



THE AUTHORITY FOR TELEVISION **ON DEMAND**

**Statement on regulatory fees for
on-demand programme services
for the period
1 April 2013 to 31 March 2014**

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Section 1

Executive Summary

- 1.1 This is a Statement by the Authority for Television On Demand (“ATVOD”), the body that Ofcom designated (“the Designation”)¹ on 18 March 2010 as the co-regulator for video on demand (“VOD”) editorial content made available on On-Demand Programme Services (“ODPS”). Among the statutory functions designated to ATVOD is requiring Service Providers to pay an annual fee in respect of each service they provide. Such fees are subject to Ofcom’s prior written approval.
- 1.2 The Statement sets out ATVOD’s response to submissions made to its consultation on proposals for regulatory fees for ODPS for the period 1 April 2013 to 31 March 2014 (“the 2013-14 Fees Consultation”)² and records ATVOD’s decision in relation to the fees to be set with regard to ODPS for the period 1 April 2013 to 31 March 2014 (“2013-14 Fees”). In doing so, the Statement assesses the impact of the different proposals on relevant stakeholders which has been taken into account in reaching a decision.
- 1.3 This Statement also sets out Ofcom’s approval of the amount and structure of the 2013-14 Fees since ultimate responsibility for setting regulatory fees for ODPS rests with Ofcom.
- 1.4 A total of 13 submissions were received. Ten submissions were from providers of notified ODPS, two were from trade associations representing providers of notified ODPS, and one was from a company which does not provide an ODPS. In coming to its decision, ATVOD has taken into account the strength and weight of arguments contained in the submissions from stakeholders.
- 1.5 Since the publication of the Consultation on 12 February, the projected financial position in relation to 2012-13 has improved for two reasons. Firstly, as a result of ATVOD’s careful housekeeping and the postponement of an IT project, we have been able to revise down our estimate of 2012-13 costs by £31,544 to **£455,645**. Secondly, following further notifications projected 2012-13 Income has risen by £22,733 to **£534,800**. This has resulted in the projected surplus for 2012-13 rising from £24,878 to **£79,155**.
- 1.6 The improved projected financial outcome is reflected in the decisions set out in this Statement.

Summary of decision

¹ Following a scheduled review in 2012, an Amended Designation was made on 14 September 2012 and can be found at <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

² See <http://www.atvod.co.uk/news-consultations/news-consultationsconsultations/closed-consultations/2013-14-fees>

1.7 Having duly considered and taken account of the responses to the 2013-14 Fees Consultation, and in light of all the information currently available and the relevant legislative provisions, ATVOD has decided that:

- The proposed new notification requirements should be adopted with the result that the 2013-14 tariff will maintain the existing progressive tariff bands, based on the turnover or non-commercial status of the provider of the ODPS, and will set out a 'single outlet' and 'multiple outlet' rate within each band;
- An online notification and data submission facility should be developed for the convenience of service providers;
- The estimate of the likely costs of performing the designated functions in 2013-14 should be revised to £553,050 to incorporate the costs associated with (a) amending the ATVOD website to reflect the new notification requirements (b) developing the online notification and data submission facility and (c) completing the database project postponed from 2012-13 so that its design can take account of the changes relating to notification requirements and the online notification facility;
- Having taken into account the revised estimate of ATVOD's 2012-13 surplus, and the revised estimate of 2013-14 costs, the previous working assumption that the aggregate amount of fees required in 2013-14 would be £510,050 should be changed to £498,773;
- 'Single outlet' fees should be 5% lower in each tariff band than the corresponding 'first service' fee charged in 2012-13;
- 'Multiple outlet' outlet fees for those qualifying for concessionary rates or for the B Rate should be set at the corresponding 'first service' fee charged in 2012-13 to ensure that non-commercial providers and providers with turnover below £6.5m do not pay more under the new notification requirements;
- The average fee paid by a service provider is likely to fall by 5% in 2013-14. This follows a fall of more than 3.5% in 2012-13.

Concessionary rates

- Concessionary rates should continue to apply for services provided by non-commercial service providers and for services provided by small scale and micro scale service providers with no affiliation to a larger company.

- The concessionary rate fee structure should be based on the proposal set out in Option 2b of the Consultation Document, but with slight modifications to fees in light of the revised estimate of the aggregate amount of 2013-14 Fees required;
- As in the previous two years, the concessionary rates should be payable only when an eligible service has been operating for three months³, and thereafter can be paid in four instalments.
- The concessionary rate tariff will therefore be as follows:

Non-Commercial Concessionary Rate: Service provider is

- i) a registered charity; or
 - ii) a community interest company; or
 - iii) a not-for-profit company operating in the public interest; or
 - iv) The Welsh Authority.
- £91 for a 'single outlet' service.
 - £96 for a 'multiple outlet' service.

Commercial Micro-scale Concessionary Rate: Service provider

- i) has no affiliation to a larger company⁴; and
 - ii) satisfies one of the two conditions below:
 - (a) had a turnover of less than £50,000 in the last accounting year for which figures are available; or
 - (b) is in the first year of trading and expects to have a turnover of less than £50,000 in that first year.
- £137 for a 'single outlet' service.
 - £145 for a 'multiple outlet' service.

Commercial Small-scale Concessionary Rate: Service provider:

- i) has no affiliation to a larger company⁵; and
- ii) satisfies one of the two conditions below:
 - (a) had a turnover of less than £100,000 in the last accounting year for which figures are available; or

³ This temporary waiver will apply only if the service provider has, prior to launching the service, received from ATVOD confirmation of its qualification for a concessionary rate, has submitted to ATVOD a completed notification form for the new service, and has requested a 3 month waiver

⁴ A service provider will be regarded as having an affiliation to a larger company if (a) a larger company has a 10% or greater stake in the service provider (in terms of ownership or voting rights), or (b) the Board of the service provider includes a representative of a larger company with an interest in the video on demand sector

⁵ See above footnote

(b) is in the first year of trading and expects to have a turnover of less than £100,000 in that first year.

- £183 for a 'single outlet' service.
- £193 for a 'multiple outlet' service.

Standard rates

- the standard fee structure should be based on the proposal set out in Option 2b of the Consultation Document, but with slight modifications to fees in light of the revised estimate of the aggregate amount of 2013-14 Fees required;

- the standard rate tariff will therefore be as follows:

Super A Rate: Provider Revenue is greater than £25.9m

- £9,480 for a 'single outlet' service.
- £12,302 for a 'multiple outlet' service.

A Rate: Provider Revenue is greater than £6.5m but not more than £25.9m

- £4,740 for a 'single outlet' service.
- £6,151 for a 'multiple outlet' service.

B Rate⁶: Provider Revenue is £6.5m or less; or the service provider is in the first year of operation

- £732 for a 'single outlet' service.
- £771 for a 'multiple outlet' service.

- A cap of £25,000 applies to the aggregate amount of fees paid by a single service provider. Where two or more service providers are wholly owned by the same parent company, the service providers may each opt to be assessed on the basis of group turnover with the result that the cap on total fees payable will also apply at the group level.

1.8 In addition, ATVOD has decided that:

- Stakeholders wishing to see a further relaxation to the qualification criteria for consideration as a group (with respect to the application of the group cap on fees), should be invited to submit a formal and detailed proposal to ATVOD. Such proposal to include an analysis demonstrating the likely impact of the proposed change on aggregate fee revenue;
- A 'watching brief' should be maintained with regard to the development of a widely accepted means of measuring ODPS audiences and, in the meantime, the viability of an audience based fee structure should not be actively investigated; and

⁶ Fees payable by providers qualifying for the B Rate can be paid in four instalments

- Provision should not be made at this time to remunerate a future Non-Independent Director in order to attract candidates from smaller service providers to the ATVOD Board. However, ATVOD would like further to discuss this matter with stakeholders through the Industry Forum.

Background

1.9 On 12 February 2013, in accordance with our statutory duty to consult⁷ with providers likely to be required to pay a fee during the relevant year, we published the 2013-14 Fees Consultation. In Section 2 of this Statement, we set out the background to the consultation.

Stakeholder responses

- 1.10 In Section 3, we set out details of the 13 responses to the consultation. In summary, these responses indicated:
- support for the new notifications requirements;
 - support for an online notification and data submission facility
 - support for option 2b;
 - support for the proposal that stakeholders wishing to see a further relaxation to the qualification criteria for consideration as a group (with respect to the application of the group cap on fees), should be invited to submit a formal and detailed proposal to ATVOD;
 - support for the proposition that a ‘watching brief’ should be maintained with regard to the development of a widely accepted means of measuring ODPS audiences; and
 - a lack of support for the proposition that provision should be made to remunerate a future Non-Independent Director in order to attract candidates from smaller service providers to the ATVOD Board

ATVOD’s response and decision

1.11 In Section 4, we set out ATVOD’s response to the submissions made to the 2013-14 Fees Consultation, and the reasons for our decision.

2013-14 Fee Tariff

1.12 In Section 5, we provide a table setting out the rates that apply in each band, details of the temporary waiver for new services from providers who qualify for a concessionary rate, and confirmation of the ability to pay in four instalments for providers who qualify for a concessionary rate or for rate B. We also set out the

⁷ See Section 368NA(5)(c) of the Act.

procedure by which service providers can apply for rates below the Super A Rate and the evidence required in support of such applications.

Ofcom's approval of the fees

- 1.13 In Section 6, we set out Ofcom's approval of the 2013-14 Fees, as required by the Designation, Ofcom having ultimate responsibility for setting the amount of the regulatory fees to be paid in any year.

Next steps

- 1.14 In Section 7, we set out the next steps we will take in the process of requiring payment of fees in relation to 2013-14. These steps include requiring service providers to confirm (a) details of the outlets through which they provide their service(s) and (b) the extent to which they wish those outlets to be considered part of a single service.

Section 2

Background

- 2.1 This is a Statement by the Authority for Television On Demand (“ATVOD”), the body that Ofcom designated (“the Designation”)⁸ on 18 March 2010 as the co-regulator for video on demand (“VOD”) editorial content made available on On-Demand Programme Services (“ODPS”).
- 2.2 ATVOD has been designated various statutory functions in relation to the regulation of ODPS including requiring Service Providers to pay an annual fee in respect of each service they provide. Such fees are subject to Ofcom’s prior written approval. Under the Communications Act 2003 (as amended) (“the Act”)⁹ the fees set must represent the appropriate contribution of the provider towards meeting the estimated costs¹⁰ to be incurred in the relevant year¹¹ and be justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed¹².
- 2.3 The Statement sets out ATVOD’s response to submissions made to our consultation on proposals for regulatory fees for ODPS for the period 1 April 2013 to 31 March 2014 (“the 2013-14 Fees Consultation”)¹³ and records our decision in relation to the fees to be set with regard to ODPS for that period (“2013-14 Fees”).
- 2.4 The Statement also sets out Ofcom’s approval of the 2013-14 Fees, as ultimate responsibility for the setting of regulatory fees for ODPS for any year rests with Ofcom.
- 2.5 The legislative and regulatory background to the setting of these regulatory fees and the factors affecting tariff levels are set out in full in the 2013-14 Fees Consultation¹⁴.
- 2.6 The options set out in the 2013-14 Fees Consultation were:

Option 1a – ‘Status quo , with no online notification facility’

The existing notification requirements should be maintained, with versions of services which are not ‘substantially the same’ requiring separate notification and being subject to a separate fee. The tariff bands first introduced in 2011-12 should be

⁸ Following a scheduled review in 2012, an Amended Designation was made on 14 September 2012 and can be found at <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

⁹ Annex 1 lays out the legal framework relating to the relevant statutory provisions in relation to the setting of fees.

