadcast on a linear channel (in the previous 7 days in relation to all catch-up content on the cable platform³⁵). In essence it allows the customer to view his or her favourite shows recently broadcast on a linear channel at a more convenient time. Catch-up VOD services are almost invariably free (with the BBC's iPlayer having determined the "market" price) and are largely limited to content from UK independent production houses and the broadcasters' in-house producers (which produce key content such as Coronation Street, EastEnders and Doctor Who). Due to rights limitations, catch-up services do not typically include movies, sports or content from US studios. Customers are resistant to pay for catch-up VOD as they see it as being equivalent to a form of personal video recording.

³⁴ The OFT goes on to say in paragraph 77 that "*For one-off programmes or non-returning series, the primary broadcaster will hold the exclusive VOD rights for a month after initial broadcast. This is then followed by a 5-month period when neither the broadcaster nor the production company can exploit VOD rights*"... and in paragraph 78 that "*For returning series, the situation is slightly more complicated, in that the broadcaster retains exclusive VOD rights on the first series until after broadcasting the last episode of the third series. This is done on a rolling basis, so that the second series does not then become available until the end of the fourth series and so on. Third parties noted that returning series are obviously going to be popular programmes and would thus be particularly valuable to any retail VOD service*".

³⁵ However ITV and Channel 4 catch-up content is available on their websites for 30 days.

- 4.34 In contrast, archive VOD services allow customers to choose from a wide range of attractive back catalogue content which may have originally been broadcast a number of years previously (i.e. anything from attractive older programming such as "Friends" and "Basil Brush" to more recent programming which has been broadcast as little as 6 months previously³⁶), and often includes multiple episodes of a single series. Rather than being offered for free, archive VOD services are generally available to customers only on a subscription or PPV basis. Finally, archive VOD services tend to offer a wider range of content (including some of US origination).
- 4.35 Virgin Media considers that, for some customers, catch-up services fulfil a very specific need. They allow a customer the opportunity to view a specific show at a time convenient to the customer, or to "catch-up" with a show that has been missed. For those customers of a catch-up VOD service, content available on an archive VOD service (for which an additional payment may be required) is unlikely to be considered to be an acceptable substitute. Virgin Media is not, however, able to determine the proportion of such customers relative to those that may consider catch-up and archive VOD services to be effective substitutes.
- 4.36 Notwithstanding the differences between catch-up VOD services and archive VOD services, there remain considerable similarities in the consumer proposition (i.e. a choice of content on demand). Further, it is inevitably difficult to draw a clear line between when content can be described as catch-up and when it can be considered archive content. By way of example, whilst the BBC's iPlayer service offers content broadcast in the previous seven days, the online catch-up services of Channel 4 and ITV offer content from the previous 30 days. It is quite possible that the Kangaroo JV may lead to a further blurring of this distinction.

Linear channel content and VOD content are not substitutes

- 4.37 As a preliminary point, there is a clear link between TV VOD content and content available on linear channels in the sense that most TV content available on VOD services is, by definition, content that has already been broadcast, at some point in time, on linear channels. Further, the most attractive content on linear channels, also drives the uptake and viewing on VOD services. In other words, there is complementary relationship between demand for content provided on linear channels and demand for content on VOD services.
- 4.38 The most recent UK precedent to consider the supply of TV generally in the UK is the CC's investigation of Sky's acquisition of a 17.9 per cent stake in ITV. Although the CC considered that linear broadcasting and VOD should form part of the same market, the circumstances in that case were unusual.³⁷ On the one hand BSkyB is the largest pay TV operator by a substantial margin, whose dominant position in the market for the retail supply of pay TV is reinforced by its position as the largest wholesaler and purchaser of pay TV channels and its position in purchasing sport and movie content rights. On the other hand, ITV is the largest commercial FTA broadcaster and has made a major contribution to the success of Freeview. Accordingly, the CC carried out its SLC analysis by reference to an all TV market so as to be able to capture the competitive dynamics between the Sky and ITV.

³⁶ This six month delay generally arises from the requirement for a "black out" period between catch-up availability and archive availability. However, in relation to content produced in-house by broadcasters and US content, there may not be a requirement for a "black-out" window.

³⁷ Paragraph 4.22 of the Sky/ITV reports states that "*[m]ost content is suitable for both means of delivery [i.e. linear and VOD] to viewers and...if a provider of audiovisual services possesses suitable content and sufficient capacity it can choose the form of delivery that suits its commercial offer best. Therefore we believe that, for content suitable for VOD, there is sufficient demand- and supply-side substitution between VOD and linear broadcasting that VOD should form part of the same market.*"

- 4.39 In this regard, it is noteworthy that the distinction between VOD and linear services did not impact the economic analysis of that particular case. The CC's analysis on this point was therefore brief and appears not to have taken into account the fact that different rights are required to broadcast VOD and linear services. For example, a provider of audiovisual services will not necessarily be able to acquire linear and VOD rights and indeed these rights are generally sold separately in relation to TV content. The approach adopted by the CC in this case is a clear example of the approach to market definition being determined by the specific circumstances being considered.
- 4.40 Virgin media considers that linear channel content and VOD content cannot be considered to be substitutable. The essence of VOD services is that the content can be accessed at a time that suits the customer and does not require a traditional "appointment to view". In this regard, content broadcast on traditional linear channels does not meet the demand of customers in two important ways. First, the broadcaster and not the customer determines what content is going to be broadcast and second, that content is then broadcast at a time that is determined by the broadcaster, and not at a time that necessarily suits the customer. The increasing demand by consumers for choice and flexibility in the entertainment options available to them means that linear channels will not be perceived as a substitute for VOD services.
- 4.41 In this regard, in contrast to the CC's Sky/ITV report, in its recent SFR/Tele2 decision the European Commission concluded that *"the development of new modes of pay-TV consumption as a result of new technology has made it possible to distinguish between rights relating to conventional ("linear") TV and those relating to "non-linear" TV services, in particular Video on Demand ("VoD") and Pay Per View ("PPV"). Non-linear services differ significantly from conventional TV channels in terms of demand, the applicable legislation and prices"*.³⁸
- 4.42 Accordingly, Virgin Media considers that linear television should not be included in the relevant market in this case, although the complementary relationship between linear and VOD content needs to be recognised.

