

Office of the Adjudicator – Broadcast Transmission Services

Report for the period 1 September 2008 to 31 December 2008

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1. Background

On 11 March 2008, the Competition Commission (CC) announced its decision to allow the merger of transmission companies Arqiva and National Grid Wireless (NGW) subject to the agreement of a package of measures (undertakings) to protect the interests of their customers.

Arqiva and NGW overlap in the provision of Managed Transmission Services (MTS) and Network Access (NA) to transmitter sites and associated facilities for terrestrial television and radio broadcasters. In its final report, the CC found that Arqiva and NGW were the only active providers of MTS/NA to the UK television broadcasters. The companies were also the most significant providers of national MTS/NA to UK radio broadcasters with a combined market share of more than 85%. In both cases, prior to merger, the companies had exercised a competitive constraint on each other.

The CC concluded the merger of the two companies would lead to a “substantial lessening of competition” in broadcast transmission services, specifically in the provision of MTS/NA to television and radio broadcasters.

After consultation by the CC with Arqiva, its customers and other stakeholders, the Commission accepted certain undertakings from Arqiva on 1 September [http://www.competition-commission.org.uk/inquiries/ref2007/macquarie/pdf/notice_undertakings.pdf].

The Undertakings are intended to mitigate the substantial lessening of competition by protecting existing and new customers over the terms and conditions of supply, including protection against future price rises and protection against changes in non-price related areas (such as discrimination issues and service standards).

The Undertakings provide for the appointment of an Adjudicator, as described in Appendix 1 (Adjudication scheme) and Appendix 2 (Adjudication Rules). The main role of the Adjudicator is to determine disputes arising out of the operation of the Undertakings.

Paragraph 35 of Appendix 1 to the Undertakings requires the Adjudicator to make periodic reports to the Office of Fair Trading, copied to Ofcom, covering the following points:

- Any Guidance issued
- Determinations in relation to Disputes
- The views of the Adjudicator about the operation of the Undertakings, the Adjudication Scheme and Adjudication Rules as well as any recommendations for amendments
- The views of the Adjudicator on the performance of Arqiva in complying with the Undertakings

This report covers the setting up and operation of the Office of the Adjudicator over the period from September 2008 to 31 December 2008. This report will be published on the website of the Adjudicator (www.adjudicator-bts.org.uk) with any information that the Adjudicator regards as confidential redacted.

2. Office of the Adjudicator

2.1 Adjudicator

In September 2008, Mr Alan Watson took up the role of Adjudicator. Ms Clare Gemmell has been appointed as executive assistant and Mr Paul Herbert of Goodman Derrick LLP as legal advisor.

A further position of Deputy Adjudicator is currently unfilled pending a review of the workload and requirements of this role.

2.2 Office

To save on premises costs, the Adjudicator and executive assistant are sharing an office space with the telecommunications Adjudicator and his staff. A private office space is available to the Adjudicator for confidential work and meetings. Provision is being made for the storage of confidential documents.

2.3 Website

Agreement has been reached for Ofcom to act as host for the website of the Adjudicator (www.adjudicator-bts.org.uk). The Adjudicator maintains editorial control of the content of this site. To date the site contains a description of the role of the Adjudicator and of the Scheme as well as a step-by-step description of the Adjudication process.

The site will gradually be expanded and will include reports, consultations and guidance documents.

2.4 Budget

In consultation with the Adjudicator, an interim budget was set to cover the period up to 31 March 2009.

At 31 December, total expenditure was £184,469 of which £96,528 represented one-off start-up costs.

Currently the Adjudicator is working with Ofcom to form the budget for 1 April 2009 to 31 March 2010.

2.5 Stakeholder Meetings

After appointment the Adjudicator regarded meetings with stakeholders as the top priority. Regular meetings have been held with the major stakeholders:

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All stakeholders welcomed the establishment of the Office but there was a variation in expectations. In general the television stakeholders had recently renegotiated their contracts in a competitive environment and had put in place long term agreements. Their need was principally the policing of costs relating to Digital Switchover (DSO) and the expectation that there might be the very occasional but potentially major dispute in this area.