¹⁰ As well as ATVOD’s estimated costs, the likely costs also reflect an estimated amount of Ofcom’s costs for the year; and the functions in respect of which fees are imposed include both functions delegated to ATVOD and the functions retained by Ofcom.

¹¹ See Section 368NA(3)(a) of the Act.

¹² See Section 368NA(3)(b) of the Act.

¹³ See <http://www.atvod.co.uk/news-consultations/news-consultationsconsultations/closed-consultations/2013-14-fees>

¹⁴ http://www.atvod.co.uk/uploads/files/Consultation_Document_for_2012-13_Fees.pdf

maintained for 2013-14. The criteria for qualification for each of those bands should also be maintained. The group cap should be maintained at the current level and with the same qualification criteria. ATVOD should not introduce an online notification and data submission facility for service providers. Tariff rates should be reduced by 3% across the board.

Under Option 1a the tariff bands and qualification criteria would be as set out on pages 9-11 of the 2013-14 Consultation and would be unchanged from 2012-13¹⁵. Under Option 1a, the fee set within each tariff band would be as set out in the table below.

Option 1a	First service	Additional services (per service)	Maximum fee (per provider)
Standard rates			
Super A Rate (Provider revenue > £25.9m)	£9,680	£748	£25,000
A Rate (Provider revenue > £6.5m)	£4,840	£748	£25,000
B Rate (Provider revenue £6.5m or less)	£748	£374	£25,000
Concessionary rates			
Non-commercial (charities, community interest companies, not for profit companies acting in the public interest)	£93	£93	N/A
Commercial micro-scale (Provider revenue < £50,000)	£141	£141	N/A
Commercial small-scale (Provider revenue < £100,000)	£187	£187	N/A

Option 1b – ‘Status quo, but with online notification facility’

The existing notification requirements should be maintained, with versions of services which are not ‘substantially the same’ requiring separate notification and being subject to a separate fee. The tariff bands first introduced in 2011-12 should be

¹⁵ Except that service providers would qualify for rate B if they were in their first year of trading on 1 April 2013, rather than 1 April 2012.

maintained for 2013-14. The criteria for qualification for each of those bands should also be maintained. The group cap should be maintained at the current level and with the same qualification criteria. ATVOD should introduce an online notification and data submission facility for service providers. Tariff rates should be increased by 1.6% across the board in order to pay for the online notification facility.

This option is the same as Option 1a, except that ATVOD's costs would be higher as it would develop an extranet facility to enable service providers to make notifications and submit data online. Under Option 1b the tariff bands and qualification criteria would be as set out on pages 9-11 of the 2013-14 Consultation and would be unchanged from 2012-13¹⁶. Under Option 1b, the fee set within each tariff band would be as set out in the table below.

Option 1b	First service	Additional services (per service)	Maximum fee (per provider)
Standard rates			
Super A Rate (Provider revenue > £25.9m)	£10,140	£783	£25,000
A Rate (Provider revenue > £6.5m)	£5,070	£783	£25,000
B Rate (Provider revenue £6.5m or less)	£783	£392	£25,000
Concessionary rates			
Non-commercial (charities, community interest companies, not for profit companies acting in the public interest)	£98	£98	N/A
Commercial micro-scale (Provider revenue < £50,000)	£147	£147	N/A
Commercial small-scale (Provider revenue < £100,000)	£196	£196	N/A

¹⁶ Except that service providers would qualify for rate B if they were in their first year of trading on 1 April 2013, rather than 1 April 2012.

Option 2a – ‘New notification requirements adopted, no online notification facility’

The proposed notification requirements set out in Annex 3 of the 2013-14 Consultation should be adopted, with service providers providing VOD content through multiple outlets given the option of being treated as providing a single ODPS regardless of any differences in the catalogues of programmes made available through those outlets. The tariff bands first introduced in 2011-12 should be maintained for 2013-14. The criteria for qualification for each of those bands should also be maintained. However, within each band two rates should apply: a ‘single outlet’ rate and a ‘multiple outlet’ rate. The group cap should be maintained at the current level and with the same qualification criteria. ATVOD should not introduce an online notification and data submission facility for service providers. The ‘single outlet’ rate in each tariff band should be 3% less than the current rate for a first service. The ‘multiple outlet’ rate should be set at a level which recovers from Super A and A Rate payers providing services through multiple outlets the revenue lost through the abolition of ‘additional service’ fees and the additional costs associated with the change.

Under Option 2a the tariff bands and qualification criteria would be as set out on pages 9-11 of the 2013-14 Consultation and would be unchanged from 2012-13¹⁷. The fee set within each tariff band would be set according to whether the service was provided through a single outlet or through multiple outlets. Under Option 2a, the fee set within each tariff band would be as set out in the table below.

Option 2a	Single outlet service	Multiple outlet service	Group cap
Standard rates			
Super A Rate (Provider revenue > £25.9m)	£9,680	£12,544	£25,000
A Rate (Provider revenue > £6.5m)	£4,840	£6,272	£25,000
B Rate (Provider revenue £6.5m or less)	£748	£771	£25,000
Concessionary rates			
Non-commercial (charities, community interest companies, not for profit companies acting in the public interest)	£93	£96	N/A

¹⁷ Except that service providers would qualify for rate B if they were in their first year of trading on 1 April 2013, rather than 1 April 2012.

Commercial micro-scale (Provider revenue < £50,000)	£141	£145	N/A
Commercial small-scale (Provider revenue < £100,000)	£187	£193	N/A

Under Option 2a, no provider with a turnover of £6.5m or less would pay more than in 2012-13, regardless of the number of outlets through which the service is provided.

Option 2b – ‘New notification requirements adopted, but with online notification facility’

The proposed notification requirements set out in Annex 3 of the 2013-14 Consultation should be adopted, with service providers providing VOD content through multiple outlets given the option of being treated as providing a single ODPS regardless of any differences in the catalogues of programmes made available through those outlets. The tariff bands first introduced in 2011-12 should be maintained for 2013-14. The criteria for qualification for each of those bands should also be maintained. However, within each band two rates should apply: a ‘single outlet’ rate and a ‘multiple outlet’ rate. The group cap should be maintained at the current level and with the same qualification criteria. ATVOD should introduce an online notification and data submission facility for service providers. The ‘single outlet’ rate in each tariff band should be 1.6% higher than the current rate for a first service in order to pay for the online notification facility. The ‘multiple outlet’ rate should be set at a level which recovers from Super A and A Rate payers providing services through multiple outlets the revenue lost through the abolition of ‘additional service’ fees and the additional costs associated with the change.

This option is the same as Option 2a, except that ATVOD’s costs would be higher as it would develop an extranet facility to enable service providers to make notifications and submit data online. Under Option 2b the tariff bands and qualification criteria would be as set out on pages 9-11 of the 2013-14 Consultation and would be unchanged from 2012-13¹⁸. The fee set within each tariff band would be set according to whether the service was provided through a single outlet or through multiple outlets. Under Option 2b, the fee set within each tariff band would be as set out in the table below.

Option 2b	Single outlet service	Multiple outlet service	Group cap
Standard rates			
Super A Rate (Provider revenue > £25.9m)	£10,140	£13,100	£25,000

¹⁸ Except that service providers would qualify for rate B if they were in their first year of trading on 1 April 2013, rather than 1 April 2012.

A Rate (Provider revenue > £6.5m)	£5,070	£6,550	£25,000
B Rate (Provider revenue £6.5m or less)	£783	£806	£25,000
Concessionary rates			
Non-commercial (charities, community interest companies, not for profit companies acting in the public interest)	£98	£101	N/A
Commercial micro-scale (Provider revenue < £50,000)	£147	£151	N/A
Commercial small-scale (Provider revenue < £100,000)	£196	£205	N/A

2.8 In this document we:

- set out stakeholders' views on the range of different options for setting the 2013-14 Fees to be paid by ODPS providers and on a range of factors that have a bearing on those fees (Section 3);
- set out our response to the views of stakeholders and our decision in relation to the 2013-14 Fees (Section 4);
- set out the tariff for 2013-14 Fees (Section 5);
- set out Ofcom's approval of the 2013-14 Fees (Section 6); and
- set out the next steps we will take in the process of requiring payment of fees in relation to 2013-14 (Section 7).

Section 3

Stakeholder Responses

- 3.1 In this section we provide information on the responses received to the 2013-14 Fees Consultation.
- 3.2 Thirteen responses were received. This is fewer than last year, when 19 responses were submitted.
- 3.3 Of the thirteen responses received, ten were from a provider of a notified service, two were from trade associations to which notified services were affiliated, and one was from a company which did not provide a notified service.
- 3.4 One response was confidential in its entirety (“Confidential Respondent A”). References to the content of this confidential submission have been made in a manner which does not identify the respondent. One other respondent requested that their organisation’s name be kept confidential (“Confidential Respondent B”). References to the content of this part-confidential submission have been made in a manner which does not identify the respondent.
- 3.5 The non-confidential respondents were:

Providers of notified services

BT, Channel 4, Channel 5 Broadcasting Ltd, ITV Consumer Limited, Portland Broadcasting / RHF Productions, Primetime TV (UK) Ltd/ Studio 66 TV, STV Central and STV North, UTV.

The confidential response and the part-confidential response were also both from entities providing notified services.

Trade associations

Commercial Broadcasters Association (“COBA”), Pact.

Other

Public Service Media Limited (“PSML”).

Question 1

Do you have any comments on the Estimated 2012-13 Costs?

- 3.6 Three respondents (Channel 5, Pact, BT) gave positive comments on the running costs, welcoming the under-spend.
- 3.7 Confidential Respondent A considered the professional fees to be too high, and suggested alternatives to external legal advice. The same correspondent also suggested a longer term fees review involving a longer range costs forecast.

- 3.8 Confidential Respondent B, while accepting the significant set-up costs of a new regulatory body, “*would hope to see greater savings being made after three years, and that these savings could be passed on to the providers*”, particularly as mainstream ODPS appear to “*subsidise*” ATVOD’s regulatory work with respect to adult material in particular.
- 3.9 PSML found it difficult to comment without a full breakdown of figures.

Question 2

Do you have any comments on the Estimated 2012-13 Income?