The use of PVRs are not substitutable with 'true' VOD

- 4.43 Virgin Media does not agree with OFT's non-committal conclusion in its reference decision that *"the OFT considers it an open question as to whether PVR usage would constrain pricing and other retail terms offered by VOD suppliers"*.³⁹ Virgin Media considers that PVRs and VOD provide complementary services (and are not substitutes) which is why it has invested heavily in both services.
- 4.44 Although PVRs may be considered to offer a "time shifting" functionality broadly equivalent to certain catch-up VOD services, the fundamental difference between PVRs and VOD is that the viewer must programme a PVR in advance in order to record the relevant shows. This requires forward planning on behalf of viewers with PVRs. In addition, there are limits on the number of shows that can be recorded on a PVR⁴⁰. In contrast, catch-up VOD services will offer a large menu of titles from which to choose and do not require advanced planning on the part of the customer. Accordingly, whilst the customer time shifting capabilities of PVRs might offer a limited substitute to certain catch-up services, they cannot offer an effective substitute to a true archive VOD service offering a wide catalogue of attractive titles.
- 4.45 PVRs might also be used to offer a type of VOD service in combination with a "push-VOD" service (such as that offered by Sky+ Anytime⁴¹ and Top Up TV's service on the DTT

³⁸ Paragraph 27. Case No COMP/M.4504 - SFR/Télé 2 France, 18 July 2007.

³⁹ Paragraph 48.

⁴⁰ Typically a PVR will store between 40 and 80 hours of programming.

⁴¹ In this context, Virgin Media is referring to the Sky Anytime service which downloads content to a partitioned Sky+

platform). These services download content selected by the service provider onto the customer's PVR from which the customer can later make a choice. In practice, this type of offering is significantly more limited than a true VOD service. In a push VOD service the content in question is selected by the service provider, rather than by the customer, and due to capacity constraints, the choice of content is very limited. By way of example, Sky+ Anytime TV typically offers a choice of 40 hours while Top Up TV typically offers a choice of 100 hours a week. This compares to approximately 3,500 hours of programming currently available on Virgin Media's VOD service.

- 4.46 Virgin Media notes from paragraph 46 of the OFT's reference decision that the JV Parties cite Ofcom's impact assessment report on the BBC iPlayer as evidence of the extent of competition between PVRs and VOD. However, it is noteworthy that although paragraph 1.23 of the impact assessment states that "*The bulk of the substitution effects are likely to involve changes in the viewing patterns of existing ntl:Telewest and Homechoice subscribers, away from the linear TV schedule, VOD, PVR usage and DVDs*", Table 4.4 of the impact assessment shows that the hours diverted away from PVRs as a percentage of the forecast hours without iPlayer is expected to be extremely small. In this regard paragraph 4.23 of the impact assessment states that "*the sorts of impact we have identified are small when compared to the overall size of all of these markets*".
- 4.47 In addition, although the price of PVR hardware has continued to fall (and functionality of the hardware has continued to improve) in recent years, this has not impacted on the growth in Virgin Media's VOD service. Accordingly, Virgin Media considers that PVR's do not provide an effective competitive constraint on VOD services.

DVD rental and retail sales of DVDs are not substitutes for VOD

- 4.48 Virgin Media does not consider DVD rental or retail sales of DVDs to be a substitute for VOD services. From a demand-side perspective:
- (a) retail DVDs are significantly more expensive than VOD services (reflecting the fact that viewers purchase the right to watch content an infinite number of times when they purchase DVDs, whereas VOD content is generally only available for a limited period of time). As noted by the OFT, "*DVD purchases, meanwhile, often relate to box sets of entire series, which are considerably more expensive (£20-£40 per set, for example) and arguably a very differentiated purchasing decision from downloading one or more TV episodes to rent for prices in the range of, say, 99p to £1.99, for example*".⁴² These extra costs clearly limit the substitutability of DVDs for VOD content. Further, the general decline in the retail prices of DVDs relative to VOD has not impacted on the growth of Virgin Media's VOD viewing. This also suggests that DVDs and VOD are not strong substitutes;
 - (b) rental DVDs do not represent a direct substitute for VOD due to the following:
 - (i) bricks and mortar rental stores (such as Blockbuster) require viewers to actively go to the store to select a title. Moreover, the range of titles available in bricks and mortar rental stores is often significantly more limited than the content available on VOD, and tend to be focussed more on new release movies;
 - (ii) internet-based DVD rental firms such as LOVEFiLM require viewers to plan in advance the programmes/films that they want to watch. Viewers also have to wait for the DVDs to be delivered by post, which means that there is a time lag between the selection of the title and the time when viewing can

hard drive and not to the download to PC service (recently re-branded Sky Player) which allows a customer to watch content streamed to the PC.

⁴² Paragraph 55.

take place. Furthermore, internet-based DVD rental firms often require viewers to select a list of desired titles from which the rental firm can choose in which order to dispatch the titles. In other words, unlike with VOD, the viewer is not always guaranteed to see the content that he or she desires at that specific point in time;

- (c) although some content is available on both a VOD and DVD format (for example key drama), a large amount of the popular content on a VOD service is not available for rental or sale in DVD format, such as soap operas (EastEnders, Coronation Street, etc.) and reality programmes; and
 - (d) viewers need to plan to watch either a rental or purchased DVD (i.e. purchase or borrow the physical DVD) whereas viewers can make an impromptu decision to view VOD content and browse for a suitable programme.
- 4.49 From the supply side, VOD content and DVDs are also generally released in different windows for transmission. For example, catch-up VOD content is available for seven days after transmission whereas DVDs are made available at a later stage. Due to the different release windows, DVDs cannot be used as an alternative to VOD for new release content.
- 4.50 In the Sky/ITV report, the Commission commented on the extent to which DVDs competed in the market for all TV. The Commission concluded that "*[t]he content available on DVDs is the same as some content offered in the all TV market (particularly in relation to movies and TV series). However, DVDs do not provide an alternative to much of the content broadcast on television including, for example, any live content. We do not believe that the sale or rental of DVDs is likely to constrain a hypothetical monopolist of all-TV services. In terms of demand substitution, we therefore formed the view that the market should not be widened to include television-over-the-internet or the sale or rental of DVDs.*"⁴³
- 4.51 For these reasons, Virgin Media does not consider that rental and retail sales of DVDs provide a competitive constraint on VOD.

