

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: **"Procedures for the Management of Satellite Filings: Charges and amendments to procedures"**

To (Ofcom contact): **Stephen Limb**

Name of respondent: **William G. Francis**

Representing (self or organisation/s): **Department of Telecommunications, Bermuda**

Address (if not received by email):

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Name **William G. Francis, Director of Telecommunications**



GOVERNMENT OF BERMUDA
Ministry of the Environment, Telecommunications and E-Commerce

Department of Telecommunications

Our Ref: DOT 204/11
Date: December 20, 2007

Mr. S. Limb
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United Kingdom

By email

Dear Mr. Limb

Re: Procedures for the Management of Satellite Filings: Charges and Amendments to Procedures

The Department of the Telecommunications of the Government of Bermuda welcomes the opportunity to comment on Ofcom's consultation on "Procedures for the Management of Satellite Filings: Charges and amendments to procedures".

This consultation notes that in response to the earlier consultation "Procedures for authorisation of satellite networks" of February 2005, most respondents "accepted the principle of fees, provided these were set on a cost recovery basis, transparent, proportionate and subject to consultation on detail". That consultation sought comments on the principle that Ofcom should aim to recover the overall costs it incurs in providing the range of services involved in submitting satellite network filings and the subsequent frequency coordination activities, to which we replied that such an aim would be reasonable and understandable. In reply to the second part of that question, we gave hypothetical examples of how costs could be calculated, and said that Ofcom's calculation of costs must be transparent, accountable, consistent, reasonable and equitable.

However, we do not believe that Ofcom has the power to charge satellite operators, nor do we believe that Ofcom is able to apply such charges against the Overseas Territories or Crown Dependencies. We also have concerns about how Ofcom calculates its costs.

Question 1: Are there any other options for cost recovery we should consider? If so, what are they?

- Ofcom's functions, as described, are a statutory duty
- Staff costs are therefore inescapable and "sunk"
- Ofcom cannot charge for performing this role

As section 22 of the Communications Act 2003 creates a statutory duty upon Ofcom, under section 28 of that act Ofcom is not able to charge for performing its functions as the notifying administration. Thus, Ofcom should regard the cost of staff salaries as a sunk cost rather than a fixed cost, as it is not possible for Ofcom to avoid this cost arising in the first place.

The consultation states that charging for such services falls within section 28 of the Communications Act 2003, under which Ofcom may provide a service to any person on such terms as they determine in advance or as may be agreed between that person and Ofcom. However, section 28 only applies to a service which is provided by Ofcom to a person in the course of carrying out their functions and is neither a service which Ofcom are under a duty to provide to that person; nor one in respect of which express provision is made by or under an enactment for authorising or forbidding the payment of fees or charges. References to providing a service to a person include references to a service consisting in the giving of advice to that person; the entry of his particulars in a register or other record kept by Ofcom otherwise than in pursuance of an express statutory duty to keep the register or record; or the taking of steps for the purposes of determining whether to grant an application for an entry in a register or record so kept.

As Ofcom has a duty to act as the national Administration it cannot charge for doing this. Further, as acting as the notifying Administration is regarded by Ofcom as part of the role of the national Administration, Ofcom cannot charge for doing this. Although Ofcom has a power to act as the notifying Administration on behalf of the Overseas Territories if so requested, as Ofcom regards the role of notifying Administration as inseparable from the role of national Administration, the same reasoning applies, the function is to be construed as a duty, and so Ofcom cannot charge the Overseas Territories for performing this function.

We have concerns about how Ofcom calculates the "cost" of fulfilling this duty. Although the consultation describes the salaries of the staff needed by Ofcom to perform its duty as a fixed cost, this duty is inescapable and so the cost, which is also inescapable, is actually a sunk cost. Similarly, Ofcom's proposals do not take into account work which Ofcom does not undertake, such as due diligence undertaken by the regulatory authorities in the Overseas Territories and Crown Dependencies. The variable cost of travel and subsistence is already recovered, as is the ITU processing charge. Whilst the ITU processing charge is predictable, the cost of travel and subsistence should be made more transparent and predictable. For example, if Ofcom were to adopt a scaled charge, it would be preferable to explain the determination of the scale at the beginning of the process and to provide an estimate of the effort required, supported by a timesheet at the passing of a period of time. This would be more transparent than simply presenting a timesheet of hours worked. Such a model would also need to take into account the work undertaken by the local regulatory authorities in the Overseas Territories, to avoid duplication.

