



Submission

In Response to

Consultation Document

“Rules of Practice and Procedure 2007 – Notice of
Proposed Rule Making (“the Notice”)

The succeeding comments are not exhaustive and Digicel's decision not to respond to any particular issue raised by the OUR or any party does not necessarily represent agreement, in whole or in part with the OUR's or that party's position on these issues,; nor does any position taken by Digicel in this document mean a waiver of any sort of Digicel's rights in any way. Digicel expressly reserves all its rights. Any questions or remarks that may arise as a result of these comments by Digicel may be addressed to:

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On May 14, 2007 the Office of Utilities Regulation (“OUR”) published the Notice for public consultation. We welcome the opportunity to provide comments on the Notice. Our comments on the specific provisions are set out below, so too are generic comments on the subject matter of the Notice.

Specific comments on the text of the Notice

Rule 1.1(a)(2)

1. The term “interested person” has not been defined. We recommend that a definition be included in the final version of the document and that the definition makes it clear that interested person is wide enough to encompass any person who is affected or likely to be affected by the implementation of the rules.
2. In this same paragraph the Notice states that the OUR “may” take the comments of interested persons into account. The obligation should clearly not be discretionary. If the OUR wishes to truly engage with those affected by its decisions then the text should be revised to make it clear that the OUR “**shall**” take such comments into account before reaching a decision. This requirement would not of course preclude the OUR from choosing to disagree with a respondent, but it should however be required to set out its reasons for doing so, in the interests of transparency.

Rule 1.1(a)(3)

3. If the rules are not in compliance with natural justice or the Act which authorizes their promulgation, there is no basis for the ‘limitation’ provision which requires challenges to the validity of a Rule to be made within 12 months.

Rule 1.1(b)

4. The Notice provides that where there is a suspension of the ordinary rules in extraordinary circumstances, the reasons for this suspension must be

published in writing. Will these reasons be subject to review or assessment of those affected, or will the OUR have absolute discretion to declare such circumstances?

5. It is not clear what types of emergency situation the OUR envisages would be caught by this provision. However, such a significant departure from the normal rulemaking process should only be justified in the most exceptional circumstances. The term “emergency” must therefore be clearly defined. We recommend that policy guidelines be published on the type of emergency which would justify the departure from the normal process. It is also essential that the decision of whether a situation could be properly classified as an emergency must be made by the OUR with the full consultation and agreement of the Minister.

Rule 1.2

6. All the topics here with the exception of treatment of correspondence and confidential information properly fall under the OUR’s statutory function. The OUR should confirm which power it is seeking to rely on to create rules on confidential information which may bind third parties or interested persons.

Rule 1.3

7. It is not clear that the OUR Act empowers the OUR to make such orders. Notwithstanding this, a “Declaratory Order” would always be subject to administrative or judicial review and therefore it is not accurate to state that such an order can ‘conclusively declare’ the rights of contending parties.

Rule 1.7

8. As the working hours of the OUR are from 8:00 am to 5:00 pm, it should be possible to file official documents within the same time period.

Part 2

9. The Notice states that “the Office shall in its discretion” adopt consultative processes. This discretion is of course limited to the power granted which is granted to the OUR under any relevant statute.

Rule 3.1(d)

10. If (as it appears) the OUR is exercising a quasi-judicial function, it cannot adjudicate solely on the basis of correspondence between the parties which may not encompass each party’s complete case. All the evidence in such circumstances may not be disclosed in correspondence. Whenever there is a dispute, each party must be allowed to present its full case to the Adjudicator, and not simply to exchange documents between themselves.
11. Also, if it is evident that an exchange of correspondence will not be sufficient to settle the issue, then what is the timing for taking the necessary steps to resolve the matter? Are the parties required to start the dispute process ab initio?

Part 4

12. Who will constitute the quorum and how will the quorum be determined?
13. The Notice states that at such hearings, the OUR shall not be bound by “technical rules of evidence”. The term should be defined to avoid ambiguity.

Rule 4.1.1(a)

14. A party may not seek any relief from the OUR other than by statute. Other grounds of relief are properly the purview of the Court. As a creature of statute, the OUR has no other power than that given by the statute and therefore, the phrase “other authority” should be deleted.

