Office of Utilities Regulation

RECONSIDERATION DECISION

IN RESPONSE TO APPLICATIONS BY DIGICEL PURSUANT TO SECTION 60 OF THE TELECOMMUNICATIONS ACT 2000 FOR RECONSIDERATION OF THE DECISION OF THE OUR TO ISSUE PROCEDURES FOR THE RESOLUTION OF COMPLAINTS/DISPUTES PRESENTLY BEFORE THE OFFICE

OFFICE OF UTILITIES REGULATION

March 2009

DOCUMENT TITLE AND APPROVAL PAGE

DOCUMENT NUMBER: TEL 2009/2 RCN/01

1. DOCUMENT TITLE:

Response to Applications by Digicel pursuant Section 60 of the Telecommunications Act 2000 for Reconsideration of the Decision of the OUR to issue Procedures for the Resolution of Complaints/Disputes presently before the Office.

2. PURPOSE OF DOCUMENT

This document contains the Reconsideration Decisions of the OUR regarding the Procedures for Resolution of Disputes presently before the Office.

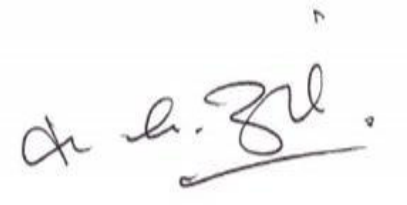
3. ANTECEDENT DOCUMENTS

Document Number	Description	Date

4. APPROVAL

This Document is approved by the Office of Utilities Regulation and the Decisions therein become effective **March 5, 2009.**

On behalf of the Office:



Ahmad Zia Mian
Director General
Date: March 4, 2009

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OFFICE OF UTILITIES REGULATION (OUR) RESPONSES TO APPLICATIONS BY DIGICEL PURSUANT TO S.60 OF THE TELECOMMUNICATIONS ACT 2000 FOR RECONSIDERATION OF DECISIONS BY THE OUR

APPLICATION #1

1.1 Digicel, by way of an application dated the 21st day of November, 2008 applied for reconsideration of the Office's decision "PROCEDURES FOR RESOLUTION OF COMPLAINTS/DISPUTES PRESENTLY BEFORE THE OFFICE" dated the 7th day of November, 2008 pursuant to s. 60 (4) of the Telecommunications Act 2000 ("the Act").

1.2 This reconsideration of 21st day of November aforesaid was submitted without prejudice to a further reconsideration application of the same date which challenged substantively the decision of the Office to –

(a) apply Dispute Resolution Procedures (DRPs) which have not been the subject of the "public consultation" required by Section 4 and 4 (2) of the Act;

(b) "arbitrate an alleged dispute filed by OCEANIC DIGITAL JAMAICA LIMITED (MiPhone) purportedly under S. 29 (4) of the Telecommunications Act of an alleged dispute submitted in relation to call termination charges of the applicant".

1.3 Digicel in the said document requested that the following decisions contained in the DRPs be reconsidered, namely:

" a. The definition of dispute is unnecessarily wide (and) lends itself to nuisance disputes filings and harassment by an aggrieved competitor.

b. The Office's decision to disallow the costs of the application and/or defence to a dispute.

c. The Office's decision not to allow cross-examination of the parties on their affidavits."

1.4 Digicel also sought the following reliefs in its application:

" a. That the definition of dispute be expanded to incorporate the following:

i. The requirement that the applicant provide conclusive evidence of the opening of negotiations in respect of an alleged dispute;

ii. The requirement that the applicant provide a comprehensive statement of the matters covered by the dispute;

iii. The requirement that the applicant provide a statement confirming that the dispute is not covered by any existing agreement between the parties;

iv. The requirement that the applicant provide a statement confirming that opposing party has confirmed its intention to provide none of the requested relief to the applicant;

v. That the DRP incorporate the right of a party to apply for the costs of the procedure and to be awarded the said costs by the tribunal hearing the dispute, such costs to be determined by taxation by the Registrar of the Supreme Court or Court of Appeal."

2.1 **Grounds for re-consideration as set out by Digicel**

GROUND I.- ALLEGED BREACH OF S. 4 (2) OF THE ACT/FAILURE TO ENGAGE IN PUBLIC CONSULTATION

" 4 The Office has misdirected itself in law in defining a dispute in the manner set out in the Final Draft of the DRP"

" 5. There should be no "alleged" addressing of an opposing party in the definition of a dispute. Rather, the definition should require that the disputant provide conclusive evidence of the opening of negotiations over a dispute, a comprehensive statement of the matters covered by the dispute, a statement confirming that the dispute is not covered by any existing agreement between the parties, and that the opposing party has confirmed its intention to provide none of the requested relief to the disputant."

" 6. The Office is required by s. 4 (2) of the Act to observe the rules of natural justice. Application of these rules dictates that the Office should not commence dispute proceedings against a party without a rigorous and exhaustive determination that a dispute in fact exists."

2.1 Office Response

In response, the Office reiterates its position as stated in its letter of November 7th, 2008:

"As regards (b) above, and with specific regard to Digicel's claim that there is no dispute, the Office is of the view that this is a matter to be determined as part of the process. Notably, the Procedures afford the party/parties with whom a dispute is alleged (to exist) (**emphasis added**) ample opportunity to respond to this allegation. Thus Digicel, as is the case with all similar parties, will be in a position to state its views as to whether or not a dispute exists and to fully ventilate its claim in that regard.

