

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of Spyder Facilities Limited

A notification of this proposal was published on 13 January 2005

Whereas:

- (A) On 5 December 2004, Spyder Facilities Limited made an application for the electronic communications code (the "Code") for the purposes of the provision by it of a system of conduits in the United Kingdom which Spyder Facilities Limited is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks;
- (B) Spyder Facilities Limited made the above-mentioned application 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 its 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;
- (C) On 13 January 2005, Ofcom published a notification of its proposal to give a direction applying the Code to Spyder Facilities Limited in accordance with section 107 of the Act;
- (D) Ofcom did not receive any representations relating to the proposed Direction as set out in the explanatory statement accompanying this Direction;
- (E) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with its 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 Spyder Facilities Limited for the purposes of the provision by it of a system of conduits in the United Kingdom which Spyder Facilities Limited is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks.

Definitions and Interpretation

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

"Act" means the Communications Act 2003;

"Spyder Facilities Limited" means Spyder Facilities Limited (registered company number 03636773)

"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.

Stephen Unger
Director of Telecoms Technology, Competition and Markets

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

10 March 2005

Explanatory Statement

1.1 On 5 December 2004, Spyder Facilities Limited ("Spyder") applied for the electronic communications code (the "Code") for the purposes of the provision by it of a system of conduits in the United Kingdom which Spyder is making available, or proposing to make available, for use by providers of electronic communications networks for the purposes of the provision by them of their networks. 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 (the "Notification").

1.2 The Notification requires providers of systems of conduits to supply written evidence showing that they are making available, or proposing to make available, their systems of conduits for use by providers of electronic communications networks. Spyder has confirmed that its system of masts would be dedicated to mobile operators and would be used to house their antennae. Spyder's website (www.spydersites.co.uk) sets out a list of locations where electronic communications network providers may site their antennae. In addition, Spyder has provided written evidence showing that it already has established agreements with providers of electronic communications networks relating to the provision of sites for mobile antennae.

1.3 On 13 January 2005, Ofcom published a notification of its proposal to give a direction applying the Code to Spyder in accordance with section 107 of the Act. Ofcom asked for any comments on its proposal to be made by 14 February 2005. No responses were received.

1.4 In considering Spyder's application, Ofcom has acted in accordance with its relevant general duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty in section 3(1)(a) "to further the interests of citizens in relation to communications matters" and the first Community requirement set out in section 4(3)(b) to promote competition "in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services". In this case, Ofcom believes that a direction might help to further the interests of citizens, as Spyder plans to lease space on its masts to one or (preferably) more mobile operators. This might reduce the need for multiple new masts.

1.5 In terms of section 4(3)(b), Spyder's system might help to facilitate competition in the provision of mobile communications, as its network of masts and associated facilities might enable mobile operators to roll out third generation mobile services more rapidly. Spyder explained that mobile operators would be able to use its masts and would not, as a result, need to erect such masts themselves. This could lessen the costs associated with installing third generation networks.

1.6 Ofcom has also considered its duties under section 4(6)(b) of the Act. This section requires Ofcom to carry its duties "in a manner which, so far as practicable, does not favour...one means of providing or making available such a network....over another". In light of this duty, Ofcom should not favour subterranean conduits for fixed communications over vertical conduits used for radio communications.

1.7 Ofcom has also had regard to its duties set out in section 107(4) of the Act, as set out below.

The benefit to the public of the conduit system by reference to which the Code is to be applied to the applicant

1.8 Spyder's installations are designed to enable multiple operators to house their antennae on the one mast. Mobile operators might, therefore, choose to use Spyder's facilities rather than erect their own masts. Any decision would need to be based on the costs that they would otherwise incur in installing their own masts measured against Spyder's charges. It is therefore conceivable that Spyder's network of masts might alleviate the need for multiple masts in the one area. In addition, Spyder believes that its system of masts might allow for third generation mobile services to be rolled out more rapidly than would otherwise be the case. This is because mobile operators would not need to install masts themselves.

1.9 For these reasons, Ofcom believes that Spyder's system of masts might directly (in terms of facilitating 3G rollout) and indirectly (in terms of housing mobile operators' antennae) benefit the public.

The practicability of the provision of the conduit system without the Code

1.10 Spyder has already installed approximately 250 installations involving masts or antennae across the United Kingdom. It has achieved the installation of its current system of masts on the basis of agreements secured with private landowners. Spyder believes, however, that it could only achieve rollout of its system on a national basis with the benefit of Code powers. In its application, Spyder explained that it had considered whether or not mobile operators could exercise their own Code powers to install masts when it was necessary to site these on public land. In this case, Spyder would have run the system of conduits located on private land. However, as Spyder wishes to allow multiple operator access to its masts, it believes that it needs to own and install the masts to achieve this.

1.11 Spyder has also stated that it would ensure that its actions were in line with the Office of the Deputy Prime Minister's *Code of Best Practice on Mobile Phone Network Development*.

1.12 For these reasons, Ofcom believes that it would not be practicable for Spyder to install its masts in a prompt and efficient manner on a national basis without Code powers.

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

1.13 Ofcom considers that the evidence supplied by Spyder regarding the intended use of its conduit system indicates that Spyder is likely to enable multiple operators to use its network. Indeed, it is likely to be in Spyder's best interests to do so, as it would produce more income.

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 Spyder has confirmed that relevant funds to meet any liabilities would be put in place and acknowledges that such funds need to be put in place at least two weeks prior to the commencement of any works undertaken (if granted) under Code powers. A letter executed by Spyder's board of directors accompanied its application and, in this letter, its directors confirmed that funds would be put in place in a manner agreeable to Ofcom. In addition, Spyder explained that it only seeks to install infrastructure where there is a clear demand that that infrastructure is required. It does not install masts speculatively and therefore it does not expect that any masts that it installed would not be used.

1.15 Ofcom is therefore satisfied that Spyder would be in a position to put in place funds should it be granted Code powers.