

Office of the Adjudicator – Broadcast Transmission Services

Report for the period 1 July – 30 September 2011

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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 2008.

[\[http://www.competition-commission.org.uk/inquiries/ref2007/macquarie/pdf/notice_undertakings.pdf\]](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 operation of the Office of the Adjudicator over the period from 1 July to 30 September 2011. 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

The Office consists of Alan Watson as Adjudicator on a 3 day/week basis, Jon Trowsdale as Deputy on 2 day/week basis. Megan Swalwell has taken over as Executive Assistant and Office Manager whilst Clare Gemmell is on a sabbatical.

Legal advice is provided by Mr Paul Herbert of Goodman Derrick LLP.

Office and IT support are provided by Ofcom.

2.2 Budget

The budget for 2010/2011 was set, following consultation, at £529,188 for operations and £470,000 for contingency. The operations budget represents a 13.3% reduction on last year's budget.

The yearend figures to 31 March 2011 have been prepared and audited. The total costs as per the statutory accounts were £383,936. The under spend was principally in external professional fees as some work was held until the following financial year. A reconciliation of the amounts paid to the Office versus expenditure has been concluded with Arqiva and the surplus credited against the Q1/2 invoice for 2011/12.

The budget for 2011/12 was set, following consultation, at £532,926 for operations and £470,000 for contingency (this includes the increase in VAT to which most of the budget is subject).

To date operations are within budget and there has been no recourse to contingency.

2.3 Stakeholder Meetings

During this period regular meetings with stakeholders have continued and include government departments, television broadcasters and radio broadcasters, both large and small:

Confidential information redacted

The Competition Commission are undertaking a piece of work to examine the effectiveness of “Undertakings” as a remedy. The Adjudicator has contributed to this review and the CC will be contacting a selection of broadcasters to seek their views.

2.4 Arqiva

Paragraph 35 of Appendix 1 requires the Adjudicator to comment on the performance of Arqiva over this period, in relation to the Undertakings.

The performance of Arqiva continues to be generally satisfactory.

Confidential information redacted

3 Disputes and Guidance

3.1 Guidance

No further guidance has been published during this period.

3.2 Disputes

In this period there have been no disputes requiring the use of the formal dispute procedure.

4 Publication of Reference Offers

Arqiva reference offers can be found at:

<http://www.arqiva.com/corporate/documentation/referenceoffers>

Following guidance from the Adjudicator, Arqiva have published the Network Access Rate Card.

http://www.arqiva.com/corporate/pdf/ReferenceOffers/NA_Rate_Card_2010-11_publication_version.pdf

Ofcom have instructed Arqiva to prepare reference offers for the forthcoming 600MHz auction.

<http://stakeholders.ofcom.org.uk/binaries/spectrum/spectrum-awards/awards-in-preparation/2011/600mhz/Reference-offer-letter.pdf>

Ofcom have also published a note describing the next steps in the auction process.

<http://stakeholders.ofcom.org.uk/binaries/spectrum/spectrum-awards/awards-in-preparation/2011/600mhz/600-award-update.pdf>

The note covers the role of the Office of the Adjudicator in this process. This will principally be to ensure that the Information Security Strategy is applied such that information relating to potential bidders is controlled within Arqiva.

5 Reporting and Audit

5.1 Reporting on Digital Switchover Progress

Under Paragraph 17 of the Undertakings, Arqiva is obliged to provide a monthly report on DSO progress. The reports are being received monthly.

5.2 Regulatory Accounts

Arqiva is obliged to produce annual accounts in accordance with the requirements set out in Paragraph 15 and Appendix 14 of the Undertakings. The regulatory accounts covering the period 30 June 2009 to 30 June 2010 are available on Arqiva's website:

http://www.arqiva.com/corporate/pdf/documentation/MUKBL%20NA_MTS_Financial_Statements_2010.pdf

And the explanatory notes on:

<http://www.arqiva.com/corporate/pdf/documentation/RAPAMs%202010.pdf>

For the period 1 July 2010 to 30 June 2011, auditors have been appointed and the accounting principles (RAPAMs) agreed. The audit is in progress and the regulatory accounts will be published on Arqiva's website by the end of the calendar year.

5.3 DSO Audit

The scope of the DSO audit has been agreed, after consultation with the BBC, SDN and D3&4. Auditors have been appointed and, as previously the audit will consist of a financial element and a process element.

The audit will take place in Q4 of 2011 and the report made available to the BBC, SDN, D3&4, Ofcom and the OFT at the end of Jan 2012.

5.4 Compliance Report

Paragraph 18.1 of the Undertakings requires Arqiva to deliver an annual report to the Office of Fair Trading setting out steps taken to comply with the Undertakings and details of any breaches and including steps taken to remedy them.

The last compliance report was delivered to the OFT at the end of November 2010 and the next is due at the end of November 2011.

5.5 The Undertakings

The Adjudicator believes that the Undertakings, the Adjudication Scheme and Adjudication Rules are satisfactory at the present time and that no changes are needed.

5.6 Information Security Strategy

Paragraph 16.2 requires Arqiva to produce an Information Security Strategy which defines the measures to be taken to ensure that confidential information held in one part of the company cannot be used by another for commercial advantage.

The Adjudicator commissioned an independent audit of the strategy and the final audit report was published during May 2011.

<http://www.adjudicator-bts.org.uk/documents/AuditArqivaInformationSecurityStrategyMarch2011.pdf>

A further audit is being considered for Q1 2012 to examine the procedures in place for protecting confidential information during the 600MHz auction.

6 Planned future activity

6.1 Guidance

The Adjudicator has now issued guidance covering Paragraphs 6 and 9-12 of the Undertakings. The Adjudicator is still considering whether further guidance is required in relation to Paragraph 6 of the Undertakings.

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

The work on Network Access cost recovery referred to below may result in guidance being issued on cost re-allocation following major changes to site use.

6.2 Future Activity

The Adjudicator has commissioned a piece of work to assess the total of Network Access charges derived from the radio rate card and television contracts against the total recovery permitted calculated from the Regulated Asset Base, WACC and relevant costs. The point in time for this assessment will be post analogue television but pre any significant change in radio analogue or DAB.

This project will check the actual recovery of costs against the permitted recovery and give a baseline for future work on the effects of the removal of some or all of the analogue radio network. Arqiva expect to have data available by Nov 2011 to allow this work to proceed.

In parallel the Adjudicator is reviewing existing guidance to Arqiva on cost re-allocation following major changes in site utilisation and is considering issuing a consultation on this subject

The review is planned to be completed by the end of the year but is becoming more complex and may run into Q1 2012.

The Office of the Adjudicator has now been in place for 3 years so the Adjudicator considered it timely to survey customer views on the usefulness/effectiveness of the Office. Accordingly, Cognisant have been commissioned to conduct a review across a sample of the groups with which the Office interacts. The report from this survey will be published in Q1 2012.