As a practical matter, it could hardly have been contemplated that the party alleging a dispute would first have to secure the agreement of the party or parties against whom a dispute is alleged, that there is indeed a dispute before making a reference to the Office. It is instructive in this regard, that Section 34(1) of the Act (dealing with pre-contract disputes) (**emphasis added**) allows either of the parties engaged in a negotiation to unilaterally refer a matter to the Office on the basis that there is a dispute. It therefore follows that any party may submit a claim to the Office without reference to the party with whom a dispute is alleged as to whether there is indeed a matter that is in dispute. In the face of this, the Office considers that it would be improper and premature for it to attempt to settle beforehand the issue of whether a dispute exists even before engaging the process that is provided to deal with such claims.

In this regard we anticipate that a party with whom a dispute is alleged (to exist) (**emphasis added**) will, where it is relevant, choose to dispute its existence as part of its response to the Notice of Request for Regulatory Intervention."

2.2 With regard to the matter of the definition of the term dispute, wherein Digicel argues that the definition of dispute is too wide and may encourage nuisance complaints, the Office stands by its definition as previously set out in the DRPs save and except the amendments outlined below. The amended section reads as follows:

> "**Dispute:** A dispute may be defined as any matter brought to the Office by a party for regulatory intervention in which that party raises an issue by argument or assertion with regard to the existence of a legal duty or right or over the extent and manner of compensation that may be claimed by the contentious party for a breach of such duty or right. A dispute arises when the party in contention has

addressed the opposing party and that party has had an opportunity to respond and such response is not satisfactory to the party in contention."

3.1 **"GROUND II-. DISALLOWING COSTS**

7. The decision to disallow the costs of an (a) dispute application or the defence of a dispute is flawed and incorrect and the Office has advised itself badly in law on this point. Costs are a normal feature of the legal environment in which the Office and telecommunications providers in the Island operate. Furthermore, costs in law normally follow the event, meaning that the successful party is ordinarily entitled to their costs of the proceeding.

8. Disallowing costs will open the door even further to nuisance complaints and disputes, particularly form (from) disgruntled and inefficient competitors who may see the dispute process as the only way possible to slow down, harass, harangue, or otherwise engage a successful telecommunications provider.

9. The costs of a public voice provider properly prosecuting or defending a dispute can easily run into millions of dollars. The shareholders of the public voice providers expect and demand that the companies will take all possible legal and reasonable steps to protect the companies' interests and its revenue. This means that any application to the Office demands due diligence and the focused attention of multiple professionals, including attorneys-at-law, accountants and financial analysts, economists, and telecommunications and networking specialists.

10. The costs of these professionals allied to the potential for a vast amount of time spent in the preparation of a claim or defence means that if a successful party is denied its costs, the effect will be to burden the provider with additional otherwise unrecoverable administrative costs which ultimately become a part of its billing structure and cannot inure to the benefit of the ultimate consumer of the services provided by the public voice network provider.

11. The legal system in the Island already contains a comprehensive system of taxation of costs which has been in effect for decades. The Registrars of the Supreme Court and Court of Appeal are expert at determining the appropriate level of costs for various applications and hearings, and for the products of pleadings, affidavits, submissions, and the like. This system is available without cost to the parties and the Office simply by incorporating it into the DRPs. There is therefore no reason why the Office should disallow costs of dispute filings particularly where the parties are competing telecommunications providers.

12. If the Office wishes to apply discretion to the award of costs, it may certainly do so, since in principle every tribunal will have discretion over this award. So for example, the Office may limit costs where the unsuccessful party is a consumer with a valid though unsuccessful claim. Such considerations, however, cannot apply to commercial entities, particularly the telecommunications providers themselves."

3.2 **Office Response**

Neither the Office of Utilities Regulation Act (as amended) nor the Telecommunications Act (2000) gives the OUR a power to award costs. In light of this, it is the Office's position that the DRPs remain silent as to the issue of the power to award costs. In the absence of an express or implied statutory power, an administrative tribunal such as the OUR has no such jurisdiction to award costs, as per the cases of ***William v Reefer 17 WIR 26, Burton v British Railways Bld. [1983] 1 AER 1094.***

4.1 "GROUND III- REFUSAL TO ALLOW CROSS-EXAMINATION

13. S. 4 (2) (b) of the Act provides that in relation to the persons the Office is required to consult with, specified in 4 (2) (a), the Office shall:

(b) give to such persons an opportunity to make submissions to and be heard by the Office;

14. S. 4 (2) (b) of the Act therefore contemplates that the Office will conduct an oral hearing in relation to the dispute it intends to intervene in and exercise its statutory power of arbitration over.

15. Where an oral hearing is given, it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; (d) allow comment on the evidence and argument on the whole case….

16. In Nicholson v. Secretary of State for Energy (1978) 76 LGR 693, the Court found that "failure to allow cross-examination by an objector at a statutory inquiry has led to the quashing of the Secretary of State's decision".

17. There is an acknowledged right to cross-examination in adverse matters where the parties are allowed to give evidence: In R. v. Newmarket Assessment Committee ex p. Allen Newport Ltd. [1945] 2 All ER 371 at 373, the MacKinnon LJ stated

… I say that I think it is unnecessary to determine that question because it seems to me that there is another ground upon which counsel for the applicants is right in saying that he is entitled to an order to quash this determination.