Geographic market definition

- 4.52 Virgin Media considers that the retail supply of TV content VOD services to viewers and the wholesale supply of TV VOD content is national in scope. This reflects the fact that VOD rights are typically sold on a national basis.

Summary

- 4.53 In summary, Virgin Media considers that the relevant markets against which the OFT should assess whether the Kangaroo JV may be expected to give rise to a substantial lessening of competition is no wider than the wholesale supply of UK TV content for VOD services and the retail supply of TV content VOD services to viewers (irrespective of the platform on which they are offered) in the UK. However, as there are arguments that catch-up and archive TV content VOD services might be considered to be in separate product markets, the CC should also consider the impact of the Kangaroo JV on competition on this basis.

MARKET POWER

- 4.54 The Kangaroo JV will possess very considerable market power in relation to both:
- (a) the retail supply of UK TV content for VOD services; and

⁴³ Paragraph 4.27 of the Sky/ITV Competition Commission report.

- (b) the wholesale supply of UK TV content for VOD services.

Retail supply of TV content VOD services

- 4.55 As the Kangaroo service would be a new service, and the JV Parties are not individually exploiting all the content that will be made available through the Kangaroo JV, it is difficult to calculate the market share of the merged entity in the retail supply of TV content VOD services. However, viewer demand for VOD content is derived from content broadcast on linear channels. In this context, it should be emphasised that the BBC, ITV and Channel 4 account for in aggregate:
- (a) 68.8 per cent share of all adult viewing in all homes in the UK⁴⁴; and
- (b) 64.4 per cent share of all viewing in all multi-channel homes⁴⁵;
- 4.56 That the Kangaroo JV may expect a very large share of the supply of TV content services is demonstrated by the popularity on Virgin Media's VOD service of the VOD content supplied by the JV Parties (albeit that ITV does not currently supply VOD content to Virgin Media):
- (a) BBCWW and Channel 4 content accounts for a [CONFIDENTIAL] per cent share of all VOD views on the Virgin Media platform (including both catch-up and archive⁴⁶) and a [CONFIDENTIAL] per cent share of all VOD views, excluding the BBC iPlayer, on the Virgin Media platform;
- (b) Channel 4 content accounts for a [CONFIDENTIAL] per cent share of views of catch-up VOD on the Virgin Media platform⁴⁷ (and a [CONFIDENTIAL] per cent of catch-up VOD views excluding the BBC iPlayer); and
- (c) BBCWW and Channel 4 content accounts for a [CONFIDENTIAL] per cent share of all views of archive VOD on the Virgin Media platform⁴⁸.
- 4.57 Accordingly the JV Parties own and broadcast content representing a very high share of viewing in the UK. Moreover the JV Parties account a [CONFIDENTIAL] of VOD TV content viewed on the cable platform. In consequence, even absent the Kangaroo engaging in input foreclosure as regards rival TV content VOD service providers, Virgin Media would expect the Kangaroo JV quickly to win a very large share of supply of TV content VOD services. Indeed, Virgin Media sees no reason why that share of supply should not rise over time to be equivalent to the aggregate share of all TV viewing accounted for by the JV Parties.
- 4.58 Further, if, as Virgin Media considers likely (see section 6 below), [CONFIDENTIAL].
- (a) [CONFIDENTIAL];
- (b) [CONFIDENTIAL];
- (c) [CONFIDENTIAL].
- 4.59 In addition to having a significant share of supply, the Kangaroo JV will also benefit from high barriers to entry in relation to the supply of VOD content services. The most

⁴⁴ BARB data for September to November 2007.

⁴⁵ BARB data for September to November 2007.

⁴⁶ Virgin Media internal data for the period September to November 2007. Excluding movies and music content.

⁴⁷ Virgin Media internal data for the period September to November 2007. Excluding movies and music content. BBCWW does not supply catch-up VOD content to Virgin Media.

⁴⁸ Virgin Media internal data for the period September to November 2007. Excluding movies and music content

significant barrier for third parties is being able to obtain access to a sufficient range of content that is familiar to, and valued by, customers.

- 4.60 In this context the three most important UK suppliers of content for VOD services are the JV Parties [CONFIDENTIAL].
- 4.61 In short, due to the access of the JV Parties to content representing a very high share of viewing in the UK, Virgin Media considers that there is a real prospect that the Kangaroo JV will achieve very significant market power in the supply of UK TV content VOD services.

Wholesale supply of content for UK TV content for VOD services

- 4.62 When considering the share of the JV Parties in the wholesale supply of UK TV content for VOD services, Virgin Media has access to data relating only to its own VOD service. Virgin Media has, therefore, provided data for the share of viewing accounted for by BBCWW and Channel 4 (Virgin Media does not acquire ITV VOD content) on the Virgin Media platform in the period September to November 2007 on the following basis:
 - (a) total views of both catch-up and archive VOD content, excluding movies and music content (both including and excluding iPlayer content);
 - (b) total views of catch-up VOD content, excluding movies and music content (both including and excluding iPlayer content); and
 - (c) total views of archive VOD content excluding movies and music content.⁴⁹

Table 4.62(a) - Share of catch-up and archive VOD content views on the Virgin Media platform (including iPlayer content)*

Provider	Total views	Share (%)
BBCWW	[CONFIDENTIAL]	[CONFIDENTIAL]
Channel 4	[CONFIDENTIAL]	[CONFIDENTIAL]
Kangaroo Joint Venture	[CONFIDENTIAL]	[CONFIDENTIAL]
BBC	[CONFIDENTIAL]	[CONFIDENTIAL]
Other	[CONFIDENTIAL]	[CONFIDENTIAL]
TOTAL	[CONFIDENTIAL]	[CONFIDENTIAL]

* excluding movies and music content

⁴⁹ The market share figures are prepared on the basis that iPlayer is not included as part of the Kangaroo JV. However, it should be noted that it is envisaged that iPlayer will be linked to the Kangaroo JV. In this connection, it should also be noted that BBC and BBCWW are not entirely independent market participants.

