

## Summary of responses to consultation

1. The CC published a notice of proposal to accept Undertakings on 25 June 2008. In light of responses received to that consultation the CC has revised the Undertakings. We have set out below a summary of the responses received and the changes made.

### General comments

2. A number of respondents commented on the importance of the role of the Adjudicator and any published guidance for the effective operation of the Undertakings. There were a number of comments on the importance of independence of the Adjudicator, the DSO Auditor and the auditor of Arqiva's regulatory accounts. There were also a number of specific suggestions for the content of guidance to be published by Ofcom and the Adjudicator in due course. We agree that the role of the Adjudicator and the guidance to be published by Ofcom and the Adjudicator in due course will be of key importance to the effective operation of the Undertakings. We have passed all of these comments to Ofcom for its consideration in due course.
3. A number of respondents commented that they had been unable to progress negotiations for new transmission agreements with the parties during the period while Undertakings were being settled. We recognize the difficulty for both customers and the parties as a result of the inevitable uncertainty during the process of settling the Undertakings. However, we expect that once Undertakings have been accepted any outstanding negotiations for new transmission agreements can be settled quickly and on fair, reasonable, non-discriminatory and cost-oriented terms as required by the Undertakings.
4. A number of respondents proposed typographical and textual amendments to the Undertakings. Where appropriate we have marked up these changes in the Undertakings. These should be self-explanatory and we do not propose to comment further.
5. A number of respondents made comments which resulted in changes to the Confidential Appendices to the Undertakings. These have been discussed by Arqiva and the relevant customers. Revised versions of the Appendices will be sent to all relevant customers in marked-up version. We do not propose to comment further on these changes in this document.

### Comments on specific provisions

#### *Paragraph 1*

6. One respondent suggested that the reference in limb (iii) of paragraph 1.3, should be to having a controlling interest in the company for the purposes of section 26 of the Enterprise Act, rather than to the ability to control policy. The three limbs of paragraph 1.3 are cumulative and all three must be fulfilled. The reference to control of policy here is to make it clear that, in addition to the first two limbs, the ability to control the policy is also required and to make it clear that, for these purposes, the ability materially to influence the policy is not sufficient.

### ***Paragraph 3***

7. One respondent suggested that paragraph 3 should require Arqiva to mitigate and reduce costs to be borne by the customer in relation to any variation. We believe that this concern is already addressed; charges under paragraph 3 will be determined in accordance with paragraph 9, including 9.3.2(d) which requires the standards of an efficient supplier to be taken into account.

### ***Paragraph 5***

8. One respondent suggested that the role of the Adjudicator be extended to consideration of disputes on the application of the Supercredit regime under paragraph 5. We believe that compliance with these provisions is relatively straightforward for customers to monitor themselves without the need for the specialist expertise of the Adjudicator.
9. One respondent commented that the operation of the Supercredit regime should not be limited by any contractual limitation on the payment of Service Credits to a level that would amount to less than 10 per cent of relevant charges. This has been addressed by an amendment to the definition of Persistent Failure in paragraph 21.7 and to equivalent definitions in confidential appendices.

### ***Paragraph 6***

10. One respondent commented that customers should be able to require Arqiva to provide an inventory and transition plan for transfer of transmitter equipment more than 18 months before the expiry of a contract. We think this is unnecessary—18 months should be sufficient time to allow customers to make appropriate plans; any longer would increase the likelihood that Arqiva would need to update any plan before implementation to take account of operational changes in the interim.

### ***Paragraph 7***

11. One respondent commented that reductions in charges should take effect from the Commencement Date and be applied at the same time as each instalment of charges becomes due. We agree and Arqiva has also confirmed that that is its understanding of the obligation and how it is required to proceed in practice. We do not think that any amendment is necessary to address this.

### ***Paragraph 10***

12. One respondent suggested that Arqiva should be required to provide services on a transitional basis following the expiry of an Existing Agreement where revised terms have not yet been agreed under paragraphs 10.13 to 10.18. We do not consider that this additional proposal is necessary. Paragraphs 8 to 10 provide a detailed framework and process for agreement between Arqiva and its customers, including for resolution of any dispute by the Adjudicator.

### ***Paragraph 12***

13. One respondent commented that the provisions of paragraphs 12.3 and 12.13 (relating to reference offers for Network Access) are limited to radio only and should be extended to cover DTT.

- Paragraph 12.3 requires a framework reference offer for radio Network Access. There will be a number of different radio contracts which will expire in coming years and we do not think it is necessary to produce a specific Reference Offer for Network Access in relation to each and every service. Arqiva has therefore offered to produce a framework Reference Offer for radio Network Access. In relation to DTT the Undertakings provide for specific reference offers for Network Access to be prepared for any likely new contracts which may arise. The Adjudicator can require additional Reference Offers in any event, (paragraph 12.5). There is therefore no need for an overarching framework reference offer for digital terrestrial television.
  - Paragraph 12.13 entitles a radio customer to request an offer for Network Access in the six months prior to expiry of an Existing Transmission Agreement. Arqiva has agreed to extend the provision to high power DTT agreements. The provision has been amended accordingly.
14. One respondent commented that Arqiva should be required to prepare an offer for Network Access more than six months before the expiry of any Existing Transmission Agreement under paragraph 12.13. We are satisfied that six months gives customers and prospective MTS providers adequate time to prepare and do not propose to change this provision.

