

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of H2O Networks Ltd

A Notification of this proposal was published on 25 July 2008

Whereas:

- (A) On 17 July 2008, H2O Networks Group made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the United Kingdom in accordance with section 107(1) of the Act and the notification published by Ofcom by virtue of the Transitional Provisions under section 107(2) of the Act on 10 October 2003 setting out their requirements with respect to the content of an application for the electronic communications code and the manner in which such an application is to be made;
- (B) On 25 July 2008, Ofcom published a notification of their proposal to give a direction applying the Code to H2O Networks Group in accordance with section 107 of the Act;
- (C) Ofcom have considered every representation made to them about the proposed Direction;
- (D) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-

1. The electronic communications code shall apply to H2O Networks Ltd for the purposes of the provision by H2O Networks Ltd of an electronic communications network to have effect in the United Kingdom.

Definitions and Interpretation

2. In this Direction, unless the contrary intention appears-

"Act" means the Communications Act 2003;

"H2O Networks Ltd " means H2O Networks Ltd (registered company number 04896797);

"Ofcom" means the Office of Communications; and

"Transitional Provisions" means sections 408 and 411 of the Act, the Communications Act 2003 (Commencement No.1) Order 2003 and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003.

3. Except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions cognate with those referred to in this Direction shall be construed accordingly.

4. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

5. This Direction shall take effect on the day it is published.

Steve Unger
Competition Policy Director

**A person authorised by Ofcom under paragraph 18 of the Schedule to
the Office of Communications Act 2002**

3 September 2008

Explanatory Statement

1.1 On 17 July 2008, H2O Networks Ltd applied for the electronic communications code (the “Code”) for the purposes of the provision by it of an electronic communications network. This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the Notification published by Ofcom (by virtue of the Transitional Provisions in the Act) on 10 October 2003 under section 107(2) of the Act.

1.2 On 25 July 2008, Ofcom published a notification under section 107 of the Act in which it proposed to give a direction applying the Code to H2O Networks Ltd. Representations on the proposal were invited by 26 August 2008. Ofcom received two representations one of which supported the proposal to grant Code powers to H2O Networks Ltd and the other commented more generally about the installation of ducting. Neither of these gave Ofcom cause to reconsider its position and it has therefore decided to proceed and grant Code powers to H2O Networks Ltd.

1.3 In considering H2O Networks Ltd’s application, Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty set out in section 3(1)(b) “to further the interests of consumers in relevant markets, where appropriate by promoting competition” and the first Community requirement set out in section 4(3)(a) to promote competition “in relation to the provision of electronic communications networks and services”. In this case, H2O Networks Ltd has started to roll out point to point dark fibre solutions to businesses on a national basis by utilising the sewerage network. Code powers would, however, enable it to roll out its network more rapidly and therefore compete on a fair basis with companies offering comparable services who already benefit from such powers.

1.4 In addition to the requirements of section 3 and 4 of the Act, Ofcom has also had regard to its duties set out in section 107(4) of the Act. These are set out below.

The benefit to the public of the electronic communications network by reference to which the Code is to be applied to the applicant

1.5 H2O Networks Ltd utilises the sewerage network to offer high speed broadband services and bespoke point to point solutions to businesses on a national basis. It also intends to offer residential broadband services to, initially, customers in two so-called fibre cities (Bournemouth and Dundee) and has committed to invest heavily in these areas. H2O Networks Ltd’s services will therefore potentially increase competition in the provision of broadband services to such areas. Also, as its network deployment is fibre-based, it intends to provide broadband speeds which are likely to exceed those that traditional copper-based networks are capable of providing and therefore will add a different dimension to the marketplace.

1.6 Beyond this, H2O Networks Ltd’s application stated that the company was willing to share spare fibre capacity to other networks which would potentially increase wholesale competition and decrease the need for alternative network infrastructure

1.7 For these reasons, Ofcom considers that Code powers would benefit the public given that choice would be increased via both an increase in retail (directly) and wholesale (indirectly) competition.

The practicability of the provision of the network without the Code

1.8 H2O Networks Ltd already provides point to point dark fibre solutions to, amongst others, a number of public sector organisations. It considers, however, that Code powers would enable it to carry out street works in a more coordinated fashion and obviate the need for specific licences under section 50 of the New Road and Street Works Act 1991 (“NRSWA 1991”). H2O Networks Ltd’s application explained, nonetheless, that it attempts to minimise street works by working in conjunction with the water companies and that it intends to continue to coordinate works (with water companies) where possible.

1.9 The Code enables, amongst other things, communications providers to construct their networks and, in particular, states that they “shall, for the statutory purposes, have the right to....(a) install electronic communications apparatus, or keep electronic communications apparatus installed, under, over, [in, on] along or across...a street.” The Code is therefore a means by which these networks could be deployed more quickly.

1.10 The Code would therefore assist H2O Networks Ltd in that it would enable it to access its present network and pursue further build plans more readily.

1.11 In addition, H2O Networks Ltd’s principal competitors already possess Code powers and therefore it would be placed at a distinct competitive disadvantage should it need to carry out street works on a case-by-case basis and require street works licences under the NRSWA 1991.

1.12 For these reasons, Ofcom considers that it should grant Code powers to H2O Networks Ltd to enable it to deploy its network as soon as it considers commercially viable.

The need to encourage the sharing of the use of electronic communications apparatus

1.13 As noted in paragraph 1.6, H2O Networks Ltd is willing to share spare fibre capacity with other electronic communications service providers.

Whether the Applicant will be able to meet liabilities as a consequence of:

(i) the application of the Code; and

(ii) any conduct in relation to the application of the Code

1.14 H2O Networks Ltd has already committed to invest heavily in the two previously mentioned fibre cities and has confirmed that it would intend to open an Escrow account to meet any liabilities that might occur following a relevant event as defined in the Electronic Communications Code (Conditions and Restrictions) Regulations 2003. It considers, however, that any potential liability would be limited to

reinstatement of public highways following street works because it does not intend to install any apparatus above ground on public highways.