ANNEX

Comments of the Office of Utilities Regulation (OUR) on the Proposed Office of Utilities Regulation (Amendment) Act, 2015

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Determination of rates and tariffs in the Electricity Sector	2.(b)	The singling out of the electricity sector for specific treatment in an omnibus act, apart from suggesting that the amendments are primarily sector driven, raises the possibility that the OUR will be required to apply asymmetric regulation across sectors. For example, the specific requirement to adhere to Bank of Jamaica guidance regarding, among other things, relevant benchmarks and country risk premium is confined to the electricity sector. This suggests that other approaches may be adopted in respect of other regulated utility sectors. The basis of this difference is not immediately clear and is not evident from the memorandum.
Determination of rates and tariffs in the Electricity Sector – Based on Cabinet Directions	2.(b)	The proposed new subsection 4.(4A)(a)(iii) requires that rates for electricity services be determined in accordance with policy directions issued by Cabinet. Please see comment on section 2.(d) below.
Determination of rates and tariffs in the Electricity Sector – Based on Bank Of Jamaica Analysis	2.(b)	New subsection 4.(4A)(a)(iv) requires that the OUR seek guidance from the Bank of Jamaica ("BOJ") in determining an appropriate return on investment when setting tariffs in the electricity sector. With full respect to the technical competence of the BOJ, it would seem that the most suitable agency to consider relevant benchmarks and the factors pertinent to

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		returns in the electricity sector is the agency with the specific sector remit. Furthermore, this action appears to be without precedence. We are mindful of the BOJ's general objects as set out in the Bank of Jamaica Act with regard to influencing monetary stability and developing money and capital markets in Jamaica. The proposed new role of assessing the appropriate country risk premium applicable to investment in the electricity sector may pose a potential difficulty for the BOJ as it may conflict with its monetary policy responsibilities. For example, the BOJ, by prescribing a return on investment (albeit for the electricity sector), may unwittingly be sending a signal to potential purchasers of Government of Jamaica instruments regarding the levels of returns the Government of Jamaica is prepared to pay on those instruments. Such an influence on market conditions in other sectors may not be intended or desirable. It is not clear whether the implementation of this proposed new role in electricity rate-making was properly canvassed with the BOJ. In any case, we believe that the requirement to seek the opinion of the BOJ in the determination of rates and tariffs in the electricity sector should be subject to further consideration. The OUR is of the view that the determination of the rate of return on investment and country risk should be based on rules, as is now the case, rather than discretion which opens the issue to regulatory capture and manipulation.

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		It should also be noted that the OUR has always used the data published by the Bank of Jamaica (including bond rates) as part of its own assessment of return on investment and country risk when determining tariffs across the regulated sectors, and cites this source in its determination notices.
Policy directions from Cabinet	2.(d)	The proposed new subsection 4(8) authorises Cabinet to issue policy directions in respect of any prescribed utility services which must be adhered to by the Office. This specific requirement represents a fundamental departure from the existing regime governing relationships between the executive arm of Government and independent public bodies. We are concerned that the language of this section and section 2.(b) of the Bill are not consistent with similar legislative provisions relating to the authority of Ministers to give policy directions to public bodies. In particular, a review of the legislation governing several regulatory bodies, including the Financial Services Commission (FSC), the Bank of Jamaica (BOJ), the Fair Trading Commission (FTC), the Civil Aviation Authority (CAA), the Airports Authority (AAJ), the Betting Gaming and Lotteries Commission (BGLC), and the Office of Utilities Regulation (OUR), in exercise of its powers under the Telecommunications Act, indicates that such policy directions shall be of a "general nature" or a "general character". In several instances the policy directions may be

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		given only after consultation with the Chairman or Governor of the particular regulatory agency (FSC, BOJ, BGLC, AAJ, FTC) and/or as may be necessary in the "public interest" (FSC, BOJ, BGLC, FTC and OUR under the Telecommunications Act). We note that similar limitations are not contemplated in the planned amendments to the OUR Act. The unrestricted power of the executive arm of Government to direct the Office in the exercise of its regulatory functions has the potential to erode the independence of the regulator. In any case, we are of the view that unrestricted power of Cabinet to direct the Office will erode the perception of independence of the regulator. This is inconsistent with the evolution of modern regulatory institutions and is in conflict with international regulatory best practice. A regulator whose activities and decision making are transparent, predictable, participatory and insulated from political influence represents best practice and can promote investor and consumer confidence. Cabinet decisions and documents are confidential and protected from public disclosure. Additionally, there are some grey areas in law regarding what decisions and actions of Cabinet are justiciable. There exists the possibility therefore that a key component of the Office's regulatory actions and decision-making, to the extent that it is informed or directed by Cabinet, may be excluded from public scrutiny, thus impairing the transparency of the regulator.