- 3.10 Only Confidential Respondent B offered substantive comments on the estimated income. This respondent believed the estimated income to be “*inflated unreasonably*” by the banding of its own notified service.
- 3.11 PSML found it difficult to comment without a full breakdown of figures.

Question 3

Do you have any comments on the Estimated 2012-13 Surplus?

- 3.12 Five respondents (BT, Channel 4, Channel 5, COBA, Confidential Respondent A) expressed general support for ATVOD’s proposal to divert the surplus to a dedicated reserve, Channel 5 for example commenting that “*it is prudent for this modest projected surplus to be added to ATVOD’s reserves.*” Two of these respondents requested further clarification on the size of the surplus – COBA suggesting further consultation on the level at which the reserve would be capped, and Confidential Respondent A requesting further information on norms for a regulatory body’s surplus, in terms of percentage of turnover.
- 3.13 Two respondents disagreed with the proposal. Confidential Respondent B suggested that “*the majority of surplus funds should be ploughed back into the running costs and used to further reduce annual fees.*” PSML felt that “*it would be unlawful for ATVOD to seek to retain any surplus from previous financial years as a provision for costs it does not have a reasonable expectation are likely to be incurred*” and that any surplus should be “*applied to reduce costs on industry at a time of significant economic challenges*”.

Question 4

Do you have any comments on the Estimated 2013-14 Costs?

- 3.14 Five respondents made substantive comments on the estimated costs.

- 3.15 Both ITV and STV felt that they could comment more usefully on the estimated costs of research if more detail were given on the types of research projects to be undertaken.
- 3.16 Both Confidential Respondent B and BT considered the proposed pay rises for staff relatively high, BT commenting that this *“is not a trend we would like ATVOD to continue in 2014/15.”* PSML suggested that ATVOD’s running costs could be substantially reduced by reductions in salaries.
- 3.17 Of those supporting the estimated costs, Pact welcomed the proposal for a reduction in fees, and while suggesting that *“ATVOD’s decision to increase pro-active investigations as part of its regulatory enforcement programme seems an appropriate regulatory activity”* also commented that any additional overhead costs *“must be balanced against the impact which the proposal will have on the rate of fees for VOD service producers”*.

Question 5

Do you have any comments on the possible additional costs in relation to:

a) an online notification and data submission facility for use by service providers?

b) a provision to remunerate a future Non-Independent Director if it is considered necessary in order to attract candidates from smaller service providers to the ATVOD Board?

- 3.18 Ten respondents (ITV, Channel 5, BT, Portland, Channel 4, UTV, Pact, both confidential respondents, PSML) expressed support for proposal (a), Channel 5 for example stating that *“[a]s a new system will have benefits for many years to come, this one-off cost seems modest.”* Some of this support was conditional: UTV pointed out that the costs incurred per provider in relation to this facility are relatively large, and required this to be clearly set out by ATVOD; confidential respondent B and PMSL stated that the facility should be funded from the previous year’s surplus; and Pact called on ATVOD *“to provide evidence of the economic case for this system, including analysis of how this will benefit the companies which ATVOD regulates.”* Of the remaining two respondents who commented on this point, STV stated that they would support the facility only if the project was *“managed in line with the indicative costs in the consultation document”* and there was *“an assurance that the end result would be a commensurate reduction in ATVOD administrative costs in subsequent years”*.
- 3.19 Only one respondent, COBA, expressing a lack of support, stating that *“one of ATVOD’s core aims should be to keep costs to a minimum.”*
- 3.20 Three respondents (Channel 5, BT, Portland) expressed support for the idea of paying a non-Independent Board member. BT could *“see the benefits from having different viewpoints within the ATVOD board”*, although Portland cautioned that *“if a*

Non-Independent Director is seen to be in the pay of ATVOD, it may create tension within that industry sector resulting from perceptions of whether or not that individual is able to represent his or her peers' views objectively."

- 3.21 The majority of respondents (eight in total – both confidential respondents, ITV, STV, UTV, Pact, COBA, PSML) did not support this proposal. ITV, UTV and STV did not believe that the potential benefit justified increasing the costs to service providers. PSML suggested that *"the main disincentive to small-scale providers seeking appointment to the ATVOD board is not remuneration but time"*. More generally, Confidential Respondent B felt that remuneration *"should be applied on an equal basis and should be limited to covering expenses"* and COBA commented that *"board selection should be open and transparent, which we believe it is, but we do not see why non independent board members of any size should be remunerated"*. These respondents tended to favour further debate on reasons and remedies for any failure to attract smaller service providers to Board positions.

Question 6

Do you have any comments on the aggregate amount of fees required in 2013-14 ?

- 3.22 Comments on the fees required tended to focus on issues regarding the proposed surplus and additional costs, as above. For example, Confidential Respondent A suggested that it may be cost beneficial to reinvest the 3% fee reduction into expenditure such as system development. Two respondents (Pact, BT) commented positively on the 3% reduction in fees proposed.

Question 7

Do you have any comments on our estimate of the number and characteristics of services likely to be notified in 2013-14 ?

- 3.23 Only two respondents commented on the estimate, with Pact stating that it *"appreciates that it is extremely difficult to predict the number of services that will be notified in the coming year"* and BT stating that the reasonable estimates *"depend on ATVOD pursuing providers who are trying to avoid paying their fees"*.

Question 8

Which option do you prefer:

Option 1a - Status quo, with no online notification facility

Option 1b - Status quo, with online notification facility

Option 2a - New notification requirements adopted, no online notification facility

Option 2b - New notification requirements adopted, with online notification facility

- 3.24 Of the four options: 1a was supported by Pact only; 1b was supported by three respondents (BT, UTV, Confidential Respondent B); 2a was supported by two respondents (CoBA, STV); and 2b was supported by seven respondents (C4, C5, Confidential Respondent A, Portland, Studio66, ITV, PSML).
- 3.25 Therefore nine submissions favoured adopting the new notification requirements, and ten favoured the online notification facility, with an additional respondent stating that they would support the online notification facility if guaranteed that future cost savings would result.

Question 9:

Do you have any comments on the four options set out above ?

- 3.26 In addition to the comments made on the proposed online notification system (see Question 5, above), respondents supported their individual preferences as follows.
- 3.27 As the only respondent to favour option 1a, Pact emphasised its cost effectiveness, suggesting that it would support the introduction of a new notification requirements or an online notification system only if ATVOD could justify these changes with an impact assessment / economic analysis to illustrate how the benefits of the change would outweigh the costs. Pact suggested that the proposed new notification requirements involved *“a large jump in the rate between a single outlet service and a multiple outlet service. If the majority of service providers are likely to have only one additional service, we recommend that ATVOD considers including an additional category for fees – one for the first service, one for one additional service, then the multiple services fee.”*
- 3.28 Of those supporting option 1b, UTV’s comments were similar to those of Pact above, stating that *“the definition of ‘multiple services’ being ‘substantially the same’ before registering ‘Additional services’, reflects a slightly less strict requirement than Option 2 where in the examples shown in paragraph 5.9, they appear very definitive when referencing a single website, app or set top box platform before increasing to the ‘Multiple outlet service’ fee.”* Confidential Respondent B’s support for 1b was conditional on the online notification system costs being *“absorbed by ATVOD and the fee levied reduced to remove this charge and to include last year’s surplus.”* BT suggested a further amendment, that *“concessionary rates should be increased to reduce the burden on the higher fee payers, such as BT, in the Super A group.”*
- 3.29 STV, a supporter of option 2a, nevertheless echoed the comments of Pact / UTV above, in questioning the *“far narrower definition of a ‘Single Outlet Service’”* compared to the ‘First Service’ notification allowed for within the status quo. However, STV stated that *“[t]he Multi-Outlet Service notification is an appropriate*

solution for Service Providers who seek to deliver services in line with the fast-changing technology of Video on Demand and growing consumer expectation.”

COBA felt that the level of fees and administrative burden on industry should reflect the fact that VOD services remain a *“nascent source of income for most COBA members”*. While neither of these respondents supported an online notification system, STV stated that it would support the proposal (ie. Option 2b), if *“there were an assurance that the implementation of 2b would lower ATVOD’s overall administrative costs in subsequent years”*.

- 3.30 As outlined above, the majority of respondents favoured option 2b – the introduction of new notification requirements and an online notification system. As with those favouring 2a, these respondents pointed to the nature of the current VOD industry. Channel 5 referred to service providers rolling out *“a range of different variations of broadly the same service to meet the needs of different platforms, gatekeepers and territories”* and therefore suggested that greater administrative simplicity would *“reduce the likelihood that service providers are inhibited from launching a new service or a variation of an existing service because of the risk of it having to be designated as a separate on-demand programme service”*.
- 3.31 Portland similarly suggested that they would *“see the benefits both in financial terms and ease of notification as we expand our on demand services across a broader range of platforms.”* Channel 4 felt the new notification requirements would provide *“certainty for broadcasters to invest in different versions of a VOD service on various outlets for the benefit of viewers without facing continual new regulatory costs for such developments”*. Channel 4 did, however, note that *“the majority of providers that are likely to benefit from these new requirements will be Super A Rate and A Rate payers, and therefore the ‘multiple outlet’ rate should be set at a level that recovers from such providers the revenue lost through the abolition of ‘additional service’ fees and the associated costs with the change.”*
- 3.32 Although favouring 2b of the options presented, PSML expressed dissatisfaction with the consultation’s scope, and proposed a substantially modified fee structure. PSML proposed a flat-rate fee to cover all services delivered by an ODPS provider, with multiple discounts and exemptions. For companies not owned by a larger company, those with a turnover below £6.5m would pay a maximum yearly fee of £250, and those with a turnover below £1m would be exempted from fees. There would also be an exemption for ODPS providers meeting certain ‘community benefit criteria’ (including charities, not-for-profit companies operating in the public interest, the Welsh Authority, and holders of Ofcom’s Local Digital Programme Service licences). PSML also proposed a ‘new entrant’ 50% discount fee for all ODPS providers launching a service in the second half of the financial year.

Question 10

Do you think that ATVOD should further investigate the proposal to relax the group qualification criteria?

- 3.33 Ten respondents commented on this proposal, of which eight gave broad support for further investigation, whether by ATVOD or by those service providers with a particular interest in the proposal. COBA in particular argued for a relaxation of the criteria, suggesting that the current requirements are “*unnecessarily restrictive and unrepresentative of the realities of corporate ownership*” whereby a corporate entity which does not bear all the costs for a joint venture should not have to “*pay those costs on top of the group cap*”, particularly as in any case it does not necessarily benefit from all profits from the venture. COBA suggested that further analysis should look at options such as “*a) allowing services where the notification holder owns 50% or more of the venture to qualify under the cap and b) allowing only joint ventures where the corporate entity in question has a majority stake to qualify.*”
- 3.34 Five respondents (UTV, ITV, STV, Channel 5, Pact) supported the idea that those stakeholders with an interest should put together a proposal for ATVOD and the industry to consider. These respondents did not consider that ATVOD should prioritise this issue in its own work programme. Some of these respondents gave additional caveats in relation to their support. UTV, for example, stated that any changes to the tariff rates “*should avoid any increase to providers who do not benefit from the group cap*”, with Pact requiring that “*the cost of developing this proposal must be proportionate to the benefits*”, while Channel 5 pointed to the potential complexities of such a proposal, and the “*risk of corporate structures being created deliberately to circumvent the ATVOD fees regime*”.
- 3.35 Two respondents stated that they did not support further investigation of the proposal (Portland, Confidential Respondent B), with Portland stating that “*it is likely to benefit only a select number of Super A and A Rate providers who already stand to gain if the new multiple services notification requirements are adopted*”.

