

DIRECTION under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of Internet AIRworks Limited

A Notification of this proposal was published on 11 November 2004

Whereas:

- (A) On 28 October 2004 Internet AIRworks Limited 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 11 November 2004 Ofcom published a notification of their proposal to give a direction applying the Code to Internet AIRworks Limited in accordance with section 107 of the Act;
- (C) Ofcom did not receive any representations objecting to the proposed Direction as set out in the explanatory statement; and
- (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 Internet AIRworks Limited for the purposes of the provision by Internet AIRworks Limited of an electronic communications network to have effect in relation to the United Kingdom.

Definitions and Interpretation

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

"Act" means the Communications Act 2003; and

"Internet AIRworks Limited" means Internet AIRworks Limited (registered company number 5081688)

"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**

13 JANUARY 2005

Explanatory Statement

1.1 On 28 October 2004, Internet AIRworks Limited ("Internet AIRworks") applied for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network. The application was made in accordance with section 107(1) of the Communications Act 2003 (the "Act") and met 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 11 November 2004, Ofcom published a notification of its proposal to give a Direction applying the Code to Internet AIRworks in accordance with section 107 of the Act. Ofcom asked for any comments on its proposal to be made by 10 December 2004. No responses were received.

1.3 In considering Internet AIRworks' 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 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". The direction applying the code helps to promote competition by assisting Internet AIRworks in its endeavours to build infrastructure which will increase competition in the provision of electronic communications networks and services. In considering Internet AIRworks' application, 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 electronic communications network by reference to which the Code is to be applied to the applicant

1.4 Internet AIRworks proposes to install a wireless broadband internet communications network offering a variety of symmetrical speeds to fit customers' requirements. The use of wireless technology will allow Internet AIRworks to offer broadband services to communities beyond the reach of traditional fixed-based asymmetric digital subscriber line services. Also, as Internet AIRworks explained to Ofcom, its network will be capable of supporting symmetrical speeds in either direction. The topography of some of the areas in which Internet AIRworks intends to offer services required the company to come up with an innovative solution to overcome the limitations of radio waves and the vagaries of reception. Internet AIRworks has managed this with its proprietary technology.

1.5 Initially the network is being constructed in the Devon area. But Internet AIRworks intends to expand the network into other areas in the south west and therefore its wireless access technology could help to increase broadband penetration in some of the more remote areas of the region. More generally, it is also likely to increase competition in the provision of broadband services.

1.6 For these reasons, Ofcom believes that the proposed network would be of benefit to the public, as it would enable some customers to obtain broadband services which are not presently available to them. Elsewhere it is likely to increase competition in the provision of electronic communication services.

The practicability of the provision of the network without the Code

1.7 Internet AIRworks will need to install antennae near to customers' premises in order to provide high quality and reliable transmission. In the absence of Code powers, Internet AIRworks would need to rely on the Town and Country Planning process established in the Town and Country Planning Act 1990. This would require them to submit an application on each occasion that they wished to install an antenna. Internet AIRworks does not therefore believe that the Town and Country Planning process would provide a practicable alternative to Code powers. It would be unable to meet customers' requirements promptly. Internet AIRworks believes that it would be disadvantaged in comparison to Communications Providers who have Code powers and would not be able to realistically compete with them.

1.8 For these reasons, Ofcom believes that Internet AIRworks would benefit from Code powers and these would enable it to compete effectively with other Communications Providers.

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

1.9 Internet AIRworks has stated that it would be willing to share facilities where practicable and where agreement can be reached on the commercial terms for sharing of the facilities. However, Internet AIRworks' network would mainly consist of antennae that would be placed on pre-existing or newly installed poles and towers situated on private land. Internet AIRworks would not therefore be in a position to grant access to this land. This would be a matter for the landowner.

1.10 More generally, Internet AIRworks is aware of the restrictions and conditions to which it would in any case be subject to under the prior approval procedures established in the Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2001. This regime would require Internet AIRworks to liaise with interested parties before installing apparatus.

1.11 Ofcom notes that Internet AIRworks would not generally be in a position to agree to the sharing of infrastructure, as such infrastructure would be sited on private land. Nonetheless, Ofcom is of the view that where such infrastructure is not sited on private land, Internet AIRworks should consider any request to share that infrastructure.

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

1.12 Internet AIRworks has explained that it does not intend to, and nor does it expect to, install any apparatus on public highways and therefore it does not need, at this stage, to put funds in place to meet any potential liabilities. Internet AIRworks has nonetheless agreed that it would inform Ofcom, and agree an appropriate methodology to guarantee that sufficient funds would be available to meet any potential liabilities, should it find that it needed to install apparatus on public land.