Table 4.62(b) - Share of catch-up and archive VOD content views on the Virgin Media platform, (excluding iPlayer content)*

Provider	Total views	Share (%)
BBCWW	[CONFIDENTIAL]	[CONFIDENTIAL]
Channel 4	[CONFIDENTIAL]	[CONFIDENTIAL]
Kangaroo Joint Venture	[CONFIDENTIAL]	[CONFIDENTIAL]
Other	[CONFIDENTIAL]	[CONFIDENTIAL]
TOTAL	[CONFIDENTIAL]	[CONFIDENTIAL]

* also excluding movies and music content

Table 4.62(c) - Share of catch-up VOD content views on the Virgin Media platform (including iPlayer content)*

Provider	Total views	Share (%)
BBC	[CONFIDENTIAL]	[CONFIDENTIAL]
Channel 4	[CONFIDENTIAL]	[CONFIDENTIAL]
Others	[CONFIDENTIAL]	[CONFIDENTIAL]
TOTAL	[CONFIDENTIAL]	[CONFIDENTIAL]

* excluding movies and music content

Table 4.62(d) - Share of catch-up VOD content views on the Virgin Media platform (excluding iPlayer)*

Provider	Total views	Share (%)
Channel 4	[CONFIDENTIAL]	[CONFIDENTIAL]
Others	[CONFIDENTIAL]	[CONFIDENTIAL]
TOTAL	[CONFIDENTIAL]	[CONFIDENTIAL]

* excluding movies and music content

Table 4.62(e) - Share of archive VOD content views on the Virgin Media platform*

Provider	Total views	Share (%)
BBCWW	[CONFIDENTIAL]	[CONFIDENTIAL]
Channel 4	[CONFIDENTIAL]	[CONFIDENTIAL]
Kangaroo Joint Venture	[CONFIDENTIAL]	[CONFIDENTIAL]
Other	[CONFIDENTIAL]	[CONFIDENTIAL]
TOTAL	[CONFIDENTIAL]	[CONFIDENTIAL]

* excluding movies and music content

- 4.63 Virgin Media does not currently acquire VOD content rights from ITV, [CONFIDENTIAL]. Accordingly, the shares of supply of the JV Parties provided above understate the position of the JV Parties in the supply of VOD content. [CONFIDENTIAL].

- 4.64 These shares of supply themselves indicate the market power of the JV Parties in the supply of VOD content. **[CONFIDENTIAL]**.
- 4.65 **[CONFIDENTIAL]**:
- (a) **[CONFIDENTIAL]**;⁵⁰
 - (b) **[CONFIDENTIAL]**;
 - (c) **[CONFIDENTIAL]**:
 - (i) **[CONFIDENTIAL]**;
 - (ii) **[CONFIDENTIAL]**;
 - (iii) **[CONFIDENTIAL]**;
 - (iv) **[CONFIDENTIAL]**⁵¹.
- 4.66 Against this background, it is absolutely clear, for the reasons given above,⁵² that US content and content from UK independent production companies could never form the basis of a viable TV VOD content service.
- 4.67 In summary, as the primary supplier of UK TV content for VOD services, the Kangaroo JV will have very considerable market power in relation to the supply of those rights to other TV content VOD service providers.

5. HORIZONTAL EFFECTS

- 5.1 As indicated above, the Kangaroo JV will give rise to a significant aggregation of share in relation to:
- (a) the retail supply of UK TV content for VOD services; and
 - (b) the wholesale supply of UK TV content for VOD services.

The retail supply of TV content VOD services

- 5.2 Virgin Media considers that the development and offering of VOD content and VOD services is part of a general and continuing trend to provide consumers with more choice and flexibility as to the entertainment options available to them. Consumers are increasingly demanding the ability to choose what they wish to view and at what time. Simultaneously, the historic objective to create an "appointment to view" (i.e. the efforts on the part of broadcasters to induce viewers to organise their activities around the broadcaster's schedule) is becoming more difficult to achieve. Accordingly, VOD services are an increasingly important means to deliver entertainment and content.
- 5.3 This being the case, Virgin Media expects, absent the Kangaroo JV, there to be an increasing proliferation of VOD services being offered over a range of different platforms, including services provided by the JV Parties. In this connection, Virgin Media considers it inevitable that, in addition to the VOD services currently provided by ITV and Channel 4 via their websites, BBCWW will also develop its own archive VOD platform. Virgin Media also expects ITV and Channel 4 to have increasingly focused their efforts on offering VOD

⁵⁰ Subscription VOD refers to Virgin Media's TV Choice VOD service available as part of the XL package at no additional cost and as an addition subscription to customers with an M and L package. See paragraph 3.23(b) above.

⁵¹ **[CONFIDENTIAL]**

⁵² At paragraphs [4.5] to [4.11] and [4.25] to [4.28].

services across a range of platforms. Given the expectation of rapid growth in demand for content delivered on a VOD basis, absent the Kangaroo JV, it would have been very likely that in order to maximise the value of their content, each of the JV Parties would have developed their own branded VOD services based on their own content (with which they may have aggregated third party content).