Question 11

Should ATVOD:

a) Further investigate the possibility of using audience as a basis for future fees through the issue of a demand for information regarding the means by which each service provider delivers video content to the consumer?

or

b) Maintain a watching brief and consider developing a proposal once an industry-recognised cross-platform means of accurately measuring ODPS audiences has emerged?

- 3.36 Of twelve respondents who commented on this point (only Studio66 did not), eleven gave support for maintaining a watching brief with regard to audience measurement. UTV, ITV and STV, for example, suggested that there is a current industry consensus that measuring audiences on VOD requires further development of

systems and resources, and that therefore a demand for information would only serve to present service providers with an unduly onerous task. Channel 5 stated that although it *“has been an advocate of an audience-based measure for assessing ATVOD fees”*, it has *“come to the view that there are serious practical difficulties in arriving at a way of measuring audiences to all ODPSs that would command wide support across the industry”*. Portland similarly *“favour an audience-based metric”* but did not feel that an adequate measure has yet been identified. Confidential Respondent B did not think an audience based measure would be reliable or provide clarity to the sector. Both Pact and Channel 4 also pointed to the absence of industry-wide practical measures for assessing VOD audience, with Channel 4 pointing to *“technical difficulties in providing relevant cross-industry audience data for video-on-demand viewing”*, particularly in relation to third party platforms via which a service is delivered. Channel 4 did, however, *“anticipate that more converged audience measures will emerge”*.

- 3.37 PSML went further in suggesting that no further work is carried out on this proposal, seeing *“no reason why an administratively-expensive audience based metric would be justifiable or proportionate or take account of the ability to pay of the provider”*

Question 12

Do you believe our proposals have any impacts in relation to matters of equality?

- 3.38 There were just two substantive points made in response to this question. COBA suggested that by *“encouraging a broader range of business models, the proposal to relax the group cap qualification could lead to a wider range of services and in so doing promote diversity.”* PSML, on the other hand, referred to the *“impact of onerous fee levels on smaller service providers, including those seeking to provide a voice to under-represented groups”*.

Section 4

ATVOD's response and decision

- 4.1 In this section we give ATVOD's response to the issues raised and comments made in the 13 responses to the consultation, and assess the impact on stakeholders of the of the various options and proposals. In doing so we note that the majority of service providers did not express a view (whether directly or through a trade association) on the proposals and options set out in the Consultation. ATVOD has given all 13 responses careful consideration in reaching its decision.
- 4.2 In assessing the submissions, ATVOD has noted that two respondents requested confidentiality, whether in whole or in part. We have respected those requests in this Statement. However, we intend to discuss with stakeholders through the Industry Forum whether confidentiality is appropriate with regard to future consultations if not justified by exceptional circumstances, such as the inclusion of commercially sensitive information.

Question 1

Do you have any comments on the Estimated 2012-13 Costs?

- 4.3 ATVOD notes that most respondents did not comment directly on the estimate of the costs of carrying out the designated functions in 2012-13 and that, of those that did, the majority made positive comments, welcoming the anticipated under-spend.
- 4.4 In response to the query about whether savings on professional fees might accrue if an in-house lawyer was employed, ATVOD is clear that the required level of expertise could not be obtained at lower cost by such an arrangement, not least because our experience has demonstrated that legal advice is likely to be required in a variety of specialist areas and on an ad hoc basis. With regard to the same respondent's suggestion that costs should be forecast and fees set over a longer time range than one year, ATVOD notes that such an arrangement would be a marked departure from current practice and would need careful consideration. It is therefore not an approach that can be introduced as part of the 2013-14 fees settlement. However, ATVOD will give the proposal some thought over the coming months.
- 4.5 With regard to the suggestion that greater savings could be hoped for after 3 years, ATVOD would note that the number of regulated services and the amount of regulatory activity has increased significantly over that period, that fees were cut by 3.58% across the board in 2012-13, and that over 85% of service providers will pay less in 2013-14 than in the previous year. With regard to the comment from one respondent that there was an insufficient level of detail in the figures provided, ATVOD notes that the level of detail was broadly in line with that provided in previous

years, that no other respondent raised the issue. ATVOD confirms its view that the level of detail provided in the Consultation was reasonable and proportionate.

- 4.6 In the Consultation, ATVOD set out an estimate of its 2012-13 Costs based on the information available at that time. Below ATVOD sets out a revised estimate based on the best information currently available. As a result of ATVOD's continued emphasis on cost control, we are revising down our Estimated 2012-13 Costs to **£455,645**¹⁹. The revised Estimated 2012-13 Costs are therefore £52,095 lower than the £507,740 estimated in the Statement on 2012-13 Fees published on 29 March 2012 and are made up as follows:

Ofcom's recouped costs ²⁰	£21,829
Remuneration for staff & Board Members	£314,720
Rent and office running costs	£18,919
Travel and other expenses (Executive and Board)	£4,472
Professional fees	£63,705
Insurance and bank charges	£5,635
Independent complaints adjudicator	£0
Recruitment	£15,533
IT and Website support	£7,152
Contingency – fee shortfall /bad debt	- £4,359
Industry Forum meeting costs	£608
ParentPort	£2,501
Research	£4850
Database development and running costs ²¹	£0
Corporation tax ²²	£79
Total	£455,645

- 4.7 The main reasons for the estimate being lower than that set out in the 2012-13 Fees Statement are that:

¹⁹ This estimate is being made prior on the basis of accounts which are yet to be audited.

²⁰ In contrast to Year 2010-11 and Year 2011-12, these costs do not include the costs of performing invoicing functions on behalf of ATVOD, as such functions were outsourced to a different provider for 2012-13.

²¹ The planned expenditure of £13,000 has been postponed until 2013-14

²² A Corporation tax liability arose in relation to interest earned on Treasury Deposits during the previous financial year. The interest is set out in the section dealing with 2012-13 income.

- the sum of £22,000 originally budgeted in relation to bad debts and a possible shortfall in fees is likely to be significantly under spent, not least as a result of ATVOD's effective fee recovery activity;
- staff costs were lower than estimated, primarily due to two posts being unfilled for short periods;
- professional fees were lower than estimated, especially in relation to legal advice; and
- development of the database was postponed until 2013-14 in order to allow its final design and implementation to take account of any new notification requirements or online notification facilities introduced following the 2012-13 Fees Consultation . The decision to postpone development of the database was taken to ensure that funds were not wasted on introducing a new facility which might need significant revision within a few months.

4.8 In accordance with section 368NA(6) of the Act, we expect to publish the statement of actual costs incurred in respect of the Year 2012-13, when we publish our 2013 Annual Report.

Question 2

Do you have any comments on the Estimated 2012-13 Income?

- 4.9 ATVOD notes that the only substantive comment received with the regard to the estimate was effectively a complaint about the impact of the tariff banding criteria on the respondents own fees, rather than a comment on the appropriateness or accuracy of the estimate itself.
- 4.10 With regard to the comment from one respondent that there was an insufficient level of detail in the figures provided, ATVOD notes that the level of detail was broadly in line with that provided in previous years, that no other respondent raised the issue. ATVOD confirms its view that the level of detail provided in the Consultation was reasonable and proportionate.
- 4.11 The estimate of £512,067 was based on the knowledge available at the time the Consultation document was drafted. Since that time, further notifications have been received and the aggregate amount of fees invoiced in relation to services which have notified since the Consultation began is higher than was projected. In addition ATVOD has received income from the sale of office equipment which was no longer required and from an insurance claim relating to an item of stolen equipment. ATVOD is therefore revising upwards its Estimated 2012-13 Income to **£534,800**. This is made up as follows:

Estimated Fee Income	£533,659
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Late payment interest	£	37
Bank interest	£	599
Sale of office equipment	£	240
Insurance claim refund	£	265
Total		£534,800

- 4.12 In accordance with section 368NA(6)(a) and section 368NA(6)(b) of the Act, ATVOD will publish a statement setting out (a) the aggregate amount of fees received during 2011-12, and (b) the aggregate amount outstanding and likely to be paid or recovered in the Annual Report it expects to publish before the end of July 2013.

Question 3:

Do you have any comments on the Estimated 2012-13 Surplus?

- 4.13 ATVOD notes that there were no comments relating to the accuracy of the estimated surplus. ATVOD further notes that, of the seven respondents commenting on ATVOD's intention to allocate the estimated surplus of £24,878 to a dedicated reserve, five expressed general support. ATVOD notes that one supporter of a dedicated reserve suggested further consultation on the level at which the reserve should be capped. In response, ATVOD restates its view that a reserve of £89,635 would be sufficient for the time being and confirms that we would not look to add to it significantly until and unless circumstances change. In response to another supporter of a dedicated reserve, who requested further information on norms for a regulatory body's reserve, we confirm that we have considered the reserves carried by a number of other regulatory bodies, including Ofcom and Phone Pay Plus, and that a reserve of £89,635 would be modest by comparison as a percentage of turnover.
- 4.14 ATVOD notes, but does not agree with, the assertion by one respondent that funding a dedicated reserve from accumulated surpluses would be unlawful. ATVOD further notes the comment by another respondent that the majority of the surplus funds should be used to fund future running costs and further reduce annual fees. In light of the increase in the expected size of the surplus, this is exactly what we propose to do.
- 4.15 In accordance with the revised Estimated 2012-13 Costs and the revised Estimated 2012-13 Income, ATVOD is revising upwards its Estimated 2012-13 Surplus from £24,878 to **£79,155**.
- 4.16 With regard to the Estimated 2012-13 Surplus ATVOD has decided that:
- £24,878 should be allocated to a dedicated reserve held against the risk of unplanned costs in relation to (a) winding up the organisation (for example in response to changes in the legislative framework), or (b) a substantive legal challenge, such as a Judicial Review. Taking into

account the accumulated surplus of £64,757 from previous years, the reserve will equal £89,635, as set out in the Consultation.

- £54,277 should be carried forward to 2013-14 and used to (a) fund the database development postponed from 2012-13, (b) fund the introduction of an online notification and data submission facility for service providers, and (c) further reduce fees below the levels set out in the consultation

4.17 In calculating the size of the reserve we have had regard to the actual costs likely to be involved in the two risk scenarios identified. Such costs are not directly related to ATVOD's turnover or budget, and we would therefore not seek to maintain a reserve at a set % of budget or turnover.

