

**FLOW'S RESPONSE**

**TO**

**OFFICE OF UTILITIES REGULATION**

**GUIDELINES ON THE RESOLUTION**  
**OF REGULATORY DISPUTES**  
**BETWEEN LICENSEES IN**  
**REGULATED SECTORS**

**NOTICE OF PROPOSED**  
**RULEMAKING**

**2017/GEN/006/NPR.001**

**2 June 2017**

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## 1. Executive Summary

- 1.1 Cable & Wireless Jamaica Limited and Columbus Communications Limited (both trading as ‘Flow’) are pleased to respond to the Office of Utilities Regulations’ (‘OUR’s’) Guidelines on the Resolution of Regulatory Disputes between Licensees in Regulated Sectors – Notice of Proposed Rulemaking (‘NPRM’). Flow expressly states that failure to address any issue raised in this consultation process does not necessarily signify its agreement in whole or in part with the OUR’s proposal. Flow reserves the right to comment on any issue raised in the consultation at a later date.
- 1.2 Flow welcomes this NPRM and the OUR’s attempt to codify the procedure for the resolution of disputes between licensees in the regulated sectors. The licensees will benefit from the certainty to be gained from written rules to guide this important area. One of the most important factors for licensees is certainty in timelines for the resolution of disputes. While there are timelines provided for specific procedures, there are some procedures where the OUR has not set a timeline. The overall effect is that a licensee remains unable to quote a set end-to-end timeline in the resolution of disputes by the OUR. That is, the NPRM does not state with certainty a time period from the date of the submission of a complaint to the date of a decision by the OUR.
- 1.3 The NPRM was developed by the OUR utilising the Notice of Proposed Rulemaking on Resolution of Interconnection in the Telecommunications Sector (“the Interconnection NPRM”)<sup>1</sup>. The OUR sought and received comments on the Interconnection NPRM. The OUR responded in its “Comments on Responses to Notice of Proposed Rulemaking” (“OUR’s Comments on the Interconnection NPRM”).<sup>2</sup> There are instances where the OUR acknowledged comments on the Interconnection NPRM and promised to revise the NPRM for clarity. In some of those instances, the rules are repeated in this NPRM without the revisions.
- 1.4 Flow reiterates that it supports the establishment of regulations and procedures to resolve regulatory disputes in regulated sectors. The comments herein are intended to ensure the effectiveness and appropriateness of the rules agreed upon.
- 1.5 Flow’s response is structured based on the NPRM.
- 1.6 All responses to this document should be sent to Sola Hines, Legal & Regulatory Counsel, Flow at sola.hines@cw.com.

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<sup>1</sup> Office of Utilities Regulation Notice of Proposed Rulemaking – Resolution of Interconnection Disputes in the Telecommunications Sector 19 September 2014/TEL/005/NPR.002

<sup>2</sup> Office of Utilities Regulation Notice of Proposed Rulemaking – Resolution of Interconnection Disputes in the Telecommunications Sector – OUR’s Comments on Responses to Notice of Proposed Rulemaking 19 October 2016 2016/TEL/017/NPR.002

## 2. Rule 4 Complaints

2.1 Flow notes that Rule 4 gives a party the right to lodge a complaint with the Office before making a formal reference of the dispute to the Office. The Rule gives a definitive timeframe for the resolution of a complaint by the Office:

*(2) Upon receipt of a complaint, the Office may address the complaint in the most efficient and effective way, as it thinks fit, and shall endeavor to resolve the issues raised in the complaint within fourteen days.*

2.2 Flow submits that the NPRM should begin with establishing definitive timeframes for the resolution of regulatory disputes between licensees in regulated sectors. Any reader of this NPRM, particularly any person in the regulated sector, has an interest in knowing the answer to the question “if a dispute is referred to the OUR, what is its timeframe for resolution?” All other timeframes and provisions in the NPRM would follow from this timeframe. The certainty to be added to the process would be invaluable.