That ground is this. It is propounded by counsel for the applicants, and is not disputed by counsel for the respondents, that, in performing their functions under sect 37, it is elementary that the assessment committee must act judicially, hear all parties who are entitled to be heard, and act only upon evidence given in the presence of those ***parties after giving them an opportunity of cross-examining the witnesses opposed to them*** *and adducing any evidence of their own. (****emphasis added****).*

….18. The right to cross-examine is all the more significant in dealing with complaints and disputes, the resolution of which may have the effect of dispossessing a public voice carrier of millions of dollars of revenue. The Office has therefore erred in law in concluding that it may proceed with dispute resolutions which are intended to be of a binding nature, without allowing parties the opportunity to cross-examine their opponents on the evidence submitted."

4.2 Office Response

The Office has considered Digicel's submissions regarding cross-examination and its response is as follows:

It is the Office's view that it is a part and parcel of the natural justice principle that when a hearing is granted it should be fair. A hearing may be oral or in writing. Whatever format the hearing takes however it should involve an opportunity by one party to respond to the evidence of the other, ***H Sabey & Co. Ltd. v Secretary of State for the Environment [1978] 1 AER 586;*** where an oral hearing is granted a party should ordinarily be allowed an opportunity to challenge evidence given against him. The Judicial Committee of the Privy Council has expressed the view that although there is no absolute right to cross-examine when administrative tribunals conduct an enquiry the right **may arise where a request to cross-examine is made**, ***University of Ceylon v Fernando [1960] 1 AER 631 @ 641I.*** The general principle is stated at 638C:

"From the many other citations which might be made, their Lordships would select the following succinct statement from the judgment of this Board in *De Vertevil v Knaggs:*

"Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the

complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."

4.3 In light of the above, the DRPs have been amended to include a provision for Cross-Examination, which states as follows:

"9. Cross Examination

Parties shall be heard by the Complaint/Dispute Resolution Panel in full, by way of affidavit or *inter presentes*, and questions regarding submissions shall be raised by the Panel.

The right to cross-examine the other party's witness may be afforded by the Office where, a party applies for permission to cross-examine and:

(i) The Panel is of the view that there are relevant issues of fact the determination of which will involve a decision as to which deponent is speaking the truth, and/or;

(ii) There are competing expert opinions and a determination has to be made as to which expert's evidence is to be preferred, and/or;

(ii) The Panel thinks that in all the circumstances cross-examination of a particular deponent or deponents will be of assistance in the process of resolving the complaint or dispute.

(iv) The Panel shall have the discretion to limit the time for cross-examination of each witness, and shall give directions to this effect prior to the date of the hearing."

5. APPLICATION #2

In their second application of even date, 21st November, 2008 Digicel (Jamaica) Ltd. applied for a reconsideration of the decision issued by the Office of Utilities Regulation ("the Office") on 7th November, 2008, as follows:

"

a. The Office's decision to apply Dispute Resolution Procedures (DRPs) which have not been the subject of a public consultation.

b. The Office's decision to arbitrate an alleged dispute filed by OCEANIC DIGITAL JAMAICA LIMITED (MiPhone), purportedly under s. 29 (4) of the Telecommunications Act of an alleged dispute submitted in relation to call termination charges of the applicant.

5.1 In this application, Digicel also sought the following reliefs:

a. The dismissal by the Office of the subject application for determination of call termination charges filed by MiPhone.

b. Costs of this reconsideration application to be determination by taxation in the Supreme Court of Judicature of Jamaica and ordered to be paid to the applicant by MiPhone.

5.2 GROUNDS FOR RE-CONSIDERATION

Digicel contends that the Office has misdirected itself in law and has based its decision on material errors of fact and law in including in the aforesaid determination that it may apply the DRPs to the claim by MiPhone and in accepting for dispute resolution the claim by MiPhone for determination of Digicel's call termination charges.

"GROUND 1 – BREACH OF S 4 (2) OF THE ACT/FAILURE TO ENGAGE IN PUBLIC CONSULTATION

3. Section 4 of the Act requires that in making a decision under the Act, the Office shall inter alia, observe the rules of natural justice.

4. S 4 (2) of the Act provides:

(2) In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe

the rules of natural justice, and, without prejudice to the generality of the foregoing, the Office shall –

(a) consult in good faith with persons who are or are likely to be affected by the decision;

(b) give to such persons an opportunity to make submissions to and to be heard by the Office.

5.3 5. The Office has erred in law in its reliance on the authority of Office of Utilities regulation v. Mossel (Jamaica) Limited and Cable & Wireless Jamaica Limited Claim No. 2007HCV03153, and has erroneously misinterpreted this decision as declaring that the Office has the power pursuant to the Act to set its own procedures regarding the resolution of disputes."

5.4 Office Response

In response to Digicel's view regarding the Office's decision to apply dispute resolution procedures that have "not been the subject of public consultation", insofar as the rules as drafted presently are specific to the disputes in question, the Office stands by its position as set out in its statement of October 3, 2008 which postulated that:

"….it is submitted that the fact that the Office has signalled its intention to apply the procedures in question to the resolution of disputes generally, does not operate to prevent their application to the current disputes namely, as between the parties Digicel, C&WJ and MiPhone, insofar as it is clear that it has consulted with the affected parties and have afforded each an opportunity to be heard. To be clear, the Office, pursuant to Section 4(2) (a) of the Act, has consulted with the parties in the instant disputes, these being the parties who are likely to be affected by the decision at present. These persons, as evidenced by the myriad correspondence received by the Office, have been given the opportunity to make their submissions to the Office on the proposed DRPs.

