



**Board of Directors Meeting of the
Utility Regulation and Competition Office (“OfReg”)
held on Thursday, 21 November 2019,
at its Offices, 3rd Floor Alissta Towers
General Meeting 8 of 2019**

Minutes

In attendance:

Dr. the Hon. Linford Pierson, Chair (Chair)
Mr. Rudy Ebanks, Non-executive Director (RE)
Mr. Paul Byles, Non-executive Director (PB) (absent 12.30 – 2.20 pm)
Mr. Phillip Ebanks, Non-executive Director (PE)
Mr. Gene Banks, Non-executive Director (GB) (arrived at 12.30 pm)
Mr. Malike Cummings, Chief Executive Officer (CEO)
Mr. Gregg Anderson, Executive Director Energy & Utilities (EDEU)
Mr. Duke Munroe, Chief Fuels Inspector/Director Fuels Markets (CFI)
Mr. Alee Fa’amoe, Executive Director ICT (EDICT)
Dr. John Epp, General Counsel/ Secretary (GC/S)
Ms. Alison Maxwell, Assistant General Counsel/ Assistant Secretary (AGC/AS)
Mr. Christen Suckoo, Chief Operating Officer (COO) (by Board Directive)

Apologies:

Mr. Ronnie Dunn, Deputy Chair (RD)
Mrs. Melissa Powery, Financial Controller (FC)

Start: 10:15 AM End: 4:25 PM (with 12.30 - 1 pm lunch break)

1. General

1.1 Welcome and Prayer

The Chair welcomed all members and the GC/S said a prayer.

1.2 EDEU and Standing Invitation to attend

The EDEU had not yet been formally appointed to the Board by Cabinet in accordance with the provisions of the Public Authorities Law (“PAL”). COO reported that the Cabinet Secretary indicated to COO that such appointment was not necessary as EDEU is a member of the Board *ex officio*. Thus, his membership runs with his employment contract.

1.3 Approval of Agenda

Motion, RE and seconded by PB: that the agenda as amended (7.0 AOB) be adopted for this meeting. CARRIED



- 1.4 Remarks by Chair with a discussion on Authorisation to Communicate
1. The mandatory Performance Audit of OfReg by the Office of the Auditor General ("OAG") is provided under section 42 of the Utilities Regulation and Competition Law (2019 Rev) ("URCL"). Under this provision of the URCL, the OAG shall, every 'three years' report to the Board on---(a) the Office's performance against its Annual Plan; (b) the extent to which the Office's development of its financial resources has delivered value for money; and (c) the impact of the Office's regulatory decisions when compared to the expected impacts established through regulatory impact assessments carried out by the Office.
 2. While the first three years of OfReg's operations actually covers the period 16 January 2017—16 January 2020, it is noted that the actual period covered by the OAG's audit is a shorter period having commenced during 2019. While the powers of the OAG are well established under section 60 (1) (c) (iii) of the Public Management & Finance Law (2018 Revision), and section 114 of the Constitution Order (2009), I am unable to find any legal interpretation/authorization for OfReg's Performance Audit to cover a shorter period than the three years (36 months) period provided under section 42 of the URCL. In view of the obvious ambiguity in this section, our General Counsel is hereby requested to consult with the Office of the Attorney General for a legal opinion as to whether or not the period of three years referred to under section 42 of the URCL contemplates a partial or full three-year period. If it is for a full three-year (36 months) period, it may be necessary to have section 42 of the URCL amended to provide the necessary clarification.
 3. The foregoing, notwithstanding, it is commendable that the majority of OfReg's Board Members and Staff worked in unison to ensure that the OAG's team was provided with factual information relating to the management and governance of OfReg during the period under review. In this connection, I wish to record the Board's thanks to the Deputy Chair and the CEO for providing general information to Board Members with the view to ensuring the consistency of factual information provided to the OAG team rather than unsubstantiated/anecdotal information during the interview process. The Board and Management of OfReg are therefore encouraged to continue to operate with honesty and integrity always reflecting a spirit of loyalty and cooperation among all members of our OfReg family.
 4. As regards the OAG interview process, I was most impressed with the professionalism of the OAG's team leader – Ms. Angela Cullen and her team. Prior to my interview with the OAG, I requested a copy of the Office's reply to the Management Letter as contained in the ISA 260 Report on the financial audit for the year ended 31 December 2018, which reflected unanswered management and governance deficiencies dating as far back as 2017. During my interview with OAG on 13 November 2019 I was reminded by Ms. Cullen that they were still awaiting a reply to their ISA 260 Report sent to OfReg's Financial Controller on 7 June 2019. In Ms. Cullen's email to me on 5