- 5.4 Against this background, Virgin Media considers that the "counterfactual" for assessing the Kangaroo JV is not the status quo ante but a situation in which each of ITV, BBCWW and Channel 4 provide both VOD content and VOD services independently of the other (whether or not with other third parties such as Virgin Media). This is consistent with the OFT view that *"absent the transaction, all three parties could therefore reasonably be expected to operate independent VOD services, and to syndicate those services and associated content to third parties in competition with each other"*.⁵³ Indeed, the OFT states at paragraph 106 of its decision that *"[g]iven the quality, volume and potential value of the BBC archive, it does not seem plausible to the OFT that the BBC's archive content would not be commercialised in the near-term, particularly given the recent and ongoing activity by ITV and Channel 4 in this regard"*.
- 5.5 In consequence, the Kangaroo JV has removed the prospect of competition between the JV Parties in the retail supply of their own VOD services. Given that the JV Parties are the three most important suppliers of TV VOD content and must therefore be considered to be very well placed to use that content as the focus of an attractive service, this loss of competition will be significant. Virgin Media therefore agrees with the OFT's conclusion that *"marginal price-sensitive consumers might, absent Kangaroo, have switched between transactional, that is, paid-for content of each of BBC, ITV and C4, and will now be infra-marginal and retained by the Kangaroo parties, leading to profit incentives to raise DTO and DTR prices (relative to no joint venture)"*.⁵⁴
- 5.6 **[CONFIDENTIAL]**, the market power of the Kangaroo JV would be such that it would be able to increase retail prices to customers for archive VOD (whether or on a subscription or PPV basis) above the level that would have existed in the absence of the Kangaroo JV. This holds true not just in relation to the commercial behaviour of the Kangaroo JV but also in relation to prices charged on the JV Parties' separate retail VOD websites, which will no longer operate in the context of independently-set prices. The potential for information exchange between the JV Parties businesses thus raises the potential for further concerns regarding coordination.
- 5.7 If, however, as is likely the Kangaroo JV were to also **[CONFIDENTIAL]**. As in all cases in which a service provider faces insufficient competitive constraints, this should be expected to lead to higher prices, reduced investment, and reduced innovation relative to a more competitive environment that would have occurred absent the transaction.

The wholesale supply of content for TV content VOD services

- 5.8 Absent the Kangaroo JV, each of the JV Parties would have been free to negotiate the terms of supply of its content to other VOD service providers, on all platforms. Accordingly, in the event the JV Parties continue to be willing to make available VOD content rights to other VOD service providers (which Virgin Media doubts - see the section 6 below), the Kangaroo JV has removed the prospect of competition between the JV Parties in the supply of those rights to third party VOD service suppliers.
- 5.9 There is, for example, now no prospect of BBCWW, ITV and Channel 4 competing in relation to the supply of their VOD content to third party VOD suppliers such as Virgin Media. **[CONFIDENTIAL]**.

⁵³ Paragraph 108.

⁵⁴ Paragraph 141.

5.10 Regardless of the precise scope of the market definition for the wholesale provision of UK TV VOD content for VOD services, Virgin Media considers that the JV Parties are each other's closest competitors for a wide range of content supplied for VOD services in the UK. The competitive dynamic between the different JV Parties is highlighted by the following examples:

- (a) [CONFIDENTIAL];
- (b) [CONFIDENTIAL];
- (c) [CONFIDENTIAL];
- (d) [CONFIDENTIAL];
- (e) as noted by the OFT in its decision, a survey by Ofcom suggested that ITV and the BBC are the top two choices for consumers when asked which channel they could not do without. In response to the question as to what channel viewers would choose if they could have only one, 40 per cent said BBC1 or 2 (35 per cent BBC1; 5 per cent BBC2), 13 per cent said ITV, and 7 per cent said C4.⁵⁵ This shows that the JV Parties' content represent first and second choice preferences for a substantial proportion of UK consumers.

5.11 In addition, as set out above, Virgin Media considers that there are no effective substitutes for the JV Parties' content because:

- (a) US originated content would not be considered to be an acceptable substitute by customers for the type and range of content provided by the JV Parties. [CONFIDENTIAL];
- (b) [CONFIDENTIAL] trying to pull together a portfolio of content from independent production houses would be unsuccessful and thus does not represent an alternative to the content provided by the JV Parties;
- (c) premium and older movies are not close substitutes for the type and range of TV content provided by the JV Parties; and
- (d) [CONFIDENTIAL].

5.12 In consequence, Virgin Media considers that [CONFIDENTIAL].

5.13 In circumstances where the JV Parties account for such a high proportion of available attractive VOD content in the UK, this reduction of horizontal competition in the supply of UK TV content for VOD services will be substantial. Virgin Media therefore agrees with the OFT's conclusion that *"the joint venture combines first and second (if not also third) rights syndication choices for retail VOD suppliers in the UK. Regardless of the precise boundary of the relevant product market, by combining close competitors, Kangaroo therefore raises unilateral effects concerns as the joint venture may be able to exert enhanced market power and raise syndication prices as a result"*.⁵⁶

6. VERTICAL EFFECTS

6.1 The starting point in the consideration of any vertical effects is an assessment of whether the relevant business has market power in an upstream and/or downstream market such that customers would have limited alternatives but to source the goods or services from the merged business. Virgin Media's primary concern relating to the creation of the

⁵⁵ Ofcom Residential Tracker Survey, September 2006.

⁵⁶ Paragraph 121.

Kangaroo JV stems from its position as a customer, or potential customer, of each of the JV Parties in relation to the supply of VOD content for Virgin Media's own VOD service, and the increase in market power that the JV Parties will obtain over the supply of VOD content as a result of the transaction.

- 6.2 The European Commission's non-horizontal mergers guidelines state that "*The Commission is unlikely to find concern in non-horizontal mergers, be it of a co-ordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30% and where the post-merger HHI is below 2000*".⁵⁷ In this connection, as mentioned above, it is clear that the JV Parties own and control for a very high proportion of all attractive UK TV content for VOD services, and they collectively account for just under 70 per cent of all adult viewing on linear channels in the UK.
- 6.3 Virgin Media has, therefore, very material concerns that, as a consequence of the Kangaroo JV, the JV Parties will [CONFIDENTIAL], in relation to its existing TV VOD service, [CONFIDENTIAL].
- 6.4 Against this background, the ability and incentive of the JV Parties to engage in input foreclosure, and the effect of them doing so, is considered below.