Nonetheless, the Office also accepts the view that procedures that are intended to be of general applicability should be made subject to similar consultation and so to the extent that it proposes to follow through on its expressed intention to apply these procedures generally, the Office may after resolving the instant matters, at a later stage make the DRPS subject to further and wider public consultation.

At present, however, the Office is of the view that it has the power pursuant to the Act to set its own procedures regarding the resolution of disputes. The Office holds the view that, in light of the judgement in Claim No. 2007/HCV-03153, the Office may hear

disputes where there is an interconnection agreement in place and shall consult before it makes its decisions but the mode and procedure by which such decision is arrived at is within the discretion of the Office to set."

5.5 The Office remains of the view that since it proposes to confine the use of the DRPs to the specific disputes presently before it, it is sufficient that it has consulted extensively at present with those parties who are identified as parties to the said disputes.

5.6 GROUND II LACK OF JURISDICTION TO RESOLVE DISPUTE

With regard to its second submission, Digicel is of the view that the Office has no jurisdiction to hear the alleged disputes as set out below:

(i) An Application by OCEANIC DIGITAL JAMAICA LIMITED (MIPHONE) pursuant to Section 29(4) (5) of the TELECOMMUNCIATIONS ACT (2000) (the ACT)

(ii) An application by OCEANIC DIGITAL JAMAICA LIMITED (MIPHONE) for Determination by the OFFICE OF UTILITIES REGULATION (The OFFICE) of call termination charges by MOSSEL JAMIACA LTD. (DIGICEL).

5.7 Digicel is of the view that the dispute as lodged with the Office is not a valid dispute, stating inter alia that:

"….(a) Claim is not a valid dispute

11. S. 29 of the Telecommunications Act, 2000, provides in part:

(4) The Office may, either on its own initiative in assessing an interconnection agreement, or in resolving a dispute between operators, make a determination of the terms and conditions of call termination, including charges.

12. On 1st April, 2005, the applicant and MiPhone entered into a Network Connection Agreement (NCA) in respect of the interconnection between the applicant's and MiPhone's public voice mobile networks. The said agreement constitutes an interconnection agreement for the purposes of the Act.

13. The said agreement provides inter alia:

> 3.1 Each party agrees to pay all charges (the "charges") based on the other Party's Services usage……
>
> 3.2 Either party may change its Charges for services described in the attachments or any subsequent …

14. The patent intention and effect of these provisions is that the parties have agreed without reservation to pay whatever rate was charged by the other party and there can therefore be no question of a "dispute" in relation to the termination charges of the applicant payable by MiPhone.

15. The allegations in MiPhone's alleged dispute application constitute a series of irrelevances which do not provide a foundation that there is a dispute between the parties. The arrangement entered into by Digicel with other operators is neither MiPhone's business, nor do such arrangements form the basis for a complaint of an abuse of dominant positions or the basis for the Office's intervention under s. 29 (4) of the Act, since that section does not deal with or raise the issue of dominance or abuse of a dominance position…..

16. A dispute suggests that there is an issue in the NCA about which there is disagreement in relation to its interpretation or application. There is absolutely no such disagreement in this case. MiPhone is neither accusing Digicel of doing something which the NCA forbids or of not doing something which the NCA requires, nor is it suggesting that there is an interpretative lacuna in relation to the clauses which deal with the setting of rates and charges.

17. The Office therefore lacks jurisdiction to intervene in the claim by MiPhone and has erred in law in concluding that there is a dispute between Digicel and MiPhone requiring its intervention pursuant to s. 29 (4) of the Act. The application filed by MiPhone has not made a single claim that suggests that Digicel is in breach of any term or condition of the NCA. Furthermore, nothing in MiPhone's purported dispute relates to any services requested or issues, including charges, that fall outside the ambit of the existing NCA.

18. What this complaint seeks to do is to trample on one of the most basic principle of civil and international law - Pacta Sunt Sevanda (agreements must be kept). The parties voluntarily have entered into an agreement without any duress and where MiPhone now, under new ownership, wants to change agreement and renege on parts already agreed and signed up to – this is not in fact a genuine dispute but rather a disingenuous solution to the problem of being bound to honour an agreement.

19. As a matter of law, a dispute can only arise if a claim has been made. In Fastrack Contractors Ltd. v Morrison Construction Ltd & Imreglio [2000] Adj. L.R. 01/04 the Court noted:

> *27. A "dispute" can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion. This is clear from a consideration of two decisions, one concerned with arbitration and the other with the dispute resolution procedure that is required to have been gone through in many civil engineering contracts before arbitration can be commenced. In the arbitration field, the Court of Appeal confirmed in Halki Shipping Corporation v Sopex Oils Ltd. [1998] 1 W.L.R. 726 that a "dispute", the existence of which is the statutory pre-condition of a party being entitled to enforce an arbitration clause and to have legal proceedings stayed for arbitration under the Arbitration Act 1996, has a wide meaning. The term includes any claim which the opposing party has been notified of which that party has refused to admit or has not paid, whether or not there is any answer to that claim in fact or in law. In the civil engineering field, the Court of Appeal, in Monmouthshire County Council v Costelloe & Kemple Ltd 5 BLR 83 held that clause 66 of the fourth edition of the ICE Conditions of Contract, which only allowed for arbitration where there was a dispute or difference that had already been referred to and decided by the engineer, required there to have been a claim by one party and its rejection by the other before a dispute or difference could be referred to the engineer. The Court of Appeal held that a rejection of a claim does not necessarily occur when the claim is submitted to the engineer or during subsequent exchanges of views in relation to that claim. A dispute only arises when the claim is rejected in clear language. An obvious refusal to consider the claim or to answer it can, however, constitute such a rejection.*

… … … … … … ….