### ***Paragraph 13***

15. Ofcom suggested that, for practical reasons in order to allow it sufficient time for consultation, paragraph 13.3 be amended to provide for guidance to be published as soon as reasonably practicable after the Commencement Date. We agree and have amended accordingly.

### ***Paragraph 14***

16. One respondent suggested that the first audit of DSO expenditure should look back at all DSO expenditure incurred to date rather than just from the date of commencement of the Undertakings. Arqiva has agreed to this and paragraph 14.1 has been amended accordingly. This audit will provide the Adjudicator and customers with useful information in relation to Arqiva's costs. However, we note that Arqiva's offer set out in paragraph 7.3 is independent of the outcome of this audit.

### ***Paragraph 18***

17. One respondent suggested that the role of the Compliance Director should be expanded to include monitoring of the DSO process. We do not think this is necessary or appropriate. The responsibility of the Compliance Director is to monitor compliance with the Undertakings, which do not themselves directly bear on the DSO process. The DSO process is already subject to detailed contractual arrangements as well as regulation by Ofcom and by Government.

### ***Paragraph 21***

18. One respondent commented that the definition of Existing Transmission Agreements should make specific reference to amendments to those agreements introduced by the Undertakings. We agree and have amended the definition accordingly; consequential amendments have been made to the confidential appendices.

### ***Appendix 1, paragraph 3***

19. Ofcom suggested that for practical reasons it should be allowed two months to appoint the Adjudicator following the Commencement Date. Ofcom said that the process of identifying and appointing an Adjudicator was well underway and this would allow it flexibility to move straight to the appointment of a permanent adjudicator without needing to make an interim appointment. We agree and have amended accordingly.

### ***Appendix 2, paragraph 7***

20. One respondent suggested that the Adjudicator should respond to a referring party within three days in the event that a Notice of Adjudication was incomplete in a material respect. Arqiva and Ofcom agreed and the provision has been amended accordingly.

### ***Appendix 2, paragraph 28***

21. One respondent suggested that, other than Arqiva, parties to adjudication should have a full right of appeal on the merits. The question of an appeal mechanism has been raised by a number of parties since the Report was published and has been considered carefully with Ofcom and the Office of Fair Trading. We do not believe that an appeal mechanism is necessary in the circumstances, nor is it clear that an appeal mechanism would be workable or to whom an appeal might be made. We note that the Undertakings will not operate to exclude any party's statutory rights, for example under the Communications Act 2003 (paragraph 13.10 of the Undertakings).

### ***Appendices 11 and 12, paragraph 3***

22. One respondent suggested that the gainshare mechanisms provided for in Appendices 11 and 12, paragraph 3 were unnecessarily prescriptive. Ofcom and the CC agree and have amended these mechanisms accordingly.
23. One respondent suggested that Arqiva should not be allowed unilaterally to adjust the charges, including in the event of a change in the number or mix of sharers of common infrastructure or as a result of a force majeure event. We note that the application of these principles is subject to adjudication in any event.
24. One respondent commented that customers should not automatically bear the risk of exchange rate fluctuations. Ofcom and the CC agree and the provision has been deleted. However, a provision has been added to recognize that Arqiva will revalidate forecast costs published in reference offers periodically in advance of entering into a new agreement.

### ***Appendices 11 and 12, paragraph 4***

25. One respondent suggested that total time of service availability was not the only relevant measure for service credits. Arqiva agreed and the provision has been amended accordingly.

***Appendices 11 and 12, paragraph 7***

26. One respondent suggested that customer responsibilities should be subject to a threshold of reasonableness. Arqiva agreed and the provision has been amended accordingly.

***Appendices 11 and 12, paragraph 10***

27. One respondent suggested that limitations on customer liabilities should also be subject to caps. Arqiva agreed and the provision has been amended accordingly.

***Appendices 11 and 12, paragraph 11***

28. One respondent suggested that a high-level definition of force majeure should be included. Ofcom said that such a provision would be overly prescriptive for the purposes of these principles, the application of which is, in any event, subject to Adjudication. We agree and do not intend to make any amendment.

***Appendices 11 and 12, paragraph 16***

29. One respondent suggested that regard should be had to the period of any relevant licence when setting the term of agreements. Arqiva agreed and the provision has been amended accordingly.

***Appendices 11 and 12, paragraph 18***

30. One respondent suggested that provision should be made for Arqiva to provide transitional assistance generally as agreements approach expiry. Arqiva agreed and the provision has been amended accordingly.