Question 4 & Question 5

Do you have any comments on the Estimated 2013-14 Costs?

Do you have any comments on the possible additional costs in relation to:

a) an online notification and data submission facility for use by service providers?

b) a provision to remunerate a future Non-Independent Director if it is considered necessary in order to attract candidates from smaller service providers to the ATVOD Board?

4.18 Given that Question 4 and Question 5 both related to the costs of performing the designated functions in 2013-14, we respond to submissions on these issues together.

4.19 ATVOD's Estimated 2013-14 Costs cover all the work set out in ATVOD's 2013-14 Corporate Plan and are based on ATVOD's experience of performing the relevant functions to date with suitable adjustments to reflect the balance and scale of work anticipated for 2013-14.

4.20 ATVOD's estimate of the cost of performing the designated functions in 2013-14 has, in particular, taken account of the fact that the number of services regulated by ATVOD has grown by more than 10% over the past year and the amount of regulatory activity has grown at an even faster rate. For example, in 2011-12 one service was found to be in breach of Rule 11 (protection of children) whereas in 2012-13 this rose to 16 services. The pattern of complaints and the progress of investigations over recent months confirms our view that regulatory activity is likely to be even greater during 2013-14.

4.21 ATVOD would not wish to argue that there always is, or should be, a direct correlation between increasing number of complaints and increasing regulatory costs, but we submit that the rise in 'within remit' complaints, which almost

exclusively relate to adult websites which appear to be in breach of both the obligation to notify and the obligation to protect children from material which might cause serious harm, does require additional activity by the regulator. We have therefore taken care to ensure that our budget for 2013-14 is sufficient to allow us to discharge the designated functions effectively as our workload rises. In doing so we have taken into account the fact that the Ofcom Designation Review Statement²³ made clear that “ATVOD will need to ensure that it is resourced adequately to deal with the likely increase in complaints stemming from the growing popularity of ODPS.” [para 5.33].

- 4.22 As set out in the Consultation, we have attempted to ensure that we have the necessary capability to deal with increase in regulatory activity not just through a modest increase in staff resources, but by streamlining our processes and updating our internal IT capabilities to improve the efficiency of existing resources. We have also sought and found savings in other areas. This has enabled us to set a budget which provides for a significant (and necessary) increase in regulatory activity with a like-for-like increase in costs of 3%. Given the current rate of inflation, this is effectively a static cost base in real terms.
- 4.23 In addition to these like-for-like costs, ATVOD’s budget for 2013-14 will include two additional one-off items of expenditure which relate to changes specifically proposed by the regulated industry (ATVOD’s partners in the co-regulatory arrangement), namely the changes to the ATVOD website necessitated by the new notification requirements and the development of an online notification and data submission facility. These two items are budgeted to cost £30,000 in 2013-14, but would not be ongoing costs. ATVOD notes that the Consultation was clear in seeking stakeholder views on these two items of potential expenditure and their inclusion in the budget for 2013-14, which rises to £553,050 as a result, is endorsed by the responses to that Consultation. Indeed, even the most critical submission (from PSML) supported both the new notification requirements and the development of an online notification and data submission facility in full knowledge of their impact on the estimated costs for 2013-14. These two items are discussed in greater detail below.
- 4.24 ATVOD further considers that given the impact of one-off items of expenditure and in-year savings on a budget as small as that of ATVOD, a more reliable guide to costs trends would be to consider ATVOD’s costs over a two year period. This would avoid giving a false impression of the underlying trend when the headline figure is distorted by the inclusion of discreet one-off projects developed at the suggestion and with the support of industry stakeholders to improve the service given by ATVOD in future years, or by a decision to defer a project from the end of one financial year to the beginning of the next in order to ensure that it can accommodate changes expected to be made in the near future.
- 4.25 Looking at its cost base over a two year period, ATVOD considers that its total expenditure over the period 2012 – 2014, based on unaudited accounts for 2012-13 and on projected expenditure for 2013-14 (as set out in this Statement), will be

²³ See <http://stakeholders.ofcom.org.uk/binaries/consultations/on-demand/statement/statement.pdf>

£1,008,695. This equates to an average of £504,348 per year, which is less than the £507,740 estimate of costs for 2012-13 on which Ofcom's approval of the 2012-13 fees was based.

- 4.26 In coming to this view, ATVOD notes that 10 out of 13 respondents expressed support for the introduction of an extranet facility for service providers which would allow online notification and data submission and which was estimated to cost £20,000 to develop. We further note that an eleventh respondent would also support the proposal if the costs were managed in line with the estimate and a commensurate reduction in ATVOD's administrative costs was assured for future years. In response, ATVOD would make clear that it makes every effort to ensure that any project is delivered within budget, as its financial outcomes in previous years demonstrate. It is also clear that the development costs would be 'one-off' costs which would not need to be replicated in future years (at least in the medium term). However, ATVOD is not in a position to offer assurances that this would result in a commensurate reduction in its total costs for future years, as such costs will depend on a wide range of factors.
- 4.27 With regard to the submission that the estimated costs of the extranet facility were relatively large and that the costs per provider should be clearly set out, ATVOD notes that development of the facility would increase ATVOD's 2013-14 costs by approximately 3.75% during the course of that year and that this increase would be broadly reflected in the level of fees charged within each band. With regard to the submissions that ATVOD should keep costs to a minimum and that it should provide evidence of the economic case for this system, we would point out that the proposal originated in submissions certain service providers made to the Ofcom Designation Review and that it is intended to reduce the administrative burden on service providers.
- 4.28 ATVOD considers that the question of whether the benefits of the facility outweigh the costs was primarily a matter to be resolved by stakeholders through the process of consultation. We take this view because the benefits will accrue to service providers in the form of reduced administrative costs which are best assessed by those service providers themselves on a case by case basis, and which are likely to vary significantly. ATVOD does not consider that it would be good value for money to attempt to independently quantify those benefits. We therefore consider that the benefits are likely to justify the costs because that is the clear message delivered through the Consultation by those who will enjoy the benefits and pay the costs. In addition, based on discussions with industry stakeholders, ATVOD considers that the online notification and data submission facility will result in a significant reduction in the administrative burden (and therefore costs) involved in service providers discharging their responsibilities to notify ATVOD, to inform ATVOD of changes to services and to submit to ATVOD data relating to, for example, European works and Access Services. Given that these benefits are likely to accrue to service providers over a period of several years, ATVOD considers that they are likely to outweigh over the lifetime of the facility the one-off costs included in the ATVOD budget for 2013-14. As noted above, this assessment is supported by the overwhelming majority of responses to the Consultation.

- 4.29 In response to the two respondents who considered that the development of the facility should be funded from the 2012-13 surplus, the larger than expected surplus allows us to do just that.
- 4.30 In relation to the additional expenditure relating to the introduction of new notification requirements, ATVOD considers that the question of whether the benefits of the new notification requirements outweigh the costs (including any costs arising from the consequential changes to the fee structure) was also primarily a matter to be resolved by stakeholders through the process of consultation. We take this view because the benefits will accrue to service providers in the form of reduced administrative costs which are best assessed by those service providers themselves on a case by case basis, and which are likely to vary significantly. ATVOD does not consider that it would be good value for money to attempt to independently quantify those benefits. This approach was made clear in the Statement on Notification Requirements published on 28 January 2013. We therefore consider that the benefits are likely to justify the costs because that is the clear message delivered through the Consultation by those who will enjoy the benefits and pay the costs.
- 4.31 ATVOD notes that although three respondents supported the proposal to include in the costs for 2013-14 provision to remunerate a future Non-Independent Director if it is considered necessary in order to attract candidates from smaller service providers to the ATVOD Board, a clear majority did not. ATVOD's decision on this issue, set out below, takes account of the balance and weight of opinion expressed in the consultation. However ATVOD remains of the view that steps may need to be taken in order to ensure that an appropriate range of candidates is attracted when Board vacancies arise and we will seek to explore the issue further through the Industry Forum.
- 4.32 In relation to the Estimated 2013-14 Costs more generally, ATVOD notes that only five respondents made substantive comments. In response to the two respondents who would have liked to have seen more detail with regard to the provision for a modest research budget, ATVOD restates the view it has expressed previously: that it is appropriate to agree the scale of provision in advance and to decide the detail of how it should be allocated in light of the needs and opportunities (eg with regard to partnership) that may arise during the course of the year. ATVOD notes that it discussed specific plans in relation to the allocation of the 2012-13 research budget with the Industry Forum during the course of that year and would expect to do so again during 2013-14.
- 4.33 At this stage, ATVOD considers that research falling into three distinct categories may be beneficial to the effective regulation of video on demand services. Category one would involve research into potential anti-avoidance strategies, given the attempts by some adult service providers to avoid the need to protect children from hardcore pornography by entering into arrangements with non-UK entities. Category two would involve research into future trends in the video-on-demand sector, the better to enable ATVOD to ensure that it is prepared to deal with future regulatory issues and challenges. Category three would involve research into consumer awareness of, and satisfaction with, the regulation of video-on-demand services.

Clearly, ATVOD's modest provision of £5,000 for research in 2013-14 is not big enough to fund significant work across all those areas so, in the spirit of co-regulation, we intend to prioritise in consultation with the industry. Given Ofcom's expertise in the area of research, we would also hope to be able to benefit from advice and guidance from the back-stop regulator in the refinement of our research plans.

- 4.34 With regard to the two responses which considered the proposed pay rises to be relatively high, ATVOD confirms once again that the proposed rises are pitched at a level designed to keep ATVOD remuneration in line with the rise in average earnings over the period since designation in March 2010. We therefore do not accept that the increases can be considered relatively high. In response to the suggestion from one respondent that costs could be substantially reduced by reductions in salaries, ATVOD does not consider that such a move would be appropriate, not least because of the impact it would be likely to have on staff retention.
- 4.35 ATVOD notes that one respondent commented positively on ATVOD's intention to increase the resources devoted to investigating potential breaches of the ATVOD Rules. ATVOD confirms its assessment that the estimate of costs set out below provides sufficient resources in order adequately to deal with the scale of potential breaches it anticipates for 2013-14 based on past experience and current trends. This assessment takes account, among other factors, of the decision to increase a staff member's hours by 25% and to free up resources and improve casework efficiency through the introduction of a new database. However, the trend in 'in scope' complaints and potential breaches appears to be on an upwards trajectory and ATVOD will need to reassess its needs for the following year (2014-15).
- 4.36 Overall, having taken account of the strength and weight of arguments expressed in the responses, ATVOD has concluded that its Estimated 2013-14 Costs should include provision, among other things, for the development of an extranet facility enabling the online submission of notifications and related data, for the revisions to the website made necessary by the adoption of the new notification requirements, and for the development of the new database postponed from 2012-13. No provision will be made to remunerate a future Non-Independent Director; instead ATVOD will discuss with the Industry Forum how best to attract candidates from smaller providers for any future Board vacancy. Our revised Estimate of 2013-14 Costs is therefore now **£553,050**. This is made up as follows:

Ofcom's recouped costs	£ 22,000
Remuneration for staff & Board Members	£344,450
Rent and office running costs	£ 21,000
Travel and other expenses (Executive and Board)	£ 4,500
Professional fees	£ 79,000

Insurance and bank charges	£ 7,000
Independent complaints adjudicator	£ 500
Recruitment	£ 1,600
IT and Website support	£ 10,000
Contingency – fee shortfall /bad debt	£ 12,000
Industry Forum meeting costs	£ 1,000
ParentPort	£ 2,000
Research	£ 5,000
Sub-total	£510,050
Revisions to website required by new notification requirements	£ 10,000
Development of extranet facility for online notifications	£ 20,000
Development of new database postponed from 2012-13	£ 13,000
Total	£553,050

Question 6

Do you have any comments on the aggregate amount of fees required in 2013-14 ?

