



Tanya Rofani
Competition Policy Advisor
Ofcom
Riverside House
2a Southwark Bridge Road
London
SE1 9HA

8th May, 2009

WITHOUT PREJUDICE
CW 963: Dispute from BT against various operators about 0870 termination rates
Misrepresentation

Dear Tanya,

I am deeply disappointed that an email (attached) that you sent to one of our customers is misrepresenting the position with respect to Ofcom's 0870 intervention and implies that FleXtel could have given its customers more notice. I should not need to remind you that, due to material health and safety risks Ofcom decided to suspend the 0870 intervention in November, 2007.

www.ofcom.org.uk/telecoms/groups/nts_focus/

During that time Ofcom, re-examined the evidence and could have, and in FleXtel's opinion should have, reversed its policy decision. In May 2008, Ofcom validated its provisional concern and confirmed that it had made a gross error by introducing a potential H&S risk embedded in its 0870 intervention. Ofcom concluded that pre-call announcements (PCAs) were unsafe to use. (An issue that should have been obvious to Ofcom from the outset in 2005, as the International Telecommunication Union (ITU) forbids their use in its recommendations and the UK is a founder signatory of the ITU and is therefore bound by ITU rules).

Since the core consumer protection mechanism had now been lost, it seemed very clear to FleXtel and others in the industry that Ofcom was unlikely to be able to proceed. We engaged with Ofcom explaining that, with the loss of PCAs, there is now no incentive for Mobile Operators to stop overcharging for 0870 and other 08x service, the core issue in our opinion. This problem was clearly identified in the Varney report to the UK Treasury, as a key issue for the homeless and Vulnerable Citizens. This means that a major benefit of the intervention had now been lost.

It follows that no one in the industry could know how Ofcom was to proceed. Indeed our analysis makes it clear, it should not. For Ofcom to proceed without proper consumer protection would be ludicrous, if it wasn't such a serious matter. We understand that not proceeding would be politically embarrassing for Ofcom, but Ofcom has made a fatal error of judgement.

Only on the 23rd April, just over two weeks ago, Ofcom finally unveiled its proposed "solution". The deadline revealed was the 1st August, now less than three months away. The offered rates to FleXtel being actually made lower than those offered in the "gains from trade" determination. Ofcom's earlier attempt was found to be erroneous and thrown out by the Courts.

FleXtel immediately examined over 200 pages consisting of the Statement and the complex calculations with respect to the disputed rates, as set out in the draft determination.

<http://www.ofcom.org.uk/consult/condocs/0870calls/0870statement/>
<http://www.ofcom.org.uk/consult/condocs/resolve0870calls/>

Furthermore Ofcom has decided to proceed, basing its consumer protection mechanism from 0870 overcharging on “good chance”. This reliance on luck is astonishing for a regulator of Ofcom’s standing. We have submitted hard evidence that we believe proves that Ofcom is betting the wrong way.

However, the new revised rates, that are even lower than those offered over a year ago (prior to Ofcom suspending the whole process) has completely dumb-founded FleXtel, since Ofcom has never considered the impact of 0870-service closure and we had always requested a minimum of 4p/minute to survive. Ofcom new draft rates are now well under 1p/minute. Ofcom’s draft determination now proves that the Ofcom Statement is, in fact, unworkable.

Since Ofcom only permitted industry only three months to react, FleXtel had no choice but to recognise that, Ofcom was clearly determined to proceed with 0870, despite strong evidence that its Cost-benefit analysis was unsound.

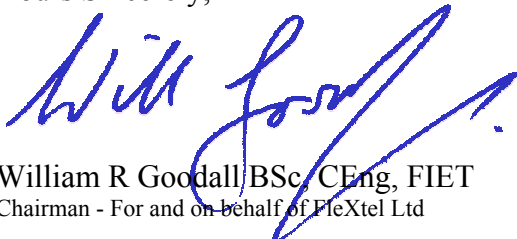
Last week FleXtel decided that it had a duty to warn its customers about the threat of closure, due to the parlous state of affairs, Ofcom has created for many low volume users, including many small businesses. FleXtel reacted in just 10 working days after notification by Ofcom of its revised regime for 0870.

Furthermore, for Ofcom to expect FleXtel to make speculative announcements, with respect to the future closure of 0870, is not reasonable. At no time has Ofcom firmly settled the matter and doubt in the details still remain. To be clear, no one in the industry could have had any knowledge of Ofcom’s final plans. Such a leakage would give competitive advantage. On the 16th January, BT went ahead with 0870 bundling, in line with Ofcom’s stated wishes. It presumably did this at its own commercial risk and had no knowledge of the final outcome, unless Ofcom acted improperly.

We would therefore ask you to rescind your statement, that FleXtel and others have had three years in which to warn its customers about closure. This is not the case. The April 2006 policy statement was seriously flawed and is therefore irrelevant to the future of 0870.

Unlike Oftel, Ofcom does not enjoy Crown Protection from liability for damages. However, FleXtel has no wish to go to the expense of engaging the Courts. Therefore as a simple efficient remedy, we would ask you to write to those concerned, with a corrective email or letter and to copy such emails or letters to me.

Yours Sincerely,



William R Goodall BSc, CEng, FIET
Chairman - For and on behalf of FleXtel Ltd