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		It is our recommendation that these provisions of the Amendment Bill be reconsidered and revised to be consistent with similar provisions for other regulatory bodies. Specifically, we recommend that the power of the Cabinet to give directions regarding the rates to be charged for electricity services be removed (proposed new section 4(4A)(a)(iii)). All other elements and factors taken into account in determining electricity rates are publicly available in regulations and/or relevant licence provisions, are consulted upon during the tariff review process and are subject to challenge and testing on appeal to the relevant tribunal and judicial review. Secondly, we recommend that the power to give directions to the Office be vested in the responsible Minsters for the particular regulated sectors, and that these directions be general in nature as may be necessary in the public interest. The following language may be considered: *"The responsible Minister, in respect of any prescribed utility service, may give to the Office such directions of a general nature as to the policy to be followed by the Office in the performance of its functions under this Act with regard to that prescribed utility service, as such Minister considers necessary in the public interest, and the Office shall give effect to those directions."*

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OUR Regulation making power – TARIFF SETTING	5.	We welcome the express power granted to the Office to make regulations prescribing the procedure and analytical tools to be used in determining tariffs in the electricity sector. This will only enhance the existing transparency, predictability and accountability of the Office in the exercise of this particular tariff making function. The restriction of this provision to only the electricity sector, however, is an unfortunate omission, given that the overarching regulatory objective of achieving market competitiveness is the same for all sectors. We believe that this should be a general power of the Office in respect of all utilities regulated under the OUR Act. Such an adjustment would improve the current imbalance and disharmony in the exercise of the OUR's regulatory functions in relation to those sectors that have the benefit of defined policy and sector specific legislation (such as telecommunication sector) and those that do not (such as the water and sewerage sectors). The following modification to the provision is submitted for consideration: *(1A) Without prejudice to the generality of subsection (1), the Office may make regulations prescribing the procedure for, and analytical tools to be used in, determining, in accordance with sections 4(4) or 4(4A), as the case may be, the rates, fares or tariffs applicable to prescribed utility services.*

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Restructuring of the Office – Director-General & Deputy Directors-General	6.(f)	Paragraph 4(1)(b) of the Second Schedule addresses the prohibition on the Director-General and the Deputy Directors-General from holding securities and other investments in certain entities. The proposed amendment to this paragraph, which replaces the reference to "approved organization" with a reference to "specified organization" seems to seek to expressly prohibit the holding of investment interests in regulated entities. In light of this, and for completeness, a reference to "licensee" (which is also a regulated entity as defined under the Act) should be added. Additionally, a similar provision should have been applied to the appointed members of the Office. This omission may have been an oversight. As all regulatory decision-making is to be vested in the seven member Office, it stands to reason that all, and not just one member (the Director-General), should be subjected to this strict provision which seeks to reduce the potential for conflict of interest and regulatory capture. We recommend that the provision should be replicated with appropriate modification and inserted in the proposed new Fourth Schedule. Please consider the following reformulation of the amendment: *(f) in paragraph 4(1)(b), by deleting–*

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		(i) The words "any approved organization" and substituting therefor the words "any licensee or specified organization"; and *(ii) The words "an approved organization" and substituting therefor the words "a licensee or specified organization";*
Restructuring of the Office – Nominations by the PSOJ and consumer interest group	7	We note the proposal to have interest groups represented among the membership of the Office – namely the PSOJ and a consumer interest group. This approach to appointing the members of the Office appears to be emphasizing a "representative board" as opposed to making technical appointments. Upon review of legislative provisions specifying eligibility requirements for boards/commissions of other regulators, we could not find similar instances where eligibility was defined by the interest group represented by the member. Rather technical competencies and experience were specified (e.g. FSC). The role of the regulator is to balance the competing interests of all stakeholders in a sector, including utility operators and their investors, consumers and the Government, using technical skills and objective regulatory principles. To this end the primary criteria for eligibility of a member of the Office has