23. The Office has erroneously concluded that the determination of the jurisdiction to intervene is a matter to be determined as a part of the intervention and dispute resolution process. Reference to the authorities cited show this conclusion to be false, and indicate that the Office is obliged before commenced the dispute resolution process, to make a proper determination of the jurisdiction to engage in the dispute resolution. The Office's decision by letter dated 7th November, 2008, falls far short of a properly conducted determination. The Office has not requested formal arguments, nor has the Office permitted oral submissions or replies by the parties involved.

(b) Parties have agreed on use of the courts or arbitration to settle disputes.

(i) The Court as first instance tribunal

24. The NCA provides inter alia:

> ***20. <u>GOVERNING LAW AND CONSENT TO JURISDICTION</u>***
>
> *This agreement shall be construed and enforced in accordance with, and the validity and performance hereof shall be governed by, the laws of Jamaica. The Parties hereby consent to the exclusive jurisdiction of the courts of Jamaica with respect to any dispute, controversy or other matter relating to or arising out of this Agreement.*

25. S. 31 of the Act provides:

> *31. Each term and condition in relation to the provision of interconnection services provided to each carrier shall be determined-*
>
> *(a) in accordance with the relevant references (sic) interconnection offer or any part thereof which is in effect in relation to the provision of those services;*
>
> *(b) where paragraph (a) does not apply, by agreement between the interconnection seeker and the interconnection provider; and*
>
> *(c) where neither paragraph (a) not (b) applies, by the Office acting as arbitrator pursuant to the arbitration rules referred to in section 34 (2).*

26. A further significant ground which the Office has failed to consider is that by the NCA, both Digicel and MiPhone have agreed that the court of first instance should a legitimate dispute arise between the parties, will be the courts of Jamaica. In <u>Cable & Wireless v Information and Communications Technology Authority</u>, March 2008, Cayman Islands Court of Appeal, Cable & Wireless failed in its application to seek judicial review of the Caymanian regulator's decision not to intervene and adjust interconnect rates in an existing interconnect agreement, freely entered into by Digicel and Cable & Wireless. By parity of reasoning, the Office cannot seek to displace the agreed forum for dispute resolution simply because it has been asked to do so by one party.

27. The combined effect of the statutory provision above and clause 20 of the NCA make it abundantly clear that the Office has no original jurisdiction to proceed to arbitrate or resolve any dispute arising under the NCA. Since in this case, neither party has issued a reference interconnect offer, s. 31 (a) is inapplicable. Since also, in this instance, the parties have agreed on their choice of forum for resolving disputes

in relation to the provision of interconnection services to each other, section 31 (b) applies to the exclusion of s. 31 (c).

28. It is submitted that the question of whether a legitimate dispute exists between the parties is itself properly to be submitted to the agreed forum before any other external sources of resolution are activated. In this instance, the Office's authority in so far as the NCA is concerned, is an external source of resolution, which ought therefore not to be the tribunal of first resort having regard to the agreement between the parties which sets out the clear intention of the parties to resort to the courts of the Island in the first instance.

29. The Court of course, can on a determination that a valid dispute exists, refer the dispute to the Office with the consent of the parties, or in lieu thereof, proceed to a full hearing and resolution of the dispute. However, the Office can assume no jurisdiction in the matter absent consent from the parties or an Order of the Court. As the consent of both parties has not been obtained, Digicel therefore submits that the Office has erred in law in assuming jurisdiction to proceed with the hearing of this complaint until the parties have completed the necessary court proceedings and obtained an Order from the court referring the matter to the Office.

(ii) Arbitration for settling disputes over amounts

30. Alternatively, the terms of clause 3.11 and particularly 3.11.5 of the NCA make it clear that where the dispute concerns amounts payable by one party to another, the model of dispute resolution is by resort to the arbitration process governed by the rules of the International Chamber of Commerce. Clause 3.11 reads:

3.11 Notwithstanding anything to the contrary contained herein, each Party to this Agreement shall have the right to withhold payment of disputed amounts that equal or exceed five percent (5%) of the total invoice for the period pursuant to the following terms and conditions:

> *3.11.5 If the Parties are unable to resolve the dispute within thirty (30) days of dispute notice receipt, they may, by mutual agreement, choose to extend the dispute resolution period by another seven (7) days. If the Parties do not choose to extend the dispute resolution period or at the expiration of the additional seven (7) day period, the dispute shall be referred to binding arbitration. Arbitration shall be governed y(by) the rules of the International Chamber of Commerce.*

31. Since MiPhone claims for a reduction in the termination rate of Digicel which far exceeds the 5% per cent minimum, any invoice to MiPhone from Digicel may become the subject of a disputed amount, and the procedure and provisions of 3.11 will apply.