Ability to engage in input foreclosure

- 6.5 As mentioned above, the JV Parties own and control a very high proportion of all attractive TV VOD content in the UK, and they collectively account for just under 70 per cent of all adult viewing on linear channels in the UK. As the main driver for VOD take-up is the content provided on linear TV channels, the JV Parties have significant market power in relation to the wholesale supply of content for VOD services in the UK.
- 6.6 There can be no doubt that the JV Parties have the **ability** to engage in input foreclosure. In particular:
- (a) [CONFIDENTIAL]. In practice, BBCWW and Channel 4 content accounts for [CONFIDENTIAL] per cent of all views of TV VOD content⁵⁸ on Virgin Media's VOD service, [CONFIDENTIAL] per cent of all non-iPlayer views of catch-up TV VOD content and 54.3 per cent of all views of archive TV VOD content (excluding movies and music);
 - (b) [CONFIDENTIAL];
 - (c) as indicated in section 4 above, there is insufficient US originated content to replace the content of the JV Parties;
 - (d) premium and older movies are not close substitutes for the type and range of TV content provided by the JV Parties;
 - (e) [CONFIDENTIAL] trying to pull together a portfolio of content by approaching independent production houses would be unsuccessful; and
 - (f) whilst the availability of BBC's iPlayer catch-up service [CONFIDENTIAL], Virgin Media considers that catch-up VOD services and archive VOD services fulfil different customer requirements.
- 6.7 In light of the above, it is absolutely clear that there are [CONFIDENTIAL].

⁵⁷ Similarly, the OFT's substantive assessment merger guidelines state that "*vertical merger concerns are likely to arise only if market power exists or is created in one or more markets along the supply chain*".

⁵⁸ Including catch-up, excluding movies and music.

6.8 Further, as set out below, there is clear evidence of the behaviour of the JV Parties changing as a direct result of the Kangaroo JV. [CONFIDENTIAL].

6.9 Given the upstream market power of the JV Parties in relation to the wholesale supply of content, it is clear that [CONFIDENTIAL]. Indeed, the OFT concluded in its reference decision that "*there is plausible ability to foreclose from Kangaroo's upstream market power*".⁵⁹ Accordingly, the following considers the **incentives** of the JV Parties to engage in such behaviour.

Incentive to engage in input foreclosure

6.10 As a preliminary observation, the materials relating to the Kangaroo JV indicate that while it is currently intended to provide a VOD service over a broadband platform, it is also intended that this service will be extended to a TV VOD offering in due course. Further, the relevant published materials in relation to Kangaroo envisage that the JV will be seeking to derive revenues from subscribers (whether on a subscription or PPV basis) and will also be looking to derive revenues from advertising. Indeed paragraph 14 of the OFT's reference decision confirms that "*Kangaroo will operate a variety of business models, providing free (advertising funded) content as well as transactional content (either download-to-rent (DTR) or download-to-own (DTO)). Kangaroo will also sell internet display advertising space (static and video), both on the pages of the website and around the content (such as pre-roll video adverts)*".

6.11 In this context, there will clearly be an incentive on the part of the JV Parties to ensure that if it were to supply content to other VOD services providers, any resulting adverse impact on the success of Kangaroo does not outweigh the benefit derived from wholesale revenues. Put another way, the incentives of the JV Parties require an assessment of whether wholesale revenues from supplying content to third party VOD service providers are sufficiently large to outweigh any resulting adverse impact on the Kangaroo VOD service. [CONFIDENTIAL].

6.12 First, the actual behaviour of the JV Parties provides a very clear indicator as to where their incentives lie. In this context:

(a) [CONFIDENTIAL⁶⁰]; and

(b) [CONFIDENTIAL⁶¹]

[CONFIDENTIAL].

6.13 Second, in circumstances where a particular service (such as the offer of VOD services in the UK) is in its infancy and is expected to grow significantly in the near future, there is a greater incentive for a vertically integrated operator to seek to win customer share than in a mature market. This is the particularly relevant where, as in this case, it is likely that that the market will be prone to "tipping" towards a particular successful supplier and/or platform. In short, whilst the supply of VOD services is still in its infancy, there will be a greater incentive for the Kangaroo JV to seek to win customer share as quickly as possible and thereby entrench its position in the future. This objective is more likely to be achieved by [CONFIDENTIAL], or charging excessive prices for content, [CONFIDENTIAL].

6.14 Third, vertically integrated organisations typically have an incentive to make content available to third parties if those third parties are able to access a range of additional customers which the content supplier would not itself be able to reach (or would be able

⁵⁹ paragraph 128.

⁶⁰ [CONFIDENTIAL]

⁶¹ [CONFIDENTIAL]

to reach only at considerably greater expense or less efficiently) through its own retail operation [CONFIDENTIAL]⁶² [CONFIDENTIAL]⁶³ [CONFIDENTIAL].

- 6.15 Fourth, the Kangaroo JV significantly increases the incentives not to supply competing platforms by increasing the likely value of advertising and subscription revenues available directly to the JV Parties. If content is to be viewed on a VOD basis, the JV Parties will have a preference for it to be viewed on its own service in order to increase advertising revenue.⁶⁴ Providing content to rival VOD services that are unable to offer advertising (or a means to monetise advertising)⁶⁵ may be regarded as "cannibalising" core advertising revenues, which in itself is a reason not to provide third party platforms with VOD content.⁶⁶ This will also mean that VOD content viewed on the Kangaroo VOD service will offer an additional stream of revenue from advertising (further to subscription or PPV revenues) that may not be available when the same content is viewed on the Virgin Media VOD platform.
- 6.16 Fifth, [CONFIDENTIAL], this will confer on it a material bidding advantage when looking to secure content from other programming distributors due to economies of scale leading to lower costs per subscriber. In this regard, it has been suggested in press materials that Kangaroo may be looking to add third party content to its VOD service. If so, Kangaroo will be in a better position to bid for, and win, the VOD rights for that content in circumstances where rival service providers are weakened. This point was expressly recognised by Ofcom when considering, in its ongoing Pay TV market investigation, the long run incentives for a vertically integrated firm not to supply content to rival retailers. Ofcom stated:

"Another example of the longer term incentives might be a desire to eliminate a rival retailer that is also active at the content acquisition level. By weakening or eliminating that rival, this may reduce competition between buyers of content rights. This might allow the vertically integrated firm to acquire content for a lower price in the future."⁶⁷

Against this background, it is likely that Virgin Media will be in competition with the Kangaroo JV for third party VOD rights. Accordingly, the JV Parties [CONFIDENTIAL].

