



**Digicel's Submission in Response  
to a Notice of Proposed Rulemaking for  
Guidelines on the Resolution of  
Regulatory Disputes Between Licensees  
in Regulated Sectors**

2 June 2017

Digicel's Submission in Response to a Notice of Proposed Rulemaking for Guidelines on the Resolution of Regulatory Disputes Between Licensees in Regulated Sectors

To: Office of Utilities Regulation  
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Kingston 10

**Attn: NPRM – Dispute Resolution for Licensees Consultation**

**DIGICEL'S RESPONSE**

Digicel (Jamaica) Limited ('Digicel') is grateful for the opportunity to provide comments on the **'Notice of Proposed Rulemaking for Guidelines on the Resolution of Regulatory Disputes Between Licensees in Regulated Sectors'**.

1. Digicel notes that at paragraph 1.1 of the consultation document the Office sets out that there is no clear legal mandate for it to intervene in disputes between licencees. Notwithstanding this fact Digicel is in general support of the proposed Guidelines however we do have some comments for your consideration.
2. Given the binding nature of a determination by the Office in execution of its market supervisory role and the unclear legal basis for the Office's intervention in inter-licensee disputes Digicel believes that scope of matters amenable to the proposed process must of necessity be limited to matters relating to the discharge of licensee obligations arising from the Telecommunications Act or its downstream regulations. Similarly any remedies imposed by way of a dispute determination must of necessity be bounded by being aimed at ensuring compliance with such obligations. Digicel considers that issues outside of these limits are ultra vires the remit of the Office and that the Office is legally precluded from dealing with them.

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3. Our view is the Guidelines should specify that if a licensee is using this procedure to settle a dispute that they cannot also seek a remedy to a dispute in an alternative setting such as court or arbitration. Further, that if a licensee does seek to address the matter in another forum that the dispute before the Office be withdrawn. It would be unjust for licensees to be subject to double jeopardy for regulatory disputes. In addition such a constraint would prevent "forum shopping" where complainants run several parallel processes on the same issue in the hope of "cherry picking" the most favourable outcome. This activity would impose unnecessary resource burden on the OUR and on the operator which is the target of the dispute as they would have to deal with the matter without the complainant being genuinely committed to the OUR dispute process in good faith.
4. We note that the Guidelines do not provide for the right for a licensee to appeal the decision of the Panel. In the circumstances where the decision and the report of the Panel will be a matter of public record (as set out at rule 32(5) of the Guidelines) we are of the view that due process and natural justice should allow for a licensee to have the right of appeal before a decision on a dispute becomes final and thereafter public. This is a significant omission.
5. We note that that the proposed rule-making does not set out either the standard or burden of proof which will underpin the Office's decision making in determining a dispute.
6. We note that in accordance with proposed rule 3(2), the Office reserves the right, in its sole discretion, to seek the advice of any person able to assist the Office regarding the issues raised in the dispute. We would raise the issue of confidentiality of the licensees information in particular any information that would have been shared in good faith as a part of the dispute resolution process. Sharing of any information with an external party would also be contrary to the Office's obligations of secrecy as cited at section 7 of the Telecommunications Act and also at section 5(1) of the Office of Utilities Regulation Act.

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7. We are of the view that the proposed rules need to clearly indicate that the decisions that are made by the Panel and the Office are solely for the purposes of settling the specific matter under dispute and that the dispute procedure cannot be used as an alternative vehicle for general rule making purposes. As disputes will be considered on a case by case basis and not necessarily applicable to any particular industry our view is that this distinction is necessary for clarity. In addition this explicit provision is necessary to give regulatory certainty and to prevent gaming of the process by complainants who might wish to use it to circumvent the normal consultative process associated with proposed rulemaking.
8. We note that under proposed rule 5(2) the Office can intervene in the market using this procedure on its own initiative. We believe that this proposal is fundamentally flawed. Even if one licensee complains about another but does not invoke the dispute procedure then it is clear that it does not consider that the matter in contention between them is a dispute. For matters which are not disputes then any market intervention by the Office on its own initiative is simply an exercise of its supervisory role and should be carried out using the normal processes associated with such supervision.
9. Our view is that the Office already has the power to investigate market matters under section 4(1)(e) of the Telecommunications Act and also under sections 4(1)(e) and 8(A) of the Office of Utilities Regulation Act. These investigatory powers are recognised by the Office itself at Paragraph 2.1 of the consultation document. The proposed dispute resolution rules should therefore only apply when a licensee has requested the Office's intervention by way of a Notice of Request as set out in the rules. Otherwise our view is that the Office will be duplicating their existing powers.

The preceding comments are not exhaustive and Digicel's decision not to respond to any particular issue raised in the document does not necessarily represent agreement, in whole or in part, nor does any position taken by Digicel in this document mean a waiver of any kind of

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Digicel's rights in any way. Digicel expressly reserves all its rights in this matter generally. Any questions or remarks that may arise as a result of these comments by Digicel may be addressed to:

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