32. Accordingly, whether the claim by MiPhone is determined to be in respect of a disputed amount, or is a dispute arising generally in the NCA, the Office has no jurisdiction to undertake an intervention in this claim as there are in place contractual procedures for the handling such disputes, procedures which also have the force of law by virtue of the provisions of the Act. "

5.9 Office Response

With regard to the above, and with specific regard to Digicel's claim that there is no dispute, the Office remains of the view that the issues as to jurisdiction to hear the matter, as well as the existence of a dispute, are matters to be determined as part of the Dispute Resolution process. These matters should be ventilated as part of the DRP process wherein, upon considering the submissions of all parties concerned, the Office shall decide as to whether it has the jurisdiction to hear the matter, once the Requests for Regulatory Intervention have been submitted and the relevant submissions heard by the Office.

With regard to the existence of the dispute, the Office stands by its views as expressed in its letter of November 7th, 2008 (quoted above and repeated below for emphasis), wherein it was stated inter alia that:

> "Notably, the Procedures afford the party/parties with whom a dispute is alleged (to exist) **(emphasis added)** ample opportunity to respond to this allegation. Thus Digicel, as is the case with all similar parties will be in a position to state its views as to whether or not a dispute exist and to fully ventilate its claim in that regard.
>
> As a practical matter, it could hardly have been contemplated that the party alleging a dispute would first have to secure the agreement of the party or parties against whom a dispute is alleged, that there is indeed a dispute before making a reference to the Office. It is instructive in this regard, that Section 34(1) of the Act allows either of the parties engaged in a negotiation to unilaterally refer a matter to the Office on the basis that there is a dispute. It therefore follows that any party may submit a claim to the Office without reference to the party with whom a dispute is alleged as to whether there is indeed a matter that is in dispute. In the face of this, the Office considers that it would be improper and premature for it to attempt to settle beforehand the issue of whether a dispute exist even before engaging the process that is provided to deal with such claims.

In this regard we anticipate that a party with whom a dispute is alleged (to exist) **(emphasis added)** will, where it is relevant choose to dispute its existence as part of its response to the Notice of Request for Regulatory Intervention."

The Office, having considered the submissions of all parties to the disputes presently before it, has amended the Dispute Resolution Procedures which are annexed hereto as **APPENDIX 1.**

APPENDIX 1

PROCEDURES FOR RESOLUTION OF COMPLAINTS/DISPUTES PRESENTLY BEFORE THE OFFICE

The Office will adopt the following process with a view to resolving complaints/disputes presently before it:

Definitions of Complaints/Disputes:

Complaint:

"A complaint is an alleged violation of any statute, rule, order, Licence, standard, or Decision which is within the Office's jurisdiction."

Dispute:

"A dispute may be defined as any matter brought to the Office by a party for regulatory intervention in which that party raises an issue by argument or assertion with regards to the existence of a legal duty or right or over the extent and manner of compensation that may be claimed by the contentious party for a breach of such duty or right. A dispute arises when the party in contention has addressed the opposing party and that party has had an opportunity to respond and such response is not satisfactory to the party in contention".

1. **Request for Regulatory Intervention**

   (i) All Complaints/Disputes for which regulatory intervention is required shall be in writing and in the English language and shall be in the form of a Notice of Request for Regulatory Intervention accompanied by an Affidavit in Support of Request for Regulatory Intervention duly sworn by the complainant before a Justice of the Peace. This affidavit formalises the request for intervention in the same manner as any other judicial or quasi judicial proceedings and shall contain a full description of the requesting party's complaint/dispute. This shall be accompanied by such supporting evidence and exhibits as is necessary to support the party's position.

   (ii) Any party to a complaint/dispute shall file two (2) copies of a Notice of Request for Regulatory Intervention accompanied by Affidavits in Support of Request for Regulatory Intervention, addressed to the Secretary to the Office. One (1) copy is to be used as a working copy by the Office during the proceedings and one (1) copy is to be filed for the Office's records.

For the Purposes of these Procedures, Filing shall be by hand delivery in the form of duly executed hard copies and shall be supplemented by an electronic copy. A matter shall be considered filled when received by the Office during the business hours of the Office of 8:30 a.m. to 4:30 p.m. All filings received after the Office's business hours shall be deemed filed as of the next business day.

(iii) The Notice of Request for Regulatory Intervention shall set out the names, addresses telephone number, facsimile number, and, if available, email addresses of the parties as well as the issues in the complaint/dispute to be set before the Office in summary, with the relevant date.

Affidavits in Support of Request for Regulatory Intervention shall include:

a. the name, address, telephone number, facsimile number, and, if available, email address of each party to the negotiations and the party's designated representative.

b. A list of the issues that have been resolved by the parties

c. A list of the unresolved issues and the position of each party with respect to those issues as well as all relevant documentation and correspondence; and

d. A description of the parties' efforts to resolve their differences by negotiation

As provided for in Rule 1 (iv) a copy of the Request for Regulatory Intervention is to be served on the other party, by the party requesting regulatory intervention. Service shall be deemed to have been effected upon receipt of evidence by the Office of acknowledgement of service.

Within (3) business days of service on the other party, the party requesting Regulatory intervention shall serve on the Office a copy of an acknowledgement of service on the other party in the matter. Such acknowledgment of service may take the form of an acknowledgement of receipt of the document.

Evidence of this service, in the event that service on the other party/parties to the dispute is unsuccessful, shall set out all reasonable attempts to effect service on the other party/parties to the dispute.

(iv) The Office shall, upon receipt of evidence of service, notify the party against whom the complaint has been made of the Request for Regulatory Intervention.