November 2019, she stated, inter alia, that: *“On the issue of the management letter for 2018 financial audit, our records in OAG show that our ISA 260 report was sent to OfReg’s Financial Controller on 7 June 2019 and we are currently awaiting a management response.”* As promised to Ms. Cullen I am hereby requesting the CEO to expedite a response to the ISA 260 Report on the 2018 financial audit at the earliest opportunity.

5. In accordance with section 17 (1) of the URCL the duties of the Chair include:
 - (a) Chairing meetings of the board;
 - (b) Instructing the Chief Executive Officer on behalf of the Office;
 - (c) Signing Minutes of meetings of the Board;
 - (d) Apprising the Office of matters raised by stakeholders;
 - (e) Making best efforts to guide the Office in accordance with sectoral legislation and any Policy directives; and
 - (f) Participating in public relations or education campaigns on behalf of the Office to subvert any processes or procedures or any matter under consideration by the Office.

6. Section 17 (1) sub-section (b) states that the duties of the Chair include: *“Instructing the Chief Executive Officer on behalf of the Office”* and sub-section (e) states: *“Making the best efforts to guide the Office in accordance with sectoral legislation and Policy directives.”* Given these and other specific directives under section 17 (1) of the URCL, I have a duty and responsibility to apprise the Board of any potential liability to OfReg of which I may become aware. In this connection, I am concerned about the significant expenditure already incurred by OfReg in the Datalink Judicial Review (JR), and the potential costs involved in the final settlement with datalink, a subsidiary of CUC—one of OfReg’s major stakeholders. It was with this concern in mind that I recently wrote to the Board Secretary/General Counsel requesting him to provide the Board with an update on Datalink JR today, if possible.

7. In view of the probable political ramifications in the Datalink matter, including possible discussions by the Public Accounts Committee, FOI request, and subsequent incorrect dissemination of factual information through the news media, it is important that all Members of the Board be provided with accurate background information of the relevant facts surrounding this issue. Some of us may already have copies of a folder compiled by the Office in August 2017 on the Datalink JR which was made available to Board Members at the time. The file commenced with “The Letter before Action – Judicial Review” from Appleby (Cayman) Ltd., dated 4 August 2017, which was replied to by Mr. Alee Fa’amoe on 7 August 2017 in his, then, position of DCEO/EDICT, without prior consultation with or approval of the Board.

8. In my email dated 29 August 2017 to Mr. J.P. Morgan, CEO at the time, I expressed my concerns about the manner in which this matter was dealt with by Mr. Fa’amoe. I, however, believe that despite the lack of proper protocol/procedure by Mr. Fa’amoe that acted in good faith. Also, I am of the



view that the two referenced letters together with any other relevant information will provide very useful information to those members of the Board who have not yet received these documents. Accordingly, I am hereby requesting the Board Secretary/GC to please make available the two referenced letters together with other relevant documentation to the new members of the Board by placing them in OfReg's Dropbox as soon as possible.

9. Further, members of the Board will note from the information to be provided by the Board Secretary/GC, that the grounds for Datalink's Judicial Review was based on a breach by OfReg of section 7 of the URCL. Also, of significance is the advice which our GC provided to the Board that OfReg should not appeal the JR ruling in favour of Datalink. This situation leaves OfReg in the untenable situation of possibly having to pay all additional costs agreed between OfReg and Datalink, which will be in addition to the significant expenditures already incurred by OfReg in defending the Datalink JR. Members will also note specific mention in section 5.5.1 of the minutes of the BOD meeting on 10 October 2019 that in addition to the expenditures already incurred by OfReg on this JR, Datalink now seeks payment of its costs /and has offered on a without prejudice basis to accept USD 380,000. The GC has agreed to seek the details of the proposal.

10. Thank you.

Response by EDICT

EDICT stated that he was not given notice of the allegation of breach of protocol and asked the Chair to state the protocol that was breached. EDICT was willing to review the two referenced letters and email that the Chair undertook to produce.

Response by Chair

The Chair emphasized that he believed that the actions of EDICT on 7 August 2017 were done in 'good faith', although they were not pre-approved by the Board.