Rule 4.2(b)

15. It is not clear under which power the OUR considers that it is authorized to consider whether a company is of ‘good standing’. This should be confirmed.

Part 6.1(a) & 6.2(a)

16. Publication of notices, decisions and all non-confidential documents etc. should not only be published in Gazette and/or in a newspaper having wide circulation, but also routinely published on the OUR website. This should help to avoid unnecessary delay and ensure that all parties have visibility of relevant decisions, a fact which is fundamental to a transparent decision making process.

17. As there is a right of appeal against the decision of the OUR or at the least, a right to request a reconsideration by the OUR of its own decision, written decisions are crucial. They will form the basis of the affected party’s grounds of appeal. The decision therefore should not take effect until after it is delivered in written form so as not to prejudice the Applicant’s ability to mount an effective and comprehensive appeal.

18. Notice of all decisions taken by the OUR will be made public within 5 working days. However in Rule 6, decisions relating to individuals will be issued no later than 30 days after the Decision is issued. Please explain the reason for the significant divergence in publication dates.

Rule 6.2(b)

19. Decisions of the OUR may be served by mailing a certified copy to all parties on record who have provided contact details. In the interest of fairness, certified copies should also be sent to all affected parties.

Rule 6.4

20. The objective of a Declaratory Order is to clarify the meaning of any rule, regulation, statute etc. It is therefore imperative that the OUR makes it clear that in providing such clarification it in no way extends the scope or applicability of the legal instrument which it is intended to clarify. Further, as a Declaratory Order has the potential to affect the legal position of the parties affected, in the interest of fairness and transparency it must be open to consultation to interested parties prior to publication.

21. Where the OUR is obliged by law to consider a particular question and make a Declaratory Order, the refusal to do so is a breach of its statutory duties for which judicial review is appropriate. In these circumstances, OUR does not have the discretion not to issue the necessary order.

22. Where a Declaratory Order is made by the OUR on its own initiative, the OUR should confirm whether or not it would also bind the parties affected.

Part 7

23. It is not clear under which statute the OUR considers that it is empowered to prescribe ADR and therefore this should be clarified. In any event, the Notice confirms that the ADR process does not preclude the parties from exercising their own rights under any statutes, regulations or rules. Please explain how the OUR will deal with any issues concerning the consistency of outcome reached via ADR, as opposed to any other body which may examine the same matter.

24. Is every dispute brought before the OUR subject to ADR/Mediation? Please confirm which OUR officers are assigned to carry out this function and whether they have the requisite skill, qualification and independence from the OUR to undertake this role. It is clear that such ADR discussions are without prejudice and as such, ought not to be disclosed before the OUR while the matter is being resolved by it in its quasi-judicial capacity.

Rule 7.1(4)

25. If a settlement is not reached before the date specified by the parties and no extension has been agreed, it is not clear what process will then take place. Are the parties required to start the dispute process ab initio?

Rule 8.2

26. What is required to be filed with the applicant's application for reconsideration? Since the OUR would only have given a Notice of its decision, which does not include the written decision and reasons, the applicant will have little information to support its application that the OUR had erred in fact or law at the time of filing. Therefore, additional grounds for reconsideration should include: alleged breaches of procedure, impropriety e.g. alleged fraud, undue influence etc.

Part 9

27. Where the OUR determines that information deemed and released to it as confidential by the applicant, is not in fact confidential, the applicant should be allowed the time and option of seeking the courts intervention or withdraw the information. It is critical to the process of applying to the OUR for the recognition of any rights granted under the Act, redress of any perceived grievance or breach of right, that the applicant has comfort in releasing sensitive information with the assurance that it will not be

made public without him being afforded the chance to protect it. He should be given ample time to seek the **court's intervention** at the very least be allowed to withdraw his application in order to prevent the release of the information.

28. In cases where the OUR is satisfied that the information submitted is of a partially confidential nature, it may order disclosure of an abridged version of the submitted information. Who will be responsible for abridging this document-the OUR itself or the party submitting the document. If it is the OUR, will the submitting party be afforded an opportunity to comment on its satisfaction with the abridged version prior to disclosure?

