

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

**Report for the period 1 January – 31 March 2012**

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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 January to 31 March 2012. 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**

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 is Executive Assistant and Office Manager on a part time basis.

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

Office facilities and IT support are provided by Ofcom.

### **2.2 Budget**

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 and compares with £529,188 for operations in 2010/11).

The financial year ended on 31 March. The expenditure for the year is within budget and there has been no recourse to contingency.

The budget for 2012/13 has been set, following consultation, at £532,162 for operations and £470,000 for 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 has contacted a selection of broadcasters to seek their views. The report is due to be published summer 2012.

## 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

## 2.5 Customer Survey

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 were commissioned to conduct a review across a sample from the groups with which the Office interacts. The report from this survey is included as an appendix to this report (it should be noted that this report represents the views of the respondents).

The main findings were:

- Satisfaction with the overall performance of OTA-BTS (Office of the Adjudicator – Broadcast Transmission Services) is high
- The fact that the formal disputes procedure has not been used is seen as positive
- Seen as a useful source of informal advice
- Industry reputation is good
- Most respondents did not need regular contact with OTA-BTS but needed to “dip in and out” when there was an issue
- Awareness of the OTA-BTS by small radio stations is low
- There is more to do on Arqiva costs and transparency but good progress noted
- The Adjudicator’s formal powers have yet to be tested as the formal dispute procedure not used so far

All respondents were keen for OTA-BTS to continue and saw the need for the Office into the future.

To address the low awareness of the smaller stations, the Adjudicator is considering a series of visits and possibly a regional road-show.

## 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](http://www.arqiva.com/corporate/pdf/ReferenceOffers/NA_Rate_Card_2010-11_publication_version.pdf)

Ofcom have instructed Arqiva to prepare reference offers for a 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.

The reference offer for 600MHz is published at:

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

At the above link there are multiple documents including one which shows the way in which potential bidders for the spectrum can engage with Arqiva.

Ofcom have subsequently published a consultation on the wider issues around the use of the UHF broadcast spectrum.

In this period Arqiva have published a reference offer for Local Television. This offer is intended to be used by prospective Multiplex Operators to determine the cost of transmission.

[http://www.arqiva.com/corporate/pdf/ReferenceOffers/Local%20TV%20Reference%20Offers%20-%20Communication%20Guidance%20for%203rd%20parties%20v3\\_58205.pdf](http://www.arqiva.com/corporate/pdf/ReferenceOffers/Local%20TV%20Reference%20Offers%20-%20Communication%20Guidance%20for%203rd%20parties%20v3_58205.pdf)

<http://www.arqiva.com/corporate/pdf/ReferenceOffers/Local%20Digital%20Television%20Programme%20Services%20Transmission%20Services%20Reference%20Offer.pdf>

<http://www.arqiva.com/corporate/pdf/ReferenceOffers/Local%20Digital%20Television%20Programme%20Services%20Network%20Access%20Reference%20Offer.pdf>

It is anticipated that the Local TV offers will be revised following a clarification of the requirement.

## **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 2010 to 30 June 2011 are available on Arqiva's website:

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

### **5.3 DSO Audit**

The scope of the DSO audit was agreed, after consultation with the BBC, SDN and D3&4. Auditors were appointed and, as previously the audit consisted of a financial element and a process element.

The audit has been completed and the reports were forwarded to BBC, SDN, D3&4, OFT and Ofcom during this period. These reports are not published.

### **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 2011 and the next is due at the end of November 2012.

## **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>

During this period there has been further work with Arqiva to develop procedures to ensure that there is no inappropriate flow of information between the transmission division of Arqiva and the multiplex operation division.

A document covering these arrangements can be found at:

<http://www.arqiva.com/corporate/pdf/ReferenceOffers/600MHz%20Spectrum%20Auction%20-%20Guidance%20to%20external%20parties%20in%20communicating%20with%20Arqiva.pdf>

As Ofcom have gone out to consultation on the use of the UHF spectrum and decisions on the allocation process for the UHF spectrum will depend on this, the audit of these arrangements has been postponed.

The BBC tender process has brought the need for separation between NA and MTS within radio into focus and Arqiva are developing procedures under the ISS to address this. Once these are in place the Adjudicator will commission an audit.

## **6 Planned future activity**

### **6.1 Guidance**

The Adjudicator has now issued guidance covering Paragraphs 6 and 9-12 of the Undertakings. The Adjudicator considers that no further guidance is currently 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 the entire analogue radio network

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 project reported to the Adjudicator in March 2012 but this raised some supplementary questions which are being resolved at present.

As DSO nears its end, there is a task to reconcile the actual costs with the original reference offers and ensure that the split of cost between Arqiva and the multiplex operators is according to the agreed process. The work is mainly between the multiplex operators and Arqiva but the Adjudicator anticipates an involvement.