The radio industry held a view that their transmission costs were excessive, that Arqiva (and also previously NGW) was inflexible and as small companies felt vulnerable to the power that the combined entity could wield. The expectation is for a significant volume of issues that require attention and investigation.

2.6 Arqiva

Para 35 of the Scheme requires the Adjudicator to comment on the performance of Arqiva over this period, in relation to the Undertakings.

To date, the performance of Arqiva has been entirely satisfactory. The two documents that were required to be produced by them during this period, an information security policy and a Reference Offer for the forthcoming spectrum auction for Manchester and Cardiff, were published on time. Reporting of DSO progress has commenced and all information requests have been met in a timely fashion.

3 Disputes and Guidance

3.1 Guidance

Following consultation, Ofcom has published Guidance to the Adjudicator. Under section 8 of the Adjudication Scheme, the Adjudicator is now publishing, following consultation, his own guidance relating to the following areas of the Undertakings:

- The application of Paras 9-12 inclusive of the Undertakings covering such issues as cost allocation methodology, return on capital employed, inflation adjustment and depreciation methodology
- The application of Para 3 relating to contract variations
- The valuing of transmitter equipment in accordance with Para 6
- Any other matters the Adjudicator considers appropriate

Work on producing Guidance has commenced and the process is described in Section 6 of this report.

3.2 Disputes

To date there have been no disputes requiring the use of the dispute procedure. Informal discussions have taken place.

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4 Publication of Reference Offers

Ofcom notified Arqiva on 29 October 2008 of the intention to hold a Relevant Spectrum Auction for low power DTT licences for Cardiff and Manchester. This obliged Arqiva to publish a Reference Offer within six weeks (Para 10.4.1).

The Reference Offer was published within the required time and is available on www.arqiva.com/products-and-services/terrestrial-solutions/group-75/reference-offers. Under Para 16.2 of the Undertakings Arqiva were obliged to produce an Information Security Strategy setting out how they intend to manage and limit the flow of sensitive information within the organisation. This was produced within the required timeframe.

The Guidance published by Ofcom on 16 January 2009 requires Arqiva to publish a framework reference offer (Para 12.3) for radio network access within one calendar month.

5 Reporting and Audit

5.1 Reporting on Digital Switchover Progress

Under Para 17 of the Undertakings, Arqiva is obliged to provide a monthly report on DSO progress. This report is provided to the BBC, SDN, D3&4 and Digital UK. To avoid duplication of effort, a common reporting format has been agreed and these reports have been duly circulated.

5.2 Form of Regulatory Report

Appendix 14 of the Undertakings sets out the format for regulatory accounts. Discussions are in hand to tie down the details.

5.3 DSO Audit

Arqiva is obliged to commission and fund an annual independent audit of DSO expenditure. The first of these relates to the period from the start of DSO to 30 June 2009. The audit report will be made available to the BBC, SDN and D3&4, subject to

Paras 28-34 of the Adjudication Rules. Discussions are in hand on the appointment of the auditor and the audit process.

6 Planned future activity

6.1 Guidance

The Adjudicator is required to issue Guidance, where appropriate, under Paras 3, 6 and s 9-12 of the Undertakings. It is the intention of the Adjudicator to produce guidance in order of priority.

Work has started on Guidance under Para 6 which relates to the price that Arqiva can charge when selling dedicated transmitter equipment to customers where they exercise the right to purchase this at the end of their contracts. This is of importance as each customer has the option to buy the existing plant and operate/maintain it instead of contracting Arqiva to do this. This Guidance will cover such aspects as depreciation policy and lifetimes of equipment.

Under Paras 9-12 the priority is a network access reference offer for radio and the Guidance centres around the quantitative elements of this. Similarly for the MTS element for radio, Guidance is required on aspects such as return on capital employed, inflation, period over which the capital is recovered and mark-ups on labour when no capital is employed.

A contract will shortly be entered into with economic advisers to assist in this task. The Adjudicator will then produce draft guidance which will be open to consultation. Once the above is in place, the Adjudicator intends to investigate the allocation of fixed costs between different business streams at a site and whole business level. This will result in further Guidance.

At the present moment no Guidance is required in relation to Para 3. Application of, and compliance with, this paragraph will be monitored and Guidance issued at a later date if necessary.