Part 12

29. It is unclear as to the reason why the types of licences (detailed in pages 24-25) which are included in the Act should be repeated in the rules. Similarly pages 26 -32 outline existing procedures that have nothing to do with Rules. In these instances the rules merely repeat what the Act already states. The relevant pages are therefore unnecessary and should be deleted.

30. Section 71 of the Telecommunications Act states:

71. Office may make rules.

71. (1) The Office may make rules subject to affirmative resolution prescribing any matter required by this Act to be prescribed by such rules or any matter that it considers necessary or desirable for the effective performance of its functions under this Act."

The OUR under Part 12 has not actually prescribed anything nor created any "rule". If the OUR is to invoke Section 71 then it must clearly identify

the rule it is creating, so that there is certainty among the licensees that it seeks to regulate.

31. The application fee of \$65,000.00 should be sufficient to cover the processing of each application including responding to public comments and attending at, and making submissions to the OUR. The applicant is responsible for his costs for preparing the application and information pertinent to the application; however he cannot be exposed to unlimited liability. In the interest of legal certainty the OUR should make a more realistic estimate of the costs to be incurred in adjudicating on the application and this should be the charge that would be applied.
32. The application for a licence under the OUR Act and the Telecommunications Act is made to the OUR and the licence or renewal is granted on recommendation by the OUR. What provisions exist for the Minister to consider an application which has not been recommended by the OUR? As the final arbiter, the Minister ought to be able to call for an application and review the analysis of same by the OUR in situations where the OUR has not seen it fit to recommend that the licence be granted. As an alternative, the OUR should be required to make a recommendation to the Minister on every application, whether or not the recommendation is in the applicant's favour.
33. The Notice states that the reasons for refusal to grant a licence will be made available "as soon as is practicable". The OUR should confirm a set timescale within which the reasons for refusal would be disclosed.
34. Is the re-application procedure only available post-refusal, or will the applicant be afforded an opportunity to amend its application during

negotiations with the OUR where issues are raised which can easily be resolved?

35. If the renewal of a telecommunication licence is delayed and/or if a party wishes to challenge a decision to refuse renewal, the Applicant must not be put at a commercial disadvantage. This issue is extremely important to ensure continuity of business services, as in the Reference Interconnect Agreement, an automatic right of termination exists in the event that one of the parties does not have the requisite licence. Therefore, the OUR and Minister should co-ordinate their activities so as to ensure that it is possible for the Applicant to continue to provide service under licence until such time as the renewal process is completed or the validity of the refusal determined by a court.

Schedule 1 (paragraph 2)

36. In the interest of transparency (a requirement which is set out in paragraph 1 of the Schedule) if the OUR has already decided on a favoured approach by the time of publication, this should be declared in the document, so that respondents may focus their comments accordingly.

Paragraph 10.4

37. Digicel has significant concerns with the OUR's position that it intends to place less weight on the parts of responses which are supplied on a confidential basis. Parties must have the opportunity to make full and frank disclosure to the OUR in any response. Respondents will be deterred from doing so if the OUR chooses to place less weight on such data, which in many cases will be essential to the OUR's assessment of an issue. Therefore, this position is likely to adversely affect the OUR's ability to make fully informed decisions on the basis of all relevant facts (including

those which may be commercially sensitive). Therefore, the OUR cannot be correct in this regard and should correct the provision accordingly.

Paragraph 10.5

38.If the OUR decides that it is in the public interest for a claim for confidentiality to be set aside, then the respective party must have the opportunity to defend its claim for confidentiality or refer the matter for judicial determination prior to publication.

Paragraph 12

39.All non-confidential responses should be placed on the OUR's website for public scrutiny.

General comments on OUR decision making process

Division of responsibility

40.In the introduction (Page vii) the OUR advises that principles which guide the OUR in its decision-making process come inter alia from the Concise Law dictionary. One of the principles is that “a man should not be judge in his own cause;”

41.Accordingly, given the administrative structure of the OUR where there is no independent Board or Commission which governs the organization and the OUR has not only an investigative function, rulemaking function and a decision making function; it is unclear how the OUR can escape from being a judge in its own cause. There is an inherent flaw in the structure of the organization which compromises the OUR's decision-making process and places it at odds with the very principles by which it seeks to be guided.