2.3 Contrast for example, Ofcom’s Dispute Resolution Guidelines<sup>3</sup> (“the Ofcom Guidelines”). The Guidelines begin with Section 1 “Scope of these Guidelines”. Section 2 is Overview of Ofcom’s dispute resolution function. Section 2.3 reads:

*There are two key procedural stages in Ofcom’s assessment of any disputes submission:*

*2.3.1 Enquiry Phase: During this phase (**usually 15 working days**) Ofcom considers (a) whether the statutory grounds for a dispute referral under the 2003 Act have been met, and (b) whether it is appropriate for Ofcom to handle the dispute. If Ofcom decides it is appropriate for it to handle the dispute, it will define the exact scope of the dispute and open formal proceedings.*

*2.3.2 Formal Proceedings: During this phase, Ofcom will determine the dispute following consultation with, and taking into account any submissions from the Parties to the dispute (and any other interested parties that have a view on the dispute). **Ofcom must determine the dispute within four months of its decision to handle the dispute, except in exceptional circumstances.***

*(emphasis Flow’s)*

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<sup>3</sup> Ofcom - Dispute Resolution Guidelines - Ofcom’s guidelines for the handling of regulatory disputes. Publication date 7 June 2011

### 3. Rule 5 Intervention by the Office in a Dispute & Rule 7 Assessment of Disputes

3.1 Rule 5 reads inter alia “(1) The Office shall have the right to intervene in a dispute on its own initiative... (2) Where the Office, on its own initiative, intervenes in a dispute, the Office shall give such directions as it thinks fit.” Flow is concerned that Rule 5 does not provide any additional information as to the criteria which will be used by the OUR to determine when it will intervene in a dispute. Flow submits that this provision has the potential for allowing inconsistent behavior by the Office who may intervene in certain matters and not in others. Without guidance on the basis of intervention by the OUR, it can be seen as arbitrary and inconsistent with good regulatory practices.

3.2 When faced with this concern in relation to Interconnection NPRM, the OUR responded in the OUR’s Comments on the Interconnection NPRM, to justify its approach on two bases. First, it was acting under its statutory mandate under the Telecommunications Act. Second, Rule 7(1) outlines the factors that the OUR will take into consideration. Rule 7(1) of the Interconnection NPRM, and Rule 7(1) of this NPRM reads:

*Before deciding to intervene in a dispute, the Office shall carry out an assessment to determine whether:*

- (a) there is in fact a dispute;*
- (b) a Respondent has a case to answer;*
- (c) a regulatory intervention is necessary; and*
- (d) a formal hearing should be conducted*

Flow would submit however, that Rule 7 (1) is of guidance when the OUR is intervening in a dispute upon receipt of a Notice of Request from a complainant. Rule 7(3) reads “Where the Office on its own initiative decides to intervene in a dispute, the Office shall, in writing, require the parties to the dispute to given an indication of the nature and status of the dispute. “ It is after the OUR gets this information that it will make the determinations set out in Rule 7(1). The concern remains, how will the OUR decide to intervene in a dispute on its own initiative?

3.3 The comment had previously been made in relation to the Interconnection NPRM, that Rule 7 refers to both “a complaint” and “a Notice of Request and the Affidavit”. The recommendation was made that the treatment of bare complaints should be dealt with in Rule 4 Complaints and kept separate from the formal Notice of Request. The OUR’s Comments on the Interconnection NPRM seems to indicate that this comment was accepted and the document would be modified. It is therefore surprising to see a similar approach in this NPRM.

#### *3.5.1.1 Responses by Stakeholders*

*LIME indicated that rule 7 dealt collectively with instances where a Notice of Request is sent to the Office and when the Office intervenes on its behalf. However, so as to have clarity, LIME recommended that both circumstances should be treated separately. Further, in relation to rule 7(2) LIME suggested that complaints be kept separate from the formal Notice of Request.*

*Digicel in its response to the NPRM indicated that the word “whether” as used in rule 7(1)(c ) was repetitive and ought to be deleted.*

### *3.5.1.2 OUR's Response*

*The OUR agrees with Digicel's suggestion that "whether" should be deleted. The OUR also agrees with LIME's comments regarding rule 7 and the OUR will review and modify same accordingly.*

3.4 In relation to the timelines in the NPRM, there are two timelines given of a five (5) working day period in which the OUR invites comments on a complaint or Notice of Request in Rule 7(2); and a ten (10) working day period for the OUR to inform parties whether it will constitute a Panel in Rule 7(5). There are no timelines for the critical activities in Rules 7(3) and 7(4):

