

Office of the Adjudicator – Broadcast Transmission Services

Report for the period 1 April – 30 June 2010

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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 operation of the Office of the Adjudicator over the period from 1 April 2010 to 30 June 2010. 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 and Clare Gemmell as Executive Assistant and Office Manager.

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

2.2 Budget

The budget for 1 April 2009 – 31 March 2010 was £610,541 for operations and £470,000 as a contingency. The operations budget is intended to cover forecast activity and includes payroll, services (office, IT, etc) and bought in professional services. The contingency is intended to cover exceptional costs arising from adjudicating disputes and investigations.

A budget for 2010/2011 has been 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.

Operations to 30 June 2010 were within budget and no contingency has been used.

The accounts for the year 2009/10 have been externally audited by BDO.

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

2.4 Arqiva

Para 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

To date there have been no disputes requiring the use of the dispute procedure.

In this period there has been no further contact with Absolute, Folder Media or UKRD. Bauer have been in contact and are looking at various options for their transmission contracts.

4 Publication of Reference Offers

Arqiva reference offers can be found at:

<http://www.arqiva.com/terrestrial/broadcast-tv/reference-offers/>

(latest are the Reference Offers for the Manchester and Cardiff areas for the 758-766 Mhz frequency band, June 2009)

<http://www.arqiva.com/terrestrial/broadcast-radio/reference-offers/>

(This was published by Arqiva on 13 Feb 2009).

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

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

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. 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 Para 15 and Appendix 14 of the Undertakings. The first set of regulatory accounts covers the period from the Commencement of the Undertakings (1 September 2008) to 30 June 2009. These have been completed and are available on Arqiva's website:

<http://www.arqiva.com/corporate/pdf/NA%20and%20MTS%20Financial%20Statments%20period%20ended%2030.06.09.pdf>

And the explanatory notes on:

<http://www.arqiva.com/corporate/pdf/Regulatory%20Accounting%20Principles%20and%20Methodologies%2017.11.09.pdf>

5.3 DSO Audit

Arqiva is also obliged to undertake an annual audit of DSO expenditure as set out in Para 14 of the Undertakings. The first of these relates to the period from the start of DSO to 30 June 2009. The audit is complete and reports have been delivered to the BBC, SDN, D3&4, OFT and Ofcom. There will be another audit at the end of 2010 to cover the period 1 July 2009 to 30 June 2010 with the results delivered by the end of Jan 2011.

5.4 Compliance Report

Para 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 next compliance report is due November 2010.

6 Planned future activity

6.1 Guidance

The Adjudicator has now issued guidance covering Paras 6 and 9-12 of the Undertakings and does not intend to issue further guidance in the short term unless events require it.

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

From the responses to the consultations preceding these two sets of Guidance it has become clear that it has been difficult for the industry to comment on some of the issues

because they are complex and not well understood. The Adjudicator is planning a series of short explanatory notes to be published on the website covering some of the more complex issues.

The first of these notes was intended to explain Weighted Average Cost of Capital (WACC) and how that formed part of the NA charges. Attempts at drafting this raised more issues than were explained. The task of producing a report which explained WACC and looked further at the implications of changing it was given to Plum Consulting. Their report has been received and will be published in whole or part during the next period

An area for further work in 2010 is the implications on NA charges should analogue radio transmission (both AM and FM) cease at some point in the future.