- 4.37 ATVOD notes that comments on the aggregate amount of fees required in 2013-14 either welcomed proposed reductions in fees or tended to focus on issues relating to the use of the surplus, as discussed above in the section on Estimated 2013-14 Costs. ATVOD confirms that the aggregate amount of fees required in 2013-14 will be equal to the Estimated 2013 Costs (£553,050) minus the portion of the 2012-13 surplus which has not been allocated to a dedicated reserve (£54,277). The aggregate amount of fees required in 2013-14 will therefore be **£498,773**.

Question 7

Do you have any comments on our estimate of the number and characteristics of services likely to be notified in 2013-14 ?

- 4.38 ATVOD notes that there were comments from just two respondents on this question and that neither took issue with the estimate set out in the consultation. ATVOD agrees with Pact that making accurate forecasts will remain difficult over the next year and, in response to BT's comment on pursuing providers who are trying to avoid paying fees, reaffirms its commitment to ensuring that providers of ODPS pay the required fee. ATVOD has taken firm action to recover fees where necessary and will continue to do so.
- 4.39 Based on the information currently available, and taking into account the adoption of the new notification requirements and the trend in new notifications, ATVOD has adopted the working assumption that during 2013-14 there will be 56 'single outlet' services and 51 'multiple outlet' services and that these will be provided by service providers who fall into the various tariff bands in broadly the same proportion as in 2012-13. This estimate is unchanged from the assumptions that underlie the figures set out in the Consultation.

Question 8

Which option do you prefer:

Option 1a - Status quo, with no online notification facility

Option 1b - Status quo, with online notification facility

Option 2a - New notification requirements adopted, no online notification facility

Option 2b - New notification requirements adopted, with online notification facility

Question 9

Do you have any comments on the four options set out above ?

- 4.40 Given that Question 8 and Question 9 both related to the tariff options set out in the Consultation, we respond to submissions on these issues together. Comments relating to the proposal to introduce an extranet facility allowing online notifications and data submission have been dealt with in detail in the response to Questions 4 and 5 above.
- 4.41 ATVOD notes that nine submissions favoured adopting the new notification requirements, and ten favoured the online notification facility, with an additional respondent stating that they would support the online notification facility if guaranteed that future cost savings would result. ATVOD further notes that, of the four specific

options: 1a was supported by one respondent; 1b was supported by three respondents; 2a was supported by two respondents; and 2b was supported by seven respondents.

- 4.42 In response to Pact's submission that, if the new notification requirements are adopted, ATVOD should consider introducing an additional rate within each band (set between the 'single service' and 'multiple service' rates) for those with two outlets, ATVOD confirms that such a structure was considered prior to the Consultation and was rejected in favour of a proposal which was both simpler and which would ensure that no provider with a turnover of £6.5m paid more under the new arrangements. We acknowledge that there are downsides to simplicity but note that responses to the earlier consultation on notification requirements for ODPS²⁴ revealed strong stakeholder support for avoiding unnecessary complexity in the fee structure and we consider that the advantages of the proposals set out in the Consultation outweigh the advantages of the alternative suggested by Pact. In doing so we note that under the Pact variant a balancing increase in the 'multiple service' rate would need to be introduced.
- 4.43 With regard to STV and UTV's comments on the new notification requirements, ATVOD notes that the relatively detailed definition of what will be considered a separate outlet is designed to ensure that all services are assessed for the purposes of fees on an equal basis. The proposed requirements take account of responses to the previous consultation on this point²⁵ and also reflect ATVOD's experience of regulating the sector to date, and its assessment of the information required in order to have a reasonable oversight of how the service is being provided to consumers.
- 4.44 ATVOD does not agree with BT that concessionary rates should be increased to reduce the burden on Super A fee payers. In particular, ATVOD considers that the negative impact of a significant increase in fees on concessionary rate payers would be far more significant than the positive impact of any corresponding reduction in fees for those with turnover in excess of £25.9m. In coming to this view, ATVOD notes that a 100% increase in concessionary fees would allow Super A fees to be reduced by less than 1%.
- 4.45 ATVOD considered carefully the PSML proposal that a substantially modified fee structure should be adopted and that this should be based around a flat-rate fee per provider, with discounts for providers with a turnover of less than £6.5m (for whom the maximum fee would not exceed £250) and a total exemption for those with a turnover below £1m and for those who met certain 'community benefit criteria' (including any holder of a Local Digital Programme Service Licence). In rejecting this proposal, ATVOD notes that previous fee consultations have demonstrated a lack of support for a flat-rate structure and that a broad consensus has developed around the established banding structure. ATVOD does not consider that a zero fee would represent the appropriate contribution of providers with a turnover of less than £1m to the costs of regulation. Neither does it consider that £250 represents the

²⁴ See <http://www.atvod.co.uk/news-consultations/news-consultationsconsultations/closed-consultations/notification-requirements>

²⁵ See footnote 24

appropriate contribution of providers with a turnover of between £1m and £6.5m to such costs. ATVOD confirms its view that the approach reflected in the concessionary rates first introduced for 2011-12, reduced in 2012-13 and reduced again for 2013-14, ensures that each provider's fee represents the appropriate contribution to the costs of regulation. ATVOD does not agree with PSML that holders of a Local Digital Programme Service Licence should be treated on the same basis as non-commercial providers. ATVOD considers that the holders of such licences should pay fees on the same basis as other commercial enterprises, unless they are charities, community interest companies or not for profit companies acting in the public interest. With regard to the PSML proposal that a discount of 50% should apply if a service is launched during the second half of the year, ATVOD notes that (a) many of the cost of regulation in a particular year do not correlate directly to the length of time during which a service was operating, and (b) in 2012-13 ATVOD was given discretion to vary the fee in exceptional circumstances, such as when a service closes very close to the start of the regulatory year, or launches very close to the end of the regulatory year. ATVOD confirms its view that this remains the most appropriate approach, and retains that discretion for 2013-14.

4.46 In coming to its view on the appropriate fee tariff for 2013-14, ATVOD has taken into account, among other things, the majority support for Option 2b among respondents and the even greater majority support for adopting the new notification requirements and developing an online notification and data submission facility. We have also taken into account the fact that ATVOD's estimate of its likely surplus has increased significantly since the 2013-14 Fees Consultation was published.

4.47 **Having duly considered and taken account of the responses to the 2013-14 Fees Consultation, and in light of all the information currently available and the relevant legislative provisions, ATVOD has therefore decided that the 2013-14 Fees should be based on Option 2b, with suitable modifications to reflect the better than anticipated financial outcome for 2012-13. These means that:**

- **The proposed new notification requirements will be adopted with the result that the 2013-14 tariff will maintain the existing progressive tariff bands, based on the turnover or non-commercial status of the provider of the ODPS, and will set out a 'single outlet' and 'multiple outlet' rate within each band;**
- **An online notification and data submission facility will be developed for the convenience of service providers;**
- **The estimate of the likely costs of performing the designated functions in 2013-14 has been revised to £553,050 to incorporate the costs associated with (a) amending the ATVOD website to reflect the new notification requirements (b) developing the online notification and data submission facility and (c) completing the database project postponed from 2012-13 so that its design can take account of the changes relating to notification requirements and the online notification facility;**

- Having taken into account the revised estimate of ATVOD's 2012-13 surplus, and the revised estimate of 2013-14 costs, the previous working assumption that the aggregate amount of fees required in 2013-14 would be £510,050 has been changed to £498,773;
- 'Single outlet' fees should be 5% lower in each tariff band than the corresponding 'first service' fee charged in 2012-13;
- 'Multiple outlet' outlet fees for those qualifying for concessionary rates or for the B Rate should be set at the corresponding 'first service' fee charged in 2012-13 to ensure that non-commercial providers and providers with turnover below £6.5m do not pay more under the new notification requirements.
- The average fee paid by a service provider is likely to fall by 5% in 2013-14. This follows a fall of more than 3.5% in 2012-13.

Concessionary rates

- Concessionary rates should continue to apply for services provided by non-commercial service providers and for services provided by small scale and micro scale service providers with no affiliation to a larger company.
- The concessionary rate fee structure should be based on the proposal set out in Option 2b of the Consultation Document, but with slight modifications to fees in light of the revised estimate of the aggregate amount of 2013-14 Fees required;
- As in the previous two years, the concessionary rates should be payable only when an eligible service has been operating for three months²⁶, and thereafter can be paid in four instalments.
- The concessionary rate tariff will therefore be as follows:

Non-Commercial Concessionary Rate: Service provider is

- iii) a registered charity; or
- iv) a community interest company; or
- iii) a not-for-profit company operating in the public interest; or
- iv) The Welsh Authority.

²⁶ This temporary waiver will apply only if the service provider has, prior to launching the service, received from ATVOD confirmation of its qualification for a concessionary rate, has submitted to ATVOD a completed notification form for the new service, and has requested a 3 month waiver

- £91 for a 'single outlet' service.
- £96 for a 'multiple outlet' service.

Commercial Micro-scale Concessionary Rate: Service provider

- i) has no affiliation to a larger company²⁷; and
- ii) satisfies one of the two conditions below:
 - (a) had a turnover of less than £50,000 in the last accounting year for which figures are available; or
 - (b) is in the first year of trading and expects to have a turnover of less than £50,000 in that first year.

- £137 for a 'single outlet' service.
- £145 for a 'multiple outlet' service.

Commercial Small-scale Concessionary Rate: Service provider:

- i) has no affiliation to a larger company²⁸; and
- ii) satisfies one of the two conditions below:
 - (a) had a turnover of less than £100,000 in the last accounting year for which figures are available; or
 - (b) is in the first year of trading and expects to have a turnover of less than £100,000 in that first year.

- £183 for a 'single outlet' service.
- £193 for a 'multiple outlet' service.