*(3) Where the Office on its own initiative decides to intervene in a dispute, the Office shall, in writing, require the parties to the dispute to give an indication of the nature and status of the dispute.*

*(4) During the assessment phase, the Office may, at its sole discretion and as soon as is practicable, meet with the parties (individually or collectively) to gather information from both parties to help the Office to decide whether or not a formal hearing should be held.*

3.5 The OUR's Comments on the Interconnection NPRM dealt with the concerns about the lack of definitive timelines and is set out below.

#### *Rule 7(3)*

*The OUR is reluctant to indicate a specific timeline to require the information since a situation may demand an urgent response. The OUR prefers to reserve that right to specify the timeline when the request is being made.*

#### *Rule 7(4)*

*Telecommunications disputes can range from simple to complex issues. Therefore, no timeline was specified for the length of the assessment phase because the OUR prefers the flexibility to deal with the matters on a case by case basis as it deems necessary. Hence the qualification therein to complete the assessment as soon as is reasonably practicable.*

3.6 Compare the wording of the NPRM and the OUR's Comments on Interconnection NPRM to Section 4 on "The Enquiry Phase" in the Ofcom Guidelines:

#### *Enquiry Phase Meeting and the clarification of facts and issues*

*4.24 Following the initial exchange of non-confidential documents, where appropriate, we normally expect all Parties to attend a joint Enquiry Phase Meeting ("EPM") held by Ofcom. This represents a change from our previous practice. The EPM is intended to be an informal meeting, attended by commercial and regulatory affairs representatives of the Parties. The purpose of the meeting will be to enable us to confirm the facts agreed by the Parties. The purpose of the meeting will be to enable us to confirm the facts agreed by the Parties, the facts that remain in dispute and to help clarify issues so as to inform our decision of what is in and out of scope, should we decide that it is appropriate for us to handle the dispute.*

4.25 The EPM may also assist in identifying what further evidence may be needed in order to resolve the dispute.

4.26 At the EPM, Ofcom will outline the process and timetable for the dispute should it be accepted for resolution by Ofcom.

4.27 In preparation for an EPM, all Parties to the dispute will normally be expected to complete a pre-EPM Questionnaire prior to the meeting. **Inevitably due to the limited time of the enquiry phase this will require immediate turnaround, with Parties using best endeavours to complete the forms within the time period specified by Ofcom.** Examples of the types of pre-EPM questions are set out at Annex 1. The responses to the pre-EPM Questionnaire will then be shared by Ofcom with the Parties and will provide the focus for the EPM.

4.28 Prior to each EPM, we will provide an agenda setting out the specific areas to be covered and why. The agenda will be based on the submissions from the Parties and their responses to the pre-EPM questionnaire. It will therefore vary on a case by case basis.

4.29 The EPM will be arranged to be held at Ofcom's premises (with facilities for remote access provided for Parties unable to attend in person). **In relation to the date of the EPM, we will need Parties to be flexible and while we will endeavor to find a date and time that is best for all Parties, Ofcom will need to reserve the right to fix the EPM for a specific time and date that will allow it to complete the enquiry within 15 working days.**

(emphasis Flow's)

3.7 Flow is also concerned about the Rule 7(6) which reads "The Office shall decide whether or not to proceed to conduct a formal hearing, on a case –by–case basis. This Rule is discretionary and requires guiding principles to engender confidence in the NPRM. In the OUR's Comments on the Interconnection NPRM, the response to this concern was:

*Rule 7(6)*

*The OUR has noted LIME's concerns and will review and indicate consideration that the OUR will bear in mind in the exercise of its discretion.*

3.8 It is unfortunate that another NPRM has been drafted without the OUR indicating how it will determine whether to proceed to conduct a formal hearing. A safeguard may exist if the OUR publishes its decision. Again, we refer to the Ofcom Guidelines where Ofcom's decision at the end of the Enquiry Phase is published. Ofcom links this to maintaining the four month time limit for resolving a dispute:

*Publication of acceptance of dispute and its scope*

*5.2 Once we have decided that it is appropriate for us to handle a dispute, we will publish our decision in the Competition and Consumer Enforcement Bulletin ("CCEB") section of our website...setting out the names of the Parties to the dispute and the scope of the dispute.*

*5.3 Defining and publishing the scope of the referred dispute ensures there is clarity from the outset of precisely what issues Ofcom is required to resolve during the course of the dispute. Ofcom's experience in dealing with the disputes shows that, in order to resolve a dispute within the four month statutory time limit, it is essential to define the scope as precisely as possible. The scope will therefore confirm those matters in scope and where appropriate, also those out of scope.*

*5.4 Ofcom will base its decision on the scope on the basis of the exchange of information provided during the Enquiry Phase, in particular, concerning the submission and subsequent comments from the Parties (including their submissions as to the appropriate scope) as clarified by the EPM.*



#### **4. Rule 9 Service of Notice of Request and Affidavit and Rule 10 Filing of the Response**

4.1 The concern had previously been raised that the timelines in Rule 9 is in conflict with the timeline in Rule 7. Specifically, the Rule 9(1) provides for service of the Notice on the Respondent by the Plaintiff in 3 days. It was submitted that this is in conflict with Rules 7 which provides for the Office to serve on the Respondent in 5 days. The OUR's Response on the Interconnection NPRM states:

##### *3.8.1.2 OUR's Response*

*The OUR disagrees that there is a conflict between the rules. Rule 7(1) is intended to operate for the purpose of the assessment of the dispute in order to determine whether the matter should proceed to a formal hearing. While Rule 9(1) is intended to operate after the Office has decided to proceed to the formal hearing. The OUR will however clarify the rules accordingly.*

4.2 It is unfortunate that another NPRM has been drafted and the OUR has not clarified the Rules. Rules 9-12 relate to the service of documents after the OUR has decided to hold a formal hearing. However, it is not immediately clear on the reading of the NPRM which goes from the Rule 7 where the OUR makes the preliminary determination as to whether to proceed, to Rule 8 which sets out "Matters to be included in the Notice of Request and Affidavit", then to Rule 9 "Service of the Notice of Request and Affidavit".

4.3 A similar concern had been in relation to the timelines for filing and service of the Notice of Request in Rule 10 and the OUR's assessment in Rule 7. Again, the OUR's Response on the Interconnection NPRM states:

##### *4.3.1.1 OUR's Response*

*As indicated in relation to rule 9, this section is intended to operate after the Office has decided to proceed to have a formal hearing. The OUR will however clarify the Rules accordingly.*

This is yet another instance that another NPRM has been drafted and the OUR has not clarified the Rules.

## **5. Rule 16 Establishment of the Panel & Rule 17 Constitution of the Panel**

5.1 The NPRM establishes a “Dispute Resolution Panel” in Rules 16 and 17:

### *Establishment of the Panel*

*16. Where the office is reasonably satisfied that the reference of the dispute is made in accordance with sections 5 and 8, and sufficient information has been provided for consideration of the dispute, the Office shall constitute the Panel and advise the parties accordingly.*

### *Constitution of the Panel*

*17. The Panel shall consist of one or more members of the Office. The Office reserves all rights and sole discretion with regard to the constitution of the Panel in relation to the number of members as well as the selection of Chairman.*

5.2 Concerns had been expressed previously about the ad hoc constitution of the Panel. Licensees have no information on: (i) who will sit on a panel; (ii) the criteria for the selection of a member of the Panel; or (iii) how many members will sit on a Panel. The constitution of the Panel which is at the “sole discretion” of the OUR.