(v) The party against whom the complaint has been made shall file an acknowledgement of the Request and a statement of intention to contest or an admission of liability/responsibility with the Office within ten (10) business days of receiving the request and/or notification from the Office of the Request for Regulatory Intervention, whichever is earlier. The said party shall file its response within thirty business (30) days of receiving the request and/or notification from the Office. The response shall be accompanied by such evidence as is necessary to support the position of the party against whom the complaint has been made. The ten (10) business day response time period will begin to run once the party against whom the complaint has been made has been served and/or notified by the Office. As provided for in Rule 1 (iii) evidence of this service must be submitted to the Office within three (3) business days.

(vi) The party/parties against whom the complaint has been made shall simultaneously serve a copy of the response and supporting evidence on the complainant. The response shall be in the form of an Affidavit duly sworn before a Justice of the Peace.

(vii) The Office will, in the event that the timetable will not be met in these proceedings, notify the parties within five (**5) business days** of the change, providing reasons for the delay, along with a new timetable. For the avoidance of doubt, the Office reserves the right in its absolute discretion to increase the time for filing/service of any document required to be filed or served under these rules either upon the application of either party or on its own motion

(viii) (a): Where the Request for Regulatory Intervention concerns a dispute the Office may as a preliminary issue on its own motion or on the application of either party consider whether the dispute falls within the jurisdiction of the Office and/or whether the parties have consented to such jurisdiction. The filing of an acknowledgement of receipt of a Request is not without more to be taken as consent to the jurisdiction.

A decision on the question of jurisdiction is only to be made after giving all parties to the dispute an opportunity to make submissions. Any decision on the question of jurisdiction will be communicated to the parties in writing.

(ix) (b): Upon receipt of a Request for Regulatory Intervention the Office may in its discretion either on its own motion or upon the application of a party commence an investigation into the circumstances of the complaint or dispute. The Office reserves the right to determine whether or not to undertake or continue an investigation and without prejudice to the foregoing may refuse to undertake or continue an investigation if it is of the opinion that:

(a) the subject matter of the complaint is trivial;

(b) the complaint is frivolous or vexatious or not made in good faith;

(c) the complainant has deferred for too long the making of his complaint to the Office;

(d) the complainant does not have a sufficient interest in the subject matter of the complaint; or

(e) having regard to all the circumstances of the case, no investigation or further investigation is necessary.

(ix) (c): Any person or persons appointed to investigate a Request for Intervention will not be allowed to sit on any panel appointed to determine a dispute or complaint.

(ix) (d): The result of any investigation conducted on behalf of the Office shall be communicated to the parties to the complaint or dispute prior to the determination of the said complaint or dispute and the parties afforded an opportunity to comment thereon.

2. Complaint/Dispute Resolution Panel

The Complaint/Dispute Resolution Panel shall consist of one or more members of the Office. The panel may be advised on legal and technical issues by members of the OUR staff designated by the chairman of the panel.

The Office reserves the right and the sole discretion with regard to the constitution of the panel in terms of number of members as well as the selection of Chairman. The Office also reserves the right and sole discretion to engage such external advice and expertise as it deems fit and necessary for the purpose of providing opinion evidence on particular matters. The same panel shall sit in the event a meeting is required under Section 4.

3. Responses to specific questions posed by the Office of Utilities Regulation

(i) The parties are required to respond to any specific questions posed by the Office in relation to their respective complaints/disputes/responses in writing in the form of an Affidavit, within ten (10) business days of the receipt of the request.

(ii) The first party's response to the Office's questions, if any, shall be shared with the other party to the dispute, who shall be given an opportunity to comment on the response.

The first party shall be allowed to comment on any new allegation or matter raised. Upon receipt of these responses requested as well as further comments, and in the event that no additional information is required, and it is the view of the Office that no meeting is necessary, the Office, following its review of the information presented, shall issue its decision within forty five (45) business days following the receipt of the requested information.

(iii) If additional information is required after receipt of the response to the initial request as specified, the Office shall within five (5) business days request such other information and the party/parties to whom such request is made shall comply with this second request within ten (10) business days.

(iv) The Office may in its discretion either on its own motion or on the application of either party decides to give to the parties an opportunity to make an oral presentation of their respective cases.

If a decision is made to allow for an oral presentation the Office shall first convene a meeting with the parties at which it will seek to have agreed and if not agreed will give directions as to:

(a) The date for the oral presentations;

(b) The Order in which such presentations will be made;

(c) Whether all the evidence will be by Affidavit or whether some and if so what evidence will be tendered orally;

(d) Whether or not there will be cross examination of affiants and/or deponents and if so the persons to be cross-examined;

(e) Time limits for the said oral presentation;

(f) The time limit for cross examination;

(g) Such other procedural matter as may be relevant and conducive to an expeditious and fair proceeding.

4. Notice of further meeting

The Office reserves the right under its sole discretion, to request a meeting with the parties in the event that it deems it necessary to obtain further and better particulars if the responses to specific questions requested under Section 3 are deemed insufficient by the Office. Once it is clear that commercial negotiations between the parties have proven fruitless and regulatory intervention is needed (as evidenced by the application to the Office), the Office reserves the right to meet with the parties to further ventilate the issues concerned.

The Office shall, if a meeting is deemed necessary, make arrangements for the hearing of the disputes and shall notify the parties not less than ten (10) business days before the meeting of the date, time and location of the meeting.