- 6.17 Finally, as a general proposition, the traditional terrestrial free to air broadcasters, and particularly those that rely on advertising income, have a general incentive not to take steps that may promote the growth of pay or PPV TV platforms. This is because the growth of pay platforms has, by fragmenting TV audiences, led to a slow decline in share of viewing of the traditional terrestrial free to air channels which has, in turn led to a reduction in share of advertising revenue. [CONFIDENTIAL].
- 6.18 [CONFIDENTIAL].

⁶² In this context, the reach of Virgin Media is limited by the reach of its cable infrastructure (which covers only approximately 50 per cent of UK households). In practice, Virgin Media has 3.2 million customers, of which [CONFIDENTIAL] million take the XL package and can therefore access Virgin Media's SVOD services.

⁶³ As reported in The Guardian on 6 May 2008, "Freesat aims to link up with broadband" by Mark Sweney, see <http://www.guardian.co.uk/media/2008/may/06/bbc.itv1>.

⁶⁴ In this context, the brief description of the anticipated joint venture provided by the parties to the CC makes it very clear that the JV Parties anticipate that Kangaroo will derive revenue from advertisements (see paragraphs 1.7 and 1.13).

⁶⁵ [CONFIDENTIAL]

⁶⁶ [CONFIDENTIAL]

⁶⁷ See paragraph 5.127 of Ofcom's Pay TV Consultation Document.

Effect of input foreclosure

- 6.19 For the reasons given above, it is likely that, if the Kangaroo JV were to proceed as envisaged, [CONFIDENTIAL]:
- (a) [CONFIDENTIAL];
 - (b) [CONFIDENTIAL];
 - (c) [CONFIDENTIAL].
- 6.20 Once the Kangaroo JV had established itself as the VOD service of choice, [CONFIDENTIAL]. This would have a number of consequences:
- (a) the Kangaroo JV would have the ability to increase prices to customers for archive VOD (whether or on a subscription or PPV basis) above the competitive level (i.e. prices for content available on download-to-rent and download-to-own bases);
 - (b) the purchasing power of the Kangaroo JV could increase barriers to entry at the upstream level;
 - (c) VOD content providers would, effectively, be required to ensure that their content was available on the Kangaroo service (assuming the Kangaroo JV did not engage in customer foreclosure) in order to obtain an economic return. This would provide the Kangaroo JV with very considerable purchasing power over those content providers;
 - (d) if the terms offered by the Kangaroo JV to VOD content providers were to diminish below a certain level, this would undermine the incentive on third parties to bid for VOD content in competition with the JV Parties, thereby further reducing competition for such content. In turn, this may reduce the incentives and ability of content providers to compete (at the upstream level), with the content production activities of the JV Parties;
 - (e) if the JV Parties were to foreclose access to the Kangaroo service by other content providers, this may lead to the JV Parties generating an additional advantage when bidding for linear content rights. This is because linear and VOD content rights are often sold as a package, and foreclosing access to the Kangaroo platform for rival bidders may allow the JV Parties to bid more for the relevant rights (because other bidders would have no effective means of generating an adequate return on the VOD rights);
 - (f) as in all cases in which a service provider faces insufficient competitive constraints, there should be expected to less investment, less innovation and less development than would be the case in a more competitive environment;
 - (g) consumers would face a reduced choice of providers; and
 - (h) quality and levels of service would be expected to drop relative to a situation in which the Kangaroo JV faced greater competition.

Conclusion

- 6.21 The Kangaroo JV raises extremely serious vertical foreclosure concerns. These concerns are more than sufficient in their own right to lead the CC to the conclusion that the Kangaroo JV may be expected to result in a substantial lessening of competition. When these vertical concerns are added to the horizontal concerns outlined above, there can be no doubt that this is the case.
- 6.22 Such is the power of the JV Parties in the supply of UK TV content for VOD services, and such is the potential and expected growth in demand for VOD content, that the Kangaroo JV has the very real potential to determine the overall structure of the supply of VOD content in the UK for years to come.

7. CONCLUDING REMARKS***The Commission should exercise caution in a fast growing market***

- 7.1 As discussed above, the Kangaroo JV raises serious concerns in relation to both horizontal and vertical effects in relation to the wholesale supply of UK TV content for VOD services and the downstream supply of TV content VOD services. In particular, Virgin Media has specific and serious concerns about the Kangaroo JV's ability to increase the price/not innovate in relation to VOD content and to [CONFIDENTIAL]. In this connection, Virgin Media draws the Commission's attention to Virgin Media's experience in relation to Sky and pay TV.
- 7.2 Sky owns and controls key pay TV content, namely premium sports and movie channels, as well as being the largest downstream supplier of pay TV services to viewers in the UK. Sky's premium sports and movie content is a key driver in relation to the uptake and retention of pay TV customers. Sky either refuses to supply this content to competing pay TV retailers or offers it on uneconomic terms. This selective distribution of key content restricts competition from other pay TV retailers and drives the growth of Sky's downstream subscriber base (i.e. pay TV customers). Sky's resulting control of the biggest base of pay TV subscribers and the largest pay TV platform inhibits competitive bids from third parties for key content, thereby entrenching its control over the supply of premium sports and movie rights. Once this vicious circle of market power is established, it is very difficult to break and it becomes self-perpetuating.
- 7.3 Virgin Media considers that the Sky analogy is particularly pertinent to the current case because, for the reasons set out in this submission, the Kangaroo JV is likely to result in:
- (a) the JV Parties holding key content and [CONFIDENTIAL];
 - (b) [CONFIDENTIAL] which will drive growth of the Kangaroo JV's own downstream VOD service; and
 - (c) [CONFIDENTIAL].
- 7.4 This would result in a very similar position as that enjoyed by Sky. In this connection, Virgin Media's experience in competing with, and purchasing from, Sky in relation to pay TV offers some valuable lessons for the review of the Kangaroo JV. First, and very importantly, in Virgin Media's experience, it would be inappropriate to rely on ex post competition powers to govern the behaviour of the merged entity because in the context of the pay TV industry ex post regulation:
- (a) has, to date, failed to ensure a competitive pay TV industry;
 - (b) takes a long time to reach conclusion;
 - (c) is costly for all parties;

- (d) has not afforded any real degree of certainty for all players in the market; and
- (e) in general, is not designed to promote sustainable entry and competition against an incumbent dominant provider.