Standard rates

- the standard fee structure should be based on the proposal set out in Option 2b of the Consultation Document, but with slight modifications to fees in light of the revised estimate of the aggregate amount of 2013-14 Fees required;
- the standard rate tariff will therefore be as follows:

Super A Rate: Provider Revenue is greater than £25.9m

- £9,480 for a 'single outlet' service.
- £12,302 for a 'multiple outlet' service.

A Rate: Provider Revenue is greater than £6.5m but not more than £25.9m

- £4,740 for a 'single outlet' service.
- £6,151 for a 'multiple outlet' service.

²⁷ A service provider will be regarded as having an affiliation to a larger company if (a) a larger company has a 10% or greater stake in the service provider (in terms of ownership or voting rights), or (b) the Board of the service provider includes a representative of a larger company with an interest in the video on demand sector

²⁸ See above footnote

B Rate²⁹: Provider Revenue is £6.5m or less; or the service provider is in the first year of operation

- **£732 for a ‘single outlet’ service.**
 - **£771 for a ‘multiple outlet’ service.**
- **A cap of £25,000 applies to the aggregate amount of fees paid by a single service provider. Where two or more service providers are wholly owned by the same parent company, the service providers may each opt to be assessed on the basis of group turnover with the result that the cap on total fees payable will also apply at the group level.**
- 4.48 The 2013-14 Fee Tariff is set out in full in Section 5 and includes full details of the qualification criteria for each band and rate or for consideration as group.
- 4.49 ATVOD considers that the fees set out in the 2013-14 Fee Tariff meet the requirements to be appropriate, justified and proportionate for the reasons set out below.
- 4.50 The banding structure contained in the 2013-14 Fee Tariff formed the basis of the fee tariffs approved by Ofcom for 2011-12 and 2012-13 after public consultation. The qualification criteria for each band are also unchanged in the 2013-14 Fee Tariff. We therefore consider that, in the absence of any evidence to the contrary, and in the absence of significant stakeholder concern about the structure, ATVOD and Ofcom’s assessment that the banding structure was appropriate, justified and proportionate in the two previous years remains valid.
- 4.51 Within that banding structure, and in light of the proposed new notification requirements which would effectively abolish the concept of ‘first services’ and ‘additional services’, we have proposed replacing ‘first service’ and ‘additional service’ fees with ‘single outlet’ and ‘multiple outlet’ fees. The reason we developed the proposal to adopt new notification requirements was because it was made clear to us that the existing policy of requiring providers to demonstrate that different versions of a single service had a substantial majority of the same programmes was requiring a significant number of providers to collect and analyse data in ways which they would not otherwise do, and that the cost of this administrative exercise would often be many thousands of pounds. If a small number of service providers in fact find themselves to be significantly disadvantaged by the new arrangements, we would consider as part of next year’s consultation whether any refinement to the approach is necessary.
- 4.52 In the meantime, we consider that the approach to ‘single outlet’ and ‘multiple outlet’ services set out in the fee proposal, and the resulting fee differentials within each tariff band, are appropriate, justified and proportionate because:
- (a) A service distributed across multiple outlets is more complex to regulate than a service distributed through a single outlet, just as a

²⁹ Fees payable by providers qualifying for the B Rate can be paid in four instalments

multitude of services from a single provider is likely to be more complex to regulate than a single service. For example, a 'multiple outlet' service may offer different programmes on different outlets, may offer programmes of a particular type on some outlets but not others, and may have different age verification mechanisms and content access control mechanisms on each outlet.

- (b) Charging a higher fee for a service operating through multiple outlets ensures that the cost of introducing the new notification requirements is borne by those most likely to benefit from a reduction in administrative costs and from the abolition of 'additional service' fees.
- (c) Having multiple outlets is a relevant (if imprecise) further indication of scale (to set alongside the relevant, but imprecise, measure of provider turnover).
- (d) The overwhelming majority of respondents to the consultation favoured such an outcome.

4.53 In terms of the actual fees proposed, we consider that the 'single outlet' fees charged within each bands are appropriate, justified and proportionate because they are set at 5% below the level of the corresponding 'first service' fee approved by Ofcom as appropriate, justified and proportionate in 2012-13. Those paying such fees would therefore benefit from the use of the surplus carried forward from 2012-13 to exactly the same extent and the relative fee levels would be maintained at constant proportions (so that, for example, the Super A Single Outlet fee would be double the A Rate Single Outlet Fee, just as in the previous two years the Super A First Service fee was double the A Rate First Service fee).

4.54 We consider that the 'multiple outlet' fees charged within each band are appropriate, justified and proportionate because they are set at a level which recoups the fees lost from the abolition of 'additional service' fees from Super A and A Rate fee payers who operate through multiple outlets. This approach meets the test because it ensures that the balance of the burden of funding the regulatory activity remains closely aligned with the balance achieved through the fee structure approved by Ofcom in 2011-12 and 2012-13.

4.55 ATVOD considers that the 2013-14 will generate aggregate fee income which is sufficient to meet, but not exceed, the anticipated costs of performing the designated functions using our knowledge of the turnover of each notified service provider and our knowledge of the number of 'outlets' through which each service provider currently provides its service(s). In making our calculations we have also assumed that a number of additional services will be notified during 2013-14. Our calculations also take into account the fact that three groups currently benefit from the group cap.

4.56 Having duly considered and taken account of the responses to the 2013-14 Fees Consultation, and in light of all the information currently available and the relevant legislative provisions ATVOD has also decided that:

- Stakeholders wishing to see a further relaxation to the qualification criteria for consideration as a group (with respect to the application of the group cap on fees), are invited to submit a formal and detailed proposal to ATVOD. Such proposal to include an analysis demonstrating the likely impact of the proposed change on aggregate fee revenue;
- A 'watching brief' should be maintained with regard to the development of a widely accepted means of measuring ODPS audiences and, in the meantime, the viability of an audience based fee structure should not be actively investigated; and
- Provision should not be made at this time to remunerate a future Non-Independent Director in order to attract candidates from smaller service providers to the ATVOD Board. However, ATVOD would like further to discuss this matter with stakeholders through the Industry Forum.

Question 10

Do you think that ATVOD should further investigate the proposal to relax the group qualification criteria?

4.57 ATVOD notes that while most respondents gave broad support to the idea being further investigated, the majority of those who expressed a view considered that those stakeholders with a particular interest should put together a proposal for ATVOD and the industry to consider. ATVOD agrees with that proposition and invites stakeholders wishing to see a further relaxation to the qualification criteria for consideration as a group to submit a formal and detailed proposal to ATVOD. Such proposal should set out clearly the criteria proposed and include an analysis demonstrating the likely impact of the proposed change on aggregate fee revenue. ATVOD would then consider whether to put the proposal out to consultation. Such a consultation (and any policy change that might result) would not necessarily have to wait until the next full round of fee consultation and fee setting, but might take place during 2013-14.

Question 11

Should ATVOD:

a) Further investigate the possibility of using audience as a basis for future fees through the issue of a demand for information regarding the means by which each service provider delivers video content to the consumer?

or

b) Maintain a watching brief and consider developing a proposal once an industry-recognised cross-platform means of accurately measuring ODPS audiences has emerged?

4.58 ATVOD notes that 11 of the 12 respondents who commented on this issue gave support for adopting a 'watching brief'. This is in line with the views expressed by stakeholders at the Industry Forum. In light of this, ATVOD considers it appropriate for the Fees Working Party to continue to adopt a 'watching brief' with a view to audience measurement and that it should not seek to actively develop a proposal for an audience based fee structure until and unless an industry-recognised cross-platform means of accurately measuring ODPS audiences has emerged.

Question 12

Do you believe our proposals have any impacts in relation to matters of equality?

4.59 ATVOD notes that neither of the substantive points made in response to this question raised issues likely to have a direct bearing on equality in relation to gender, disability or ethnicity. We therefore confirm our view that our approach to regulation as a result of the current proposals would remain unchanged and therefore we do not consider that our proposals, as outlined in Section 5 would have any particular implications for people to whom these considerations apply. We base this conclusion on the experience gained by ATVOD in regulating the sector to date.

Section 5

The 2013-14 Fee Tariff

	Single outlet service	Multiple outlet service	Group cap
Standard rates			
Super A Rate (Provider revenue > £25.9m)	£9,480	£12,302	£25,000
A Rate (Provider revenue > £6.5m)	£4,740	£6,151	£25,000
B Rate (Provider revenue £6.5m or less)	£732	£771	£25,000
Concessionary rates			
Non-commercial (charities, community interest companies, not for profit companies acting in the public interest)	£91*	£96*	N/A**
Commercial micro-scale (Provider revenue < £50,000)	£137*	£145*	N/A**
Commercial small-scale (Provider revenue < £100,000)	£183*	£193*	N/A**

* no fee will be levied if a new service would qualify for a concessionary rate, closes within the first three months of operation and no breaches of the Rules are found to have occurred. This temporary waiver will apply only if the service provider has, prior to launching the service, received from ATVOD confirmation of its qualification for a concessionary rate, has submitted to ATVOD a completed notification form for the new service and has requested a three month waiver.

** given the lack of evidence suggesting that very large numbers of services are being provided by individual service providers who would qualify for a concessionary rate, we have not set a maximum fee per provider at this time. However, we reserve the right to introduce such a cap at a later date should circumstances require it.

5.1 For those qualifying for a concessionary rate or Rate B, ATVOD will accept payment in four instalments.

NB. A service provider will be liable for the relevant Super A Rate unless they establish to the satisfaction of ATVOD that they have a turnover or status which qualifies for a lower rate as follows:

Qualification for Rate A

5.2 Qualification for Rate A will be established if the service provider can demonstrate to ATVOD's satisfaction that the **service provider** had an annual turnover of not more than £25.9 million in the last accounting year for which figures are available.

Qualification for Rate B

5.3 Qualification for Rate B will be established if the service provider:

- a) can demonstrate to ATVOD's satisfaction that the **service provider** had an annual turnover of not more than £6.5 million in the last accounting year for which figures are available; or
- b) was in its first year of trading on 1 April 2013, or has commenced trading only after that date.

Qualification for the Non-Commercial Concessionary Rate

5.4 Qualification for the Non-Commercial Concessionary Rate will apply if the service provider can demonstrate to ATVOD's satisfaction that it:

- a) is a registered charity; or
- b) is a community interest company; or
- c) is a not-for-profit company operating in the public interest (as demonstrated, for example, in the articles of association of the service provider); or
- d) is The Welsh Authority.

Qualification for the Commercial Micro-scale Concessionary Rate

5.5 Qualification for the Commercial Micro-scale Concessionary Rate will apply if the **service provider** can demonstrate to ATVOD's satisfaction that it:

- a) has no affiliation to a larger company³⁰; and
- b) satisfies one of the two conditions below:
 - (i) had a turnover of less than £50,000 in the last accounting year for which figures are available; or
 - (ii) is in the first year of trading and expects to have a turnover of less than £50,000 in that first year.

