

Office of the Adjudicator – Broadcast Transmission Services

Report for the period 1 October – 31 December 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 October 2009 to 31 December 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 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 31 December were within budget and, to date, no contingency has been used. A draft budget for the period 1 April 2010 – 31 March 2011 has been prepared ready for submission to Arqiva via Ofcom as well as public consultation in Q1 2010. It is anticipated that the budget will show a reduction on that of 2009/2010.

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

In January 2009, following consultation, Ofcom published Guidance to the Adjudicator in order to enable the Adjudicator to produce his own guidance on the approach he will take in settling disputes between Arqiva and its customers. 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

Guidance in relation to Para 6 was published in September 2009 and a Guidance note relating to the pricing of new contracts covering Paras 9-12 was published on 3 November 2009:

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

The general principle of the Guidance is to encourage transparency from Arqiva such that agreement can be reached with customers with the adjudication process as a last resort. The Adjudicator has favoured this approach to a “one size fits all” approach of specifying financial returns, mark-ups etc. This is also consistent with Ofcom’s Guidance to the Adjudicator.

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/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)

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 now.

<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 report will be made available to the OFT and Ofcom. It will also be provided to the stakeholders (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. Following discussion and agreement with the Stakeholders, Arqiva's existing auditors PwC have been appointed as auditors.

The PwC audit work is complete and the report has been delivered to the Adjudicator. Separate from the PwC work which is based on sampling invoices, the Adjudicator has commissioned an audit of the "exceptional risk" process which relates to requests from the multiplex operators for changes to the DSO programme. The report on this work will be received on Jan 27 2010 and will be made available to the Stakeholders, Ofcom and OFT along with the main PwC report.

The Adjudicator does not intend to publish these reports but would comment that the results of the audit were satisfactory.

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 compliance report was duly delivered to the OFT on 30 November 2009.

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.

The Guidance issued relating to Paras 9-12 places a requirement on Arqiva to publish a rate-card for Network Access by 1 May 2010 together with an explanation of how this is applied.

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.

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.