

Partner Angus Henderson
Contact Ara Margossian
T +61 2 9263 4224
amargossian@gtlaw.com.au
Our ref AJH:AYM:0220273
Your ref 0220273



LAWYERS

23 February 2009

By email

Richard Home and David Cranston
Communications Group
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3000

Email: digitalradio@acc.gov.au

Dear Mr. Home and Mr. Cranston,

Digital radio access undertaking – further issues

We act for Commercial Radio Australia Limited (**CRA**), which represents the eligible joint venture companies (**EJVCs**) that have lodged digital radio access undertakings with the Australian Competition & Consumer Commission (**ACCC**).

The ACCC has sought CRA's views in respect of the following issues:

- 1 where an access seeker initiates a review of the access charges pursuant to the Pricing Principles, whether all other access seekers should also be able to participate in the price review process; and
- 2 in the event that an EJVC decides to invest in a separate transmission tower for redundancy purposes, whether access seekers should be able to 'opt in / opt out' of the ability to have broadcasts provided over the backup transmission tower (and therefore, not pay the portion of access charges associated with the backup transmission tower).

CRA's views in respect of these issues are set out below.

1 Participation by all access seekers in an Access Seeker Initiated Price Review

The most recent version of the access agreement provided on behalf of EJVCs on 23 January 2009 provided a mechanism for an access seeker to initiate a review of the access charges for multiplex capacity.

The proposed price review process includes an obligation on the EJVC to notify all other access seekers of the initiation of a price review process by an access seeker but does not currently incorporate a process for the provision of cost information to those other access seekers, or the explicit right for those other access seekers to make submissions as part of the review process.

CRA is amenable to revising the access agreement to provide access seekers with the following:

- where a price review has been initiated by an access seeker, an obligation on the EJVCs to provide all other access seekers with the same information as that which is provided to the access seeker that initiates the price review process; and

Gilbert + Tobin

2 Park Street
Sydney NSW 2000
Australia

GPO Box 3810
Sydney NSW 2001

T +61 2 9263 4000
F +61 2 9263 4111

DX 10348 SSE

www.gtlaw.com.au

- the ability for all access seekers to provide the EJVC with submissions in relation to the price review in the same manner as the access seeker that initiates the price review process.

Accordingly, CRA would not object to the following:

- amending clause 5.3(e) of Schedule 2 of the access agreement as follows (see mark-up):
 - “(e) *In the event that the Multiplex Licensee receives a valid request for an Access Seeker Initiated Review (as determined in accordance with clause 5.3(d)), the Multiplex Licensee will, within 30 days of receipt of such a request (or such other period as may be agreed between the Parties):*
 - (i) *provide the Access Seeker that lodged the valid request for an Access Seeker Initiated Review with the following:*
 - (A) *an estimate of the fixed recurring charges that it reasonably considers should apply following the completion of the Access Seeker Initiated Review;*
 - (B) *the reasons for any proposed changes in the level of the fixed recurring charges, as described in clauses 5.3(a)(i)-5.3(a)(iv); and*
 - (C) *such data that the Multiplex Licensee, acting reasonably and in good faith, considers is reasonably necessary for the Access Seeker to verify that the fixed recurring charges estimated by the Multiplex Licensee are consistent with the Pricing Principles, including but not limited to data setting out the various cost elements described in clauses 3.2 and 3.4; and*
 - (D) *such other information that the Multiplex Licensee considers appropriate; and*
 - (ii) *provide all other Access Seekers with the following:*
 - (A) *a notice that an Access Seeker Initiated Review has been lodged by an Access Seeker; and*
 - (B) *the same information provided to the Access Seeker that lodged the request for an Access Seeker Initiated Review, as described in clauses 5.3(e)(i)(A) – 5.3(e)(i)(D).”*
- amending clause 5.3(f) and (g) of Schedule 2 of the access agreement as follows (see mark-up):
 - “(f) *Within 30 days of receipt of the information described in clause 5.3(e)(i), ~~each~~ Access Seeker may (but is not obliged to) provide the Multiplex Licensee with any views or comments it may have in respect of the fixed recurring charges estimated by the Multiplex Licensee.*
 - (g) *The Multiplex Licensee will consider any views or comments received from ~~each~~ Access Seeker under clause 5.3(f) in good faith. The Multiplex Licensee may revise the fixed recurring charges, if, after having considered any such views or comments in good faith, it forms the opinion that it is necessary to revise the fixed recurring charges to ensure consistency with the Pricing Principles.”*

2 Opt in / opt out of access to redundant tower sites

CRA does not support the inclusion of a mechanism in the access agreement that provides access seekers with the ability of 'opt-out' of broadcasts over a backup transmission tower (and therefore avoiding the need to pay the portion of access charges associated with that backup tower).