³⁰ A service provider will be regarded as having an affiliation to a larger company if (a) a larger company has a 10% or greater stake in the service provider (in terms of ownership or voting rights), or (b) the Board of the service provider includes a representative of a larger company with an interest in the video on demand sector.

Qualification for the Commercial Small-scale Concessionary Rate

- 5.6 Qualification for the Commercial Small-scale Concessionary Rate will apply if the **service provider** can demonstrate to ATVOD's satisfaction that it:
- a) has no affiliation to a larger company³¹; and
 - b) satisfies one of the two conditions below:
 - (i) had a turnover of less than £100,000 in the last accounting year for which figures are available; or
 - (ii) is in the first year of trading and expects to have a turnover of less than £100,000 in that first year.

Evidence required in order for ATVOD to consider whether the service provider has demonstrated to ATVOD's satisfaction that it falls within the relevant category:

- 5.7 Registered charities, community interest companies or not-for-profit companies operating in the public interest should provide documentary evidence of their status. For not-for-profit companies operating in the public interest, documentary evidence will include, but may not be limited to, the Articles of Association.
- 5.8 Other service providers registered with Companies House who wish to establish qualification for a lower rate should provide to ATVOD a copy of their filed accounts for the last year for which figures are available, or evidence that they were in their first year of trading on 1 April 2013 or have begun trading since 1 April 2013.
- 5.9 Service providers who are not registered at Companies House (e.g. non-UK companies, sole traders and unincorporated bodies) and who wish to establish qualification for a lower rate should provide equivalent evidence (e.g. the audited accounts of an unincorporated provider).
- 5.10 Evidence of qualification for a lower rate must be provided within 21 days of the date of this statement or the date of notification, whichever is later.

Within each tariff band the fee charged will depend on whether the service is provided through a single outlet or through multiple outlets.

- 5.11 For these purposes, a service will be regarded as being provided through a single outlet if it is provided through a single website, app, portal, smart TV or set top box platform. For example:

Example 1

The service is only available through a single website. The 'single outlet' rate applies.

Example 2

³¹ See footnote above

The service is only available through a single app or portal. The 'single outlet' rate applies.

Example 3

The service is only available through a single Smart TV or set top box platform³². The 'single outlet' rate applies.

- 5.12 A service will be regarded as being provided through multiple outlets if it is provided through more than one website, app, portal, smart TV or set top box platform; or if it is provided through any combination of such outlets. For example:

Example 4

The service is made available through two set top box platforms. The 'multiple outlet' rate applies

Example 5

The service is available through a single website and through a single set top box platform. The 'multiple outlet' rate applies.

Example 6

The service is available through a single website and through a single app. The 'multiple outlet' rate applies

- 5.13 The number of outlets through which a service is deemed to be distributed will be determined by ATVOD, having regard to any information supplied by the service provider or which has otherwise come to the attention of ATVOD.

Opting for consideration as a group

- 5.11 Individual service providers may nominate themselves to be considered at group level for both banding and capping purpose. In such circumstances qualification for a tariff band will be established by reference to the annual turnover of the parent company and the total amount of fees paid by providers belonging to the same group will not exceed £25,000.
- 5.12 For the purposes of establishing the group cap, service providers will only be considered to be part of the same group if they are entities which are wholly owned by the same parent company. A service provider will also be considered to be wholly owned by a parent company if it is wholly owned by a subsidiary which is itself wholly owned by the parent company. For the avoidance of doubt, each individual service provider will be liable to pay in full the relevant 'single outlet' or 'multiple outlet' fee, unless the aggregate amount of fees paid by the group would otherwise exceed £25,000.

³² For these purposes a 'set top box platform' includes a cable, satellite or IPTV platform (such as Virgin media, Sky, BT Vision or TalkTalk), or a platform requiring use of a games console or other device specifically designed to be connected to a TV to facilitate on-demand viewing.

Section 6

Ofcom's approval of the fees

- 6.1 Ofcom formally designated³³ ATVOD as a co-regulator to carry out a range of functions in relation to the regulation of VOD services. Included in the designated functions was the power to require Service Providers to pay an annual fee, such fees to be set in accordance with section 368NA of the Act. The fees must represent the appropriate contribution of the provider towards meeting the likely costs of regulation during the year and be justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed.
- 6.2 A different level of fees may be required in relation to different cases or circumstances but the aggregate amount of fees required to be paid must be sufficient to meet, though not exceed, the estimated likely costs of carrying out the regulatory functions during the year. Under the Designation any fees that ATVOD requires ODPS providers to pay, are subject to Ofcom's prior written approval³⁴.
- 6.3 Accordingly, ATVOD has sought Ofcom's approval in relation to the fees to be paid in 2013-14 (1 April 2013 to 31 March 2014). Ofcom has therefore reviewed the amount and structure of the fees and associated reasoning set out in Sections 4 and 5 of this Statement by reference to the statutory requirements set out in Section 368NA of the Act. In particular, in deciding whether to give its approval, Ofcom must be satisfied that the fee in each case "represents the appropriate contribution of the provider towards meeting the likely costs" of regulation³⁵; and "is justifiable and proportionate having regard to the provider who will be required to pay it and the functions in respect of which it is imposed"³⁶.
- 6.4 Ofcom must also be satisfied that the aggregate amount of the fees to be paid is sufficient to meet, but not exceed the likely costs of carrying out the regulatory functions during 2013-14, taking into account any deficit or surplus carried forward from the previous year(s)³⁷. Ofcom has therefore considered this requirement in light of the financial details contained in paragraph 4.36 above which include both ATVOD's estimated costs for 2013-14 and Ofcom's own current estimate of likely costs for carrying out its non-designated functions in 2013-14 (the latter being in the sum of £22,000).

³³ Following a scheduled review in 2012, an Amended Designation was made on 14 September 2012 and can be found at <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/vod/amended-designation.pdf>

³⁴ See Clause 5(iii) of the Designation.

³⁵ See Section 368NA(3)(a) of the Act.

³⁶ See Section 368NA(3)(b) of the Act.

³⁷ Section 368NA(7) of the Act states: "Any deficit or surplus shown (after applying this subsection for all previous years) by a statement under subsection (6) is to be—

(a) carried forward; and

(b) taken into account in determining what is required to satisfy the requirement imposed by virtue of subsection (5)(b) in relation to the following year".

- 6.5 In addition, Ofcom has also taken into account the £79,155 surplus which ATVOD has estimated will arise from 2012-13 (see paragraph 4.15 above), having taken into account both ATVOD's estimated costs (in 2012-13) and an amount of costs estimated to be incurred by Ofcom in 2012-13 in the sum of £21,829 (see paragraph 4.6 above), which surplus is to be carried forward in assessing whether the requirement is met that the aggregate amount of the fees to be paid in 2013-14 is sufficient to meet, but not exceed the likely costs of carrying out the regulatory functions during 2013-14³⁸. In 2013-14, Ofcom will carry out a range of functions concerning the regulation of ODPSs. We have provided an estimate of £22,000 as the projected cost of carrying out these functions. Ofcom's functions in 2013-14 will include in particular a number of appeals on whether a service is or is not an ODPS. However since the exact nature and volume of this work are currently unknown, the likely costs cannot be estimated with any certainty at this time. Ofcom has taken into account ATVOD's decision to allocate part of the accumulated surplus to a dedicate reserve held against the risk of ATVOD incurring extraordinary costs relating to a decision to wind up the organisation or to a significant legal challenge, such as a Judicial Review.
- 6.6 Having considered all these matters, Ofcom has approved ATVOD's decision as to the amount and structure of the fees set for 2013-14 and the associated reasoning set out in sections 4 and 5 of this Statement.

³⁸ Under section 368NA(6)(c) of the Act, as soon as reasonably practicable after the end of the financial year, a statement must be published setting out for that year, the aggregate amount received in fees during that year, the aggregate amount of fees outstanding and likely to be paid or recovered for that year, and the actual costs of carrying out the relevant functions during the year. Any deficit or surplus shown is to be carried forward and taken into account in determining what is required to ensure that the aggregate amount of fees that are required to be paid during that year is sufficient to enable them to meet, but not exceed the estimated costs for that year. ATVOD will publish a statement setting out the actual costs of performing the designated functions, as well as Ofcom's actual costs for performing the non-designated functions as backstop regulator, in the Annual Report ATVOD expects to publish before the end of July 2013.

Section 7

Next steps

- 7.1 ATVOD will shortly contact each provider of a notified service in writing to inform them of the new tariff and new notification requirements.
- 7.2 In order to ensure that ATVOD has complete and accurate information in accordance with the new notification requirements, and in order to ensure that each service is invoiced for the correct fee, ATVOD will include in that correspondence a statutory request for information under s368O of The Communications Act 2003. This request will set out the services and outlets currently notified to ATVOD and will require each service provider to:
- (For providers with more than one service) confirm whether it wants ATVOD to consider all the services currently notified to be constituent parts of a single service;
 - confirm the brand name and type of any outlet operated by the service provider (including the URL, if a website) through which the service is provided to consumers; and
 - confirm the brand name of any outlet operated through a third party through which the service is provided to consumers, together with contact details for that third party operator.
- 7.3 The correspondence from ATVOD will also invite those who may qualify for a rate below the Super A Rate to apply for a lower rate. The deadline for providing the requested information and for applying for a rate lower than Super A will be 21 days.
- 7.2 Those eligible for a concessionary rate or for Rate B will also be offered the opportunity to pay in four instalments.
- 7.3 Service providers who are wholly owned by a parent company which also wholly owns at least one other service provider will be invited to consider whether they wish to be considered on the basis of group turnover for banding purposes in order to qualify for the cap of £25,000 being applied at group level.
- 7.4 Invoices will be issued as soon as possible after the 21 day deadline has expired. Those who have not submitted an application for a lower rate, or whose applications have been declined, will be invoiced at the Super A Rate.

Looking forward

- 7.5 ATVOD notes that while its decision in relation to the 2013-14 Fees is in line with the views expressed by stakeholders, debate continues over a number of matters.

- 7.6 With regard to the application of the group cap, in light of the views expressed during the consultation, ATVOD invites stakeholders wishing to see a further relaxation to the qualification criteria for consideration as a group to submit a formal and detailed proposal to ATVOD. Such proposal should set out clearly the criteria proposed and include an analysis demonstrating the likely impact of the proposed change on aggregate fee revenue. ATVOD would then consider whether to put the proposal out to consultation. Such a consultation (and any policy change that might result) would not necessarily have to wait until the next full round of fee consultation and fee setting, but might take place during 2013-14.
- 7.7 In line with the views expressed by stakeholders, both at the Industry Forum and during this consultation, the Fees Working Party will continue to adopt a 'watching brief' with a view to audience measurement and will not actively develop a proposal for an audience based fee structure until and unless an industry-recognised cross-platform means of accurately measuring ODPS audiences has emerged.
- 7.8 We also look forward to engaging with the ATVOD Industry Forum on how best to ensure that ATVOD can attract candidates from smaller service providers to the ATVOD Board.