5. Procedures for Hearing Matters at Meeting

Where the Office has determined in accordance with Rule 4 that a meeting is to be held or that parties are to be summoned to a meeting as part of the Dispute Resolution process:

(i) The parties to the complaint/dispute shall be entitled to be heard and to present such further particulars/evidence.

(ii) A party, who wishes to adduce further evidence at the hearing of the complaint/dispute, shall be required to disclose such evidence in the form of an Affidavit, to the Office (in the same manner as the initial Request for Regulatory Intervention) , as well as to the party against whom the complaint has been made, in advance of the meeting. The other parties will be given five (5) business days to respond in the interest of procedural fairness and transparency.

(iii) The Office shall have broad discretion in conducting the hearing of the compliant/dispute and has the authority to regulate its own proceedings having regard to the rules of natural justice.

(iv) Verbal responses at the meeting shall be recorded by a steno typist or by such other means as the Office considers appropriate.

(v) The transcript shall be circulated by the Office to the parties within thirteen (13) business days , and the parties shall signify their respective acceptance of the accuracy of their positions with regard to the verbatim words as recorded by the signing the transcript and returning it to the Office within three (3) business days of receipt of the transcript.

6. Determination of the Office

The Office after considering all the submissions of the party/parties shall endeavour to issue its final decision within forty five (45) business days after the conclusion of the meeting.

(i) The final decision and report of the Office shall be based upon the result of its investigations and the evidence produced before the Panel, submissions of the parties and applicable law and shall represent a fair balance between the legitimate interests of both parties. The Office may in its discretion agree with the position of one or more of the parties of any or all issues or may offer an independent resolution of the issues.

(ii) The final decision and report of the Office may include among other things:

(a) A ruling on each of the issues presented for resolution by the parties.

(b) A statement of any conditions imposed on the parties in order for the parties to comply with the provisions of the Telecommunications Act.

(c) A narrative report explaining the Office's rationale for each of the rulings included in the final decision.

(d) The final decision and report of the Office in the matter is a matter of public record and shall be delivered to all parties of record in the dispute.

(e) Such other Order, Direction, Declaration and/or Recommendation as to the Panel appear just.

(iii) The final decision and report of the Office in the matter is a matter of public record and shall be delivered to all parties of record in the dispute.

7. Compliance with Decision of the Office

These procedures and any Office decision that flows from them will be subject to the same regulatory provisions as all Office decisions, pursuant to Section 60(4) to (8) of the Telecommunications Act (2000) which states:

"…(4) A person who is aggrieved by a decision of the Office may, within fourteen days of receipt of that decision, apply to the Office in the prescribed manner for a reconsideration of the matter.

(5) An application under subsection (4) shall be heard only if the applicant-

(a) relies upon new facts or changed circumstances that could not, with ordinary diligence have become known to the applicant while the matter was being considered by the Office; or

(b) alleges that the decision was based upon material errors of fact or law.

(6) The Office may, in relation to an application under subsection (4), confirm, modify or reverse the decision or any part thereof.

(7) Where a decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made.

(8) Where an application is made under subsection (4)-

(a) the Office may, on an application by the applicant order that the decision shall not take effect until a determination is made under subsection (6)…"

The Office has a discretion, under Section 60 (8) (a) to suspend the decision (upon an application by the applicant) until it has made a determination. This provision shall apply to these Rules in a similar manner, as prescribed by law.

The parties shall comply in full with the decision of the Office subject to such rights as accorded by applicable legislation.

8. Confidentiality

(i) A party to a complaint/dispute may:

(a) inform the Office that, in the party's opinion, a specified part of a document contains commercially sensitive information; and

(b) request that the Office not give a copy of that part to another party

(ii) On receiving a request, the Office shall:

(a) inform the other party or parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates; and

(b) ask the other party or parties whether there is any objection to the Office complying with the request.

(iii) If there is an objection to the Office complying with a request, the party objecting may inform the Office of its objection and the reasons for it.

(iv) After considering:

(a) A request

(b) Any objection

(c) Any further submissions that any party has made in relation to the request.

The Office may decide to give to the other party or parties a copy of so much of the document as contains commercially sensitive information that the Office thinks should be so given.

Documents and/or any part thereof shall be treated as confidential upon the request of that party or parties seeking such confidential treatment.

9. Cross Examination

Parties shall be heard by the Complaint/Dispute Resolution Panel in full, by way of affidavit or *inter presentes*, and questions regarding submissions shall be raised by the Panel.

The right to cross-examine the other party's witness may be afforded by the Office where a party applies for permission to cross-examine, and:

(i) The Panel is of the view that there are relevant issues of fact the determination of which will involve a decision as to which deponent is speaking the truth, and/or;

(ii) There are competing expert opinions and a determination has to be made as to which expert's evidence is to be preferred, and/or;

(iii) The Panel thinks that in all the circumstances cross-examination of a particular deponent or deponents will be of assistance in the process of resolving the complaint or dispute.

(iv) The Panel shall have the discretion to limit the time for cross-examination of each witness, and shall give directions to this effect prior to the date of the hearing.

10. Compliance

These rules are intended to apply prospectively rather than retrospectively. Complaints/Requests already filed will be allowed to stand and will be treated as Requests filed in accordance with these Rules. However, the parties shall be required to re-submit Affidavits in support which complies in content and format with the requirements of these Rules. The Office shall give directions with respect to the timetable for such filings in each pending matter.