42. Of great concern is the fact that the OUR gives notice of the rules it intends to adopt, allows persons the opportunity to comment on the rules and then after reviewing the comments can proceed to adopt the rules that it intended to adopt in the first place. There ought to be an independent third party which examines the OUR's proposed rules, the comments that have been made and then makes a final decision. This would be more in keeping with rules of natural justice and administrative law.

43. The Director General and the Deputy Director Generals who form the most senior management tier of the OUR and comprise the executive of the organization under the proposed rules take on quasi-judicial functions/responsibilities which leave licensees subject to an intrinsically flawed and contradictory process. It is difficult to imagine how the executive of the regulator can objectively make findings and rulings on its own processes.

Governance structure

44. Despite the definition of the Office as being the OUR, the Office appears to be an entity separate from the OUR. Please see page 10 Part 4 on proceeding before the Office. Indeed Section 1 of the Second Schedule of the Office of Utilities Regulation Act states that "*The Office shall consist of the Director General and such number of Deputy Directors-General as may be appointed pursuant to this Schedule.*"

45. The Rules assert that the Office is an impartial independent body. The Office is in effect a separate administrative and quasi-judicial entity from the OUR, operating within the OUR, comprised exclusively of the OUR's most senior management. The Office makes the rules and takes the decisions which govern both the OUR and the entities subject to the jurisdiction of the OUR. The Office under the rules has within its remit the very suspension of the rules of the OUR. This situation is exacerbated by

the fact that the Secretary of the Office is an employee of the OUR who under Part 10 (10 (b) has the responsibility to “coordinate with the General Counsel to ensure enforcement of the Office’s Determinations and Directives, etc.” The ability of the members of the Office and employees to effectively separate their roles and functions in the OUR from their status as members of “the Office” is questionable and warrants the seeking of a judicial declaration on the point. In this regard please note the following from the Draft Telecommunications Policy issued by the Ministry of Industry technology Energy and commerce:

“4.2 Policy Element – Governance Structure

(a) Policy Issue

The governance structure currently used at the OUR and the SMA does not separate the investigative and adjudicative functions. The regulatory procedures are; therefore, open to challenges on the grounds that they do not satisfy the rules of natural justice.”

46. Additionally the Jamaican Court has already adjudicated on the issue of whether a statutory body should have the power to adjudicate upon matters upon which it has itself investigated and itself laid the complaint. In Jamaica Stock Exchange vs. Fair Trading Commission the Court of Appeal held that such a combination of powers or functions amounts to a clear breach of natural justice.

Absence of clear timescales for OUR action

47. A concern that Digicel has with the Notice is the absence of clear timescales within which the OUR will take action. This has been done in a

number of limited circumstances (e.g. Rule 8.3(b)), but this is very much the exception, rather than the rule.

48. It is clear that the OUR wishes parties to adhere to a number of strict deadlines for the submission of documents, launching of challenges etc. however the OUR is not bound by a similar requirement to take action in an expeditious manner. The requirement for the regulator to take effective and decisive action to address market failures is one that is explicitly recognized throughout Europe and is contained within The Framework Directive itself:

“Dispute resolution between undertakings

*1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within **four months except in exceptional circumstances.** [our emphasis] The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.¹”*

49. It is essential that the OUR will seek to resolve disputes quickly and efficiently so as to minimize the detrimental affect on consumers which result when parties are not directly interconnected or are prevented from launching new services for which there is consumer demand. The absence of clear guidance from the OUR on the timing that it will take to accept, investigate and resolve disputes must be addressed. Therefore,

¹ http://eur-lex.europa.eu/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf

we request that the necessary amendments to be included in a revised version of the Rules of Practice and Procedure. As this is a matter of fundamental importance to parties which will be affected by the OUR's decisions, a further round of consultation on the revised Notice should precede the adoption of any final text.

Conclusion

We once again thank the OUR for the opportunity to comment on the Notice. We look forward to continued engagement in the process which will lead to the adoption of the final Notice on Rulemaking. As outlined above, we have a number of significant concerns with the draft version of the text and these should be addressed fully before the Notice is finalized. We remain at the OUR's disposal should it wish to discuss any of the points raised in more detail.