

Office of the Adjudicator – Broadcast Transmission Services

Report for the period 1 January 2009 to 31 March 2009

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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

[\[http://www.competition-commission.org.uk/inquiries/ref2007/macquarie/pdf/notice_undertakings.pdf\]](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 January 2009 to 31 March 2009. 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.

Mr Jon Trowsdale has been appointed as Deputy Adjudicator on a part time basis and will start on 1 April. No further appointments are envisaged.

2.2 Budget

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

At 31 March, total expenditure from startup was £281,677 out of an operating budget of £387,581. A further contingency sum of £235,000 was not used.

The budget for 1 April 2009 – 31 March 2010 has been agreed following a consultation at £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.

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.

Names of those with whom meetings were held redacted

2.4 Arqiva

Para 35 of the Scheme 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 satisfactory.

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

During this period Value Partners Management Consulting were engaged after a competitive tender round to advise on the pricing policy for the sale of transmission equipment (Para 6) and aspects of new contract pricing (Para 9-12). This will result in a consultation which will be published early May.

3.2 Disputes

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

Details of informal discussions redacted

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

This offer had a validity of 90 days and was revalidated on 10 March. The spectrum auctions have been held by Ofcom and an award made in each case.

The Guidance published by Ofcom on 16 January 2009 required Arqiva to publish a framework reference offer (Para 12.3) for radio network access within one calendar month. The Framework Radio reference Offer was published on 13 February and is available on:

<http://www.arqiva.com/media/dContent/mediaCentre/TMS/PDFs/arqiva-radio-reference-offer-version-1.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 Form of Regulatory Report

Appendix 14 of the Undertakings sets out the format for regulatory accounts. The form of the accounts has been agreed. The first set of regulatory accounts covers the period from the Commencement to 30 June 2009.

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. Arqiva have proposed a methodology after discussions with the Adjudicator. A meeting will be held with the recipients to agree the methodology.

6 Planned future activity

6.1 Guidance

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

A consultation document will be published early May relating to Para 6, the pricing policy for the sale of transmission assets. This will result in the publication of guidance early June.

A second consultation will be published early May covering the principles for pricing new contracts under Paras 9-12 and will similarly result in the publication of guidance in early June.

The overall objective is to ensure that a customer can make an informed decision between the three options which are to roll over the existing contract, to purchase the transmission equipment and operate it themselves or to move to Reference Offer terms and conditions and pricing.

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 may 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.