Each of these concerns are considered below.

- 7.5 First, ex post competition powers have shown themselves to be entirely ineffective in controlling the pay TV industry in the UK. Despite Articles 81 and 82 of the EC Treaty, and the equivalent powers of the Competition Act 1998, Sky has been able, over the last decade, to create and entrench leading and dominant positions across the pay TV industry.
- 7.6 Second, as the Commission will be aware, investigations under ex post competition powers can be very lengthy (even before any appeal of any decision). By way of example, the OFT's investigation of Sky under the Chapter II prohibition of the Competition Act took nearly three years to conclude (March 2000 to December 2002), excluding applications from third parties to the OFT to vary its final decision. Indeed, in relation to Ofcom's market investigation into the pay TV industry, the initial submissions on the need for a market investigation were made in January 2007. Ofcom has not yet decided whether to refer the market investigation to the Commission, some 18 months later.
- 7.7 In this respect, in fast moving markets, such as TV broadcasting, the delay in reaching a decision under ex post competition powers will prevent such powers being either an effective deterrent or an appropriate means of obtaining satisfactory redress.
- 7.8 Third, the length of proceedings adds to the total cost to the complainant (both the management time and external advisor fees incurred, and the cost of the alleged anti-competitive practice continuing until the conclusion of proceedings). It can also add to the total cost to the company complained about (management time and external advisor fees). This is true of many types of private actions and regulatory investigations, however it is particularly acute in competition cases because of the factual and economic complexities involved, including the importance of detailed, fact-based, economic analysis.
- 7.9 Fourth, ex post regulation can create uncertainty for firms in a market, i.e. both firms with market power and their competitors, suppliers and customers. In this respect, it can be very difficult for market participants to judge the line between aggressively competitive behaviour and anti-competitive use of market power. Potential complainants can be discouraged from complaining or issuing private actions in relation to conduct because of the large cost, lengthy time frame and difficulties in gathering suitable factual evidence to support their case (this evidence is often held by the firm with market power (i.e. margin/costs breakdown data)).
- 7.10 Fifth and lastly, where a decision not to engage in ex ante regulation has enabled a provider to achieve market power at various levels of the supply chain, such as Sky in pay TV, ex post regulation will not be able to reverse that position. That is because ex post regulation typically seeks to regulate the behaviour of the incumbent but cannot create the incentives for expansion and entry that would have existed prior to the incumbent achieving market power. In short, history has shown that ex post regulation has not been successful in encouraging competition to a dominant incumbent.

The JV will not give rise to any credible customer benefits

- 7.11 At paragraph 95 of the OFT Decision, the OFT suggests that "*the joint venture may bring benefits to consumers in providing a one-stop library of UK TV (and in due course other) content.*" However, the OFT correctly recognises that "*these claims are difficult to quantify, have not been quantified by the parties and it is not possible to weigh the consumer benefits properly against the risk of consumer harm*". Moreover, what the OFT

has identified as a "one-stop" shop is nothing more than the JV Parties operating as a single supplier with significant market power. In this regard, Virgin Media cannot see how the Kangaroo JV can give rise to any material benefits to consumers compared to the potentially significant adverse consequences that will arise as a result of the market power of the Kangaroo JV.

7.12 Virgin Media agrees with the OFT's scepticism about the claimed benefits and notes that, according to the Commission's guidelines, *"the burden is upon the merging parties to provide evidence that any claimed benefit does in fact fall within the meaning of a relevant customer benefit"*.⁶⁸ The JV Parties would need to provide compelling evidence demonstrating that, on the balance of probabilities, the Kangaroo JV would lead to:

- (a) *"lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market or markets in which the substantial lessening of competition has, or may have occurred or (as the case may be) may occur)"*⁶⁹; or
- (b) *"greater innovation in relation to such goods or services"*.

7.13 Further, the Commission would need to be convinced that:

- (a) *"the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation"*⁷⁰; and
- (b) *"the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition"*⁷¹.

7.14 Against this background, the Commission should be wary about accepting the JV Parties' claims of hypothetical future consumer benefits, in particular given that under the counterfactual significant benefits are expected to continue to accrue to consumers. This is because VOD services are a nascent and rapidly expanding service in the UK, and this high level of innovation is a direct result of a large number of VOD content providers and VOD service providers competing to establish and provide a market leading service. Absent the Kangaroo JV, Virgin Media expects that this innovation and competition would continue unabated, may even intensify, leading to continuing consumer benefits.

⁶⁸ Competition Commission *Merger references: Competition Commission Guidelines* June 2003, paragraph 4.38.

⁶⁹ Enterprise Act 2002, section 30(1)(a)(i)

⁷⁰ Enterprise Act 2002, section 30(1)(a)(ii).

⁷¹ Enterprise Act 2002, section 30(3)(b).

SCHEDULE OF ANNEXES

- A. VOD growth charts
- B. Summary of correspondence with BBCWW
- C. Summary of the key terms of the BBC/Virgin Media Contract of **[CONFIDENTIAL]** in relation to iPlayer
- D. VOD proposition presentation of May 2008

ANNEX A

VOD growth charts

ANNEX B

Summary of correspondence with BBCWW

[CONFIDENTIAL]:

- (a) **[CONFIDENTIAL];**
- (b) **[CONFIDENTIAL];**
- (c) **[CONFIDENTIAL];**
- (d) **[CONFIDENTIAL];**
- (e) **[CONFIDENTIAL];**
 - (i) **[CONFIDENTIAL];**
 - (ii) **[CONFIDENTIAL⁷²];**
- (f) **[CONFIDENTIAL].**

[CONFIDENTIAL].

ANNEX C

Summary of the key terms of the BBC/Virgin Media Contract of [CONFIDENTIAL] in relation to iPlayer.

ANNEX D

VOD proposition presentation of May 2008