

# **Office of the Adjudicator – Broadcast Transmission Services**

**Report for the period 1 July 2009 to 30 September 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 July 2009 to 30 September 2009. This report will be published on the website of the Adjudicator ([www.adjudicator-bts.org.uk](http://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 from 1 April 2009. No further appointments are envisaged.

### **2.2 Budget**

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.

Operations to 30 September are within budget and, to date, no contingency has been used.

### **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 required to publish, 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 on any sale in accordance with Para 6
- Any other matters the Adjudicator considers appropriate

A Guidance note relating to the sale of Transmitter Equipment (Para 6) was published on 31 July:

[http://www.adjudicator-bts.org.uk/documents/OTABTS\\_Report\\_2009\\_transmitter.pdf](http://www.adjudicator-bts.org.uk/documents/OTABTS_Report_2009_transmitter.pdf)

A second consultation relating to the pricing of new contracts was published on 22 May With a closing date of 19<sup>th</sup> June. There were 8 responses which are currently being considered. The replies raised some further issues which have been considered and a guidance note is ready for publication.

#### **3.2 Disputes**

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

Confidential information redacted

### **4 Publication of Reference Offers**

Arqiva reference offers can be found at:

<http://www.arqiva.com/products-and-services/terrestrial-solutions/group-75/reference-offers>

<http://www.arqiva.com/products-and-services/terrestrial-solutions/broadcast-radio/page-1703>

## **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 are obliged to produce regulatory accounts as 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. The form of the accounts has been agreed with Arqiva.

### **5.3 DSO Audit**

Arqiva is obliged to undertake an 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 report will be made available to the OFT and Ofcom. It will also be provided to the BBC, SDN and D3&4, subject to Paras 28-34 of the Adjudication Scheme. The scope of the audit has been agreed between the Adjudicator, Arqiva and the stakeholders (BBC, SDN, D3&4). Following agreement with the stakeholders, PwC have been appointed as auditors and the audit work commences at the beginning of November 2009 with the report made available to the stakeholders in Jan 2010.

## **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.

Guidance on the pricing of new contracts (Para 9-12) will be published in Oct 2009. In general the approach has been not to impose "one size fits all" guidance on pricing in favour of discussion and agreement between Arqiva and its customers with the Adjudication process available as a safety net should these discussions not be successful.

Work has commenced on a review of the mechanisms for determining the Network Access charges and the allocation of fixed costs between users. It has become clear from responses to consultations that this complex area is not well understood by the customers and that little information exists to assist an understanding.

Value Partners have been contracted to investigate and report on the mechanism for dividing the fixed costs at transmitter sites. Initial findings support the use of a ratecard for radio but further work is necessary to explore the consequences of changes to the overall cost base such as analogue closedown. The Adjudicator intends to publish information to assist understanding and may also need to issue further Guidance.

At the present moment the Adjudicator is of the opinion that 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.