Investment in a backup transmission tower facility represents standard engineering practice in the broadcasting sector. Such investment would only occur over the medium and long term. To minimise upfront costs to the industry associated with the introduction of digital radio, it will not occur in the initial years of digital radio and would only occur once there are a sufficient number of digital radio listeners to justify such investment.

The proposal put forward by the Community Broadcasting Association of Australia (**CBA**A) in its submission to the ACCC for an 'opt out' arrangement is overly simplistic and would raise a number of technical and operational issues for EJVCs if they decided to invest in a backup transmission tower facility.

First, a backup transmission tower facility would ordinarily be designed to replicate the first tower facility. In the context of digital radio, this would mean that the design of multiplexing equipment on the second site would be identical to the design on the first in the sense that it would be designed to accommodate the same number of access seekers and the various fractions of multiplex capacity and bit rates that they would acquire on the first site.

If an 'opt out' arrangement was implemented, the design of digital radio multiplexing equipment would differ between the two sites, such that the second site would be designed to accommodate only the number of access seekers that 'opt in' to receiving services from the backup tower.

This raises a number of issues:

- there will be costs associated with different equipment designs between the two sites – these costs would need to be recovered from the access seekers that 'opted out' of acquiring services on the backup transmission tower, on a cost causality basis; and
- as the design will vary between the two sites (and transmission between the two sites will not be synchronised), the multiplex transmission stream will not be identical between the sites and it will not be possible to have seamless cutover of services from the first transmission tower to the second transmission tower in the event of an outage on the first transmission tower. This will result in a time lag/loss of service for all access seekers that have decided to 'opt in', thereby creating a lower quality of service for these broadcasters and undermining the main reason for having a backup transmission tower in the first place (i.e. continuity of digital radio broadcasting services).

In addition, an 'opt out' arrangement would impact on the ability of the EJVC's engineers to undertake testing of, and operations and maintenance works on, the digital radio multiplexing equipment (and time available to the EJVC's engineers to perform these activities). For example, it will be necessary to perform periodic testing of the digital radio multiplexing equipment on the second transmission tower facility and to perform scheduled operations and maintenance activities on equipment on the first tower facility.

Where there are two transmission towers, it is generally the case that the performance of testing, and operations and maintenance, is scheduled for daylight hours (given the issues associated with accessing towers at night) and performed over a maintenance window of several hours (given that the

second tower is available for continued service delivery during this maintenance window).

In the event that there are some access seekers do not 'opt in' to acquiring services over the second transmission tower site, it will not be readily possible for engineering staff to undertake operations and maintenance procedures in accordance with these standard engineering practice, as this would result in some access seekers being offline for extended periods of time and would increase the cost and complexity associated with the performance of testing, and operations and maintenance services. Again, this would undermine the one of the primary reasons for having transmission tower redundancy in the first place.

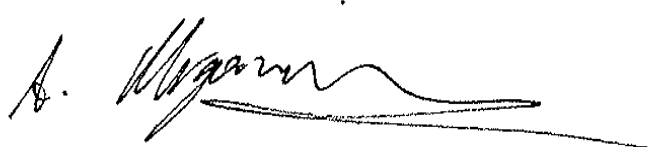
In light of the above, CRA does not support an arrangement where access seekers are able to 'opt in / opt out' of the ability to have broadcasts provided over the backup transmission tower (and therefore, not pay the portion of access charges associated with the backup transmission tower).

Please do not hesitate to contact us if you have any further questions.

Yours faithfully



Angus Henderson
Partner
T +61 2 9263 4018
ahenderson@gtlaw.com.au



Ara Margossian
Lawyer
T +61 2 9263 4224
amargossian@gtlaw.com.au