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		been, and should be, the technical skills and competencies of the individual, and not the interest group he or she represents. A matter to consider is whether by this approach the government is signalling that regulatory decision-making should tend more to sector interest considerations as against economic, technical and quasi-judicial considerations. If this is the intent, then this change in the nature of the regulator should have been subjected to a wider consultation with stakeholders including private operators across all regulated sectors. It is our recommendation that all six appointed members of the Office be selected in accordance with paragraph 1(2)(a) of the proposed new Fourth Schedule.
Restructuring of the Office – Conflict of Interest prohibition	7	As was mentioned earlier, it would be prudent to apply the express prohibition on holding securities and interests in regulated entities to all members of the Office as is done for the Director-General and the Deputy Directors-General. Please consider the following addition to paragraph 1(5) of the proposed new Fourth Schedule to the Act. *"Without prejudice to the generality of the foregoing, a person shall not be qualified for appointment as a member of the Office holds or is interested in any stock, share, bond, debenture or other security of, or is otherwise interested in, any licensee or specified organization or any other company which is in*

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		competition with or provides similar services to those supplied by a licensee or specified organization."
Memorandum of Objects and Reasons		The Memorandum of Objects and Reasons indicates that the OUR Act is being amended in order to enhance the regulatory environment governing prescribed utility services by establishing a governance framework in keeping with best practices, so as to encourage development investment and growth while protecting the interest of consumers. Elements of the amendments, as we have outlined above, rather than enhancing the regulatory framework, pose the risk of: 1. Reducing transparency; 2. Blurring the lines between policy and operations; 3. Reducing regulatory independence; 4. Increasing vulnerability to regulatory capture; 5. Creating regulatory asymmetry; 6. Making Regulatory decisions less objective; and 7. Reducing predictability and consistency given the possibility of situational shifts in policy directives.
General Comments – Lack of Proper Consultation		The OUR is constrained to also offer some comments on the manner and approach adopted to implementing the proposed changes: 1. The proposed amendments clearly represent a retreat from independent regulation across all the regulated sectors. While the OUR continues to hold to the view that independent regulation represents best practice,

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		our particular concern is that it would appear to us that the significance of this shift should invite greater and more widescale consultation. In this regard we would wish to underscore that the Office only had sight of these amendments after their passage in the Lower House. We are also not aware that stakeholders in the water and telecommunication sectors have been consulted on amendments that fundamentally affect both the structure of their regulatory agency and the manner of regulation. 2. The recording of the proceedings in the Lower House indicates that concerns expressed about decisions taken in the electricity sector has influenced these changes. A number of decisions issued by the Office in response to the JPS' 2014 tariff application are currently on appeal before the Electricity Appeal Tribunal established under JPS' licence. In the circumstances, it is a matter of concern to the OUR that the proposed amendments and their timing in relation to the determination of tariffs in the electricity sector may be seen as undermining certain positions currently being argued at the Tribunal and/or an attempt at circumventing the appeal process.
General Comments – Failure to consider OUR's recommended changes to the Act.		From as far back as 2010, the OUR had submitted a draft Cabinet submission to the Cabinet Office, setting out proposed changes to the OUR Act which sought, inter alia, to harmonise the regulatory powers of the OUR across all its regulated

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		sectors. The draft was circulated to affected/interested Ministries and public bodies for comment including the Office of the Prime Minister, Ministry of Energy and Mining, Ministry of Industry, Investment and Commerce, Ministry of Transport and Works, Ministry of Water and Housing, Ministry of Finance and the Public Service, Attorney General's Department and the Fair Trading Commission. The draft submission was amended after taking into account the comments received and re-submitted to the Cabinet Office. Further updates of the draft submission were sent in 2012 and again in 2015 in hopes that decision of Cabinet would be finally obtained for the long overdue modernisation of the OUR Act. Several of the recommendations set out in the draft submission would have gone a far way in achieving the very objectives identified in the Memorandum of Objects and Reasons supporting the Office of Utilities Regulation Amendment Bill - i.e. "… to enhance the regulatory environment governing prescribed utility services by establishing a governance framework in keeping with best practices, so as to encourage development investment and growth while protecting the interest of consumers". These recommendations include proposals to enhance the enforcement powers of the regulator, establish tariff setting guidelines applicable across the regulated sectors, establish a tribunal to adjudicate appeals against decisions of the OUR and extensive provisions on consumer protection similar to those included in the Telecommunications Act.

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		We are disappointed that these recommendations have not met with the same attention and expedition that the proposals in the current Bill have received, and that the opportunity was not taken to consider and implement these modifications that would support and improve the transparency, accountability and predictability expected of an independent regulator.