As the management of filings is part of Ofcom's spectrum management functions, and as Ofcom's spectrum management functions are funded by grant-in-aid from Her Majesty's

Government, there is no true “cost” to Ofcom which Ofcom needs to recover. Even if Ofcom were to recover this cost, it is unlikely that Ofcom would have the power to retain the revenue through the mechanism of publication in the Tariff Tables, as Ofcom proposes, and so the cost would not truly be recovered.

Although we have not formally seen the Memorandum of Understanding between Ofcom and Her Majesty’s Government, we understand that it is silent about the cost of Ofcom fulfilling its representative role, and we also understand that this was one of the issues which was to be agreed after Ofcom agreed to accept the role in principle. We are not aware of any agreement between Ofcom and Her Majesty’s Government on this, nor have we been consulted by the Foreign and Commonwealth about whether the Overseas Territories will be required to contribute towards any such arrangement.

Question 2: Do you agree with Ofcom’s choice of preferred option for the basis of setting cost-recovery fees for satellite filings and co-ordination? If not, what alternative would you propose and why?

Our response to this question is hypothetical, as the Department does not believe that Ofcom currently has the power to charge fees for these services. However, if Ofcom had the power to charge such fees, the Department’s preferred option would be a form of subjective fees, combining elements of Ofcom’s proposals. In addition, it is important that local due diligence, preparatory and support work undertaken by the local regulatory authorities of the Overseas Territories is taken into account, so as to avoid the unnecessary duplication of work and associated increase in costs to all involved.

The principles of Ofcom’s suggested approach, recording work undertaken according to staff timesheets, appear essentially sound and reflects practices common in professional service provision, although professional service providers are also usually required to hold insurance cover, and may be required to present regular summaries of work undertaken or estimates of time and costs for work to be undertaken: Ofcom’s proposals are silent about these practices, how they would be adopted, and whether there would be any associated increase in Ofcom’s costs and administrative burdens.

Question 3: Do you agree with the proposal that the Procedures should be amended so that, before submitting a request for co-ordination to the ITU, Ofcom should accept evidence of the existence of construction and launch contracts, or a firm date on which they are expected to be signed as a sufficient basis for submission of a request for co-ordination to the ITU?

The Department is concerned that this proposal is inadequate, as it still appears to require a firm date for signature, which does not serve the purpose of increasing flexibility or reflecting commercial reality. These contracts will have to be signed and executed at some point, and demonstrating progress towards this should be adequate. Regular discussion with satellite operators throughout the early life of the project should be sufficient to ensure that this process is adequately tracked. The information is only vital for licensing under the Outer Space Act and for securing insurance cover, both of which are within the responsibility of the BNSC rather than Ofcom, and for filing notifications under Resolution 49, which can be done after the network is brought into use.

Question 4: do you agree that Ofcom should suppress filings at the ITU if the operators request it to do so without inviting expressions of interest from other UK operators?

We agree that Ofcom should suppress filings if the operator requests this. If an operator wishes to withdraw, but is indifferent to whether the filing is withdrawn, and if Ofcom can see benefit, then there might be occasions when assignment to another operator might be suitable, however, it goes without saying that the operator should first be able to seek an alternative operator, or partner, to exploit the filing.

The Department of Telecommunications is grateful for the opportunity to provide these comments, and we hope that Ofcom find them useful and will take them into account in developing its response to the consultation. We note also the letter from the Director of the Communications Commission of the Isle of Man to Ofcom, and Ofcom's response of 19th December. Having due regard to our comments above, we are considering this matter further and if it is appropriate, then we will submit supplementary comments as invited.

Yours sincerely,



William G. Francis, CCP
Director of Telecommunications