5.3 For the Telecommunications sector, under Section 60 of the Telecommunications Act, a person aggrieved by a decision of the Office can seek a reconsideration of the decision. If the person remains aggrieved after reconsideration, it can appeal to the Telecommunications Appeal Tribunal. The constitution of the Tribunal is dealt with in the Second Schedule of the Telecommunications Act and is set out below:

### *SECOND SCHEDULE (Section 61)*

#### *Constitution and Procedure of Appeal Tribunal*

- 1. (1) The Appeal Tribunal shall consist of three members appointed by the Minister as follows- (a) one member shall be a former Judge of the Supreme Court or the Court of Appeal and shall be chairman of the Tribunal;(b)one member shall be appointed on the recommendation of the Advisory Council; and (c) one member shall be appointed on the recommendation of the Consumer Affairs Commission.*
- 2. The members of the Tribunal shall, subject to the provisions of Schedule, hold office for such period not exceeding two years as the Minister may determine and shall be eligible for reappointment.*
- 3. The Minister may appoint any person to act in the place of the chairman or any other member of the Tribunal in the case of the absence or inability to act of the chairman or other member.*

4. (1) *Any member of the Tribunal other than the chairman may at any time resign his office by instrument in writing addressed to the Minister and transmitted through the chairman, and from the date of the receipt by the Minister of such instrument that member shall cease to a member of the Tribunal.*Resignations

(2) *The chairman may at any time resign his office by instrument in writing addressed to the Minister and such resignation shall take effect as from the date of receipt by the Minister of that instrument.*

5. *The Minister may at any time revoke the appointment of any member of the Tribunal if such member - (a) becomes of unsound mind or becomes permanently unable to perform his functions by reasons of ill health;(b) is convicted and sentenced to a term of imprisonment;(c) fails without reasonable excuse to carry out any of the functions conferred or imposed on him under this Act; or (d) engages in such activities as are reasonably considered prejudicial to the interest of the Tribunal.*

6. *If any vacancy occurs in the membership of the Tribunal, such vacancy shall be filled by the appointment of another member thereof.*

7. *The names of all members of the Tribunal as first constituted and every change in the membership thereof shall be published in the Gazette.*

8. *There shall be paid to the chairman and other members of the Tribunal in respect of each appeal, such remuneration, whether by way of honorarium, salary or fees, and such allowances as the Minister may determine.*

9. *The decisions of the Tribunal shall be by a majority of votes of the members.*

10. *Subject to the provisions of this Schedule, the Tribunal shall regulate its own proceedings.*

11. *The office of chairman or member of the Tribunal shall not be a public office for the purposes of Chapter V of the Constitution of Jamaica.*

5.4 Flow accepts that the OUR has delegated its functions under Section 60 of the Telecommunications Act to the Panel. So the process of the treatment of a person aggrieved by a decision of the office under the Act has not changed. However, what has changed is the certainty embedded in the Act. Licensees know the identity of the members of the Office who are making a

relevant decision. They are also aware of how the Telecommunications Appeal Tribunal is constituted. With the uncertainty in decision-making, comes a concern about bias. If I do not know how the adjudicator in my matter is chosen, how do I know that the adjudicator is treating me fairly?

5.5 In the OUR's Comments on the Interconnection NPRM, the OUR made short shrift of this argument:

*3.10.1.2 OUR's Response*

*The OUR disagrees with the recommendation made by LIME for a permanent panel. It is the OUR's view that LIME has not justified how the constitution of the Panel could potentially result in bias to a party. In any case, the Office would want to dispose of a complaint in the most efficient manner and with the assistance of the different expertise that may be relevant in the instant case. The flexibility of selection of the Panel would ensure that the Panel is tailored to fit the issues that are being brought before it. This will enhance the efficiency of the Panel and reduce the potential of having personnel involved who would be unable to contribute to the resolution of the issues.*

5.6 While Flow appreciates the OUR's arguments on efficiency and the availability of expertise, it is unable to remove the nagging doubts about the possibility of a member of the Panel, chosen according to criteria known only to the OUR, may fail to treat it with partiality and fairness.

## **6. Conclusion**

- 6.1 Flow reiterates its overall support of the establishment of regulations and procedures to resolve regulatory disputes in regulated sectors. Our primary concerns with the NPRM lie in the lack of a definite timeline for the resolution of disputes by the OUR and the lack of rules surrounding the constitution of a panel to hear disputes.
  
- 6.2 We expect that the areas of concern raised within this response will be addressed by the OUR. According to the timetable for the consultation on the NPRM, the OUR will issue “Responses to Comments” and “the Guidelines” on 22 September 2017. We expect that, especially in instances where the OUR had previously indicated its intention to address concerns raised about similar worded rules in the Interconnection Guidelines, it will amend the rules before issuing the final document.