2. Declaration of Interest

None.

3. Minutes of Previous Meetings

3.1 Approval of the Minutes of:

3.1.1. General Meeting no. 7, held 10 October 2019 version 2
Motion, RE and seconded by PE: that the minutes of the meeting of 10 October 2019 be approved as amended (grammatical issues). CARRIED

3.1.2. Special Meeting no. 4, held 25 October 2019 version 1
Motion, RE and seconded by PE: that the minutes of the special meeting of 25 October 2019 be approved as circulated. CARRIED.

3.2 Round Robin Resolutions (none)



- 3.3** Matters Arising From Previous Minutes
- 3.3.1** Policy Development
PE reported that the next policies for finalisation were the General Reserve Fund and the Anti-Fraud Policy.
- 3.3.2** Board Action Item Log ('Bail')
The Board noted that most of the tasks were done.
Update on matters:
14-02-2019/4.2 Redesign and content of Webpage extended to 10 October 2019. CEO obtained clarification and reported he would outsource the project as resources identified and complete project by 30-01-2020.
29-08-2019/3.2 Board self-assessment to be completed by 16-01-2020.
29-08-2019/4.4 CEO to prepare paper addressing OfReg budget needs for Cabinet to be completed by 16-01-2020.
25-07-2019/3.4 Organising quarterly meetings with Industry and Board, in progress. CUC and OfReg discussing a date in December 2019.
25-07-2019/7.5 All Executive Directors are to provide jointly through CEO to the Board quarterly a RAG Report on the progress made to complete the strategic ownership goals set out in Annual Plan 2019. Due end of year.
10-10-2019/4.1.1 PE had not completed ToR for Remuneration and Human Resources Committee, extension to 16-01-2020.
10-10-2019/4.1.5 RD absent. High level strategy paper on Public Relations now due 16-01-2020.
10-10-2019/7.4 CEO to present Succession Plan, extension to 16-01-2020.
Other tasks were assigned as set out in these minutes and the tasks were added to the draft BAIL.

4. Board Matters

- 4.1** Board Committee Reports
- 4.1.1** Remuneration and Human Resource (PE, chair, RD, RE, PB and EDICT)
CEO asked to meet with the committee to discuss the proposed CEO assessment document.
- 4.1.2** Risk and Audit Committee (Mr. Abraham Mathew, chair, RD, PB and PE)
PB reported that the Committee's proposed Charter had not yet been reviewed by all the Committee Members. An extension was granted.
- 4.1.3** Finance Committee (RD, chair, PB, FC). No report
- 4.1.4** Interim Investigation Committee (GB, chair, PB, PE, COO)
The Board had directed the Committee to acquire expert assistance. GB reported that the COO had contacted service providers and that quotations were expected from service providers by 16 December 2019 with a view to making a selection by year end.
- 4.1.5** Public Relations Committee (RD, chair, PB, PE, RE and CEO)
The Committee was formed to provide high-level policy and guidance, and it would not be involved in operational matters such as vetting proposed media releases. RD was absent and had not filed a paper. An extension to the next meeting was granted. The discussion lead to the discussion of the work done on OfReg's innovation remit, and the opportunity find synergies



with Mr. Eric Bush, Chief Officer - Ministry of International Trade, Investment, Aviation and Maritime Affairs and his 'Inward Investment' remit.

4.1.6 Innovation Committee (PB, chair, PE, RE, EDEU, EDICT)

The committee was appointed and tasked with focusing on innovation in the sectors. PB was appointed the committee chair and he was directed to invite specialists from the Office and the private sector to participate. PB agreed to draft the committee's terms of reference by the next meeting.

4.2 Board Administration

4.2.1 Finance Report

The FC was unable to attend. Her written report was accepted.

4.2.2 Auditor General's ISA 260 (2018) Management Letter

The CEO's draft letter of reply made in the OAG's form (appendix 3, column 3 to OAG's letter to Office) was presented and it was reviewed.

Motion, PE and seconded by RE: that the CEO's reply to the OAG be approved for submission, with immediate effect. CARRIED

4.2.3 Funding Proposal

The CEO reported that he adopted the Chair's plan to define the financial needs of the Office and then determine if it was appropriate to seek additional funding from Cabinet or Cabinet's agreement to allow the Office to withhold some royalty payments collected (as WAC had been allowed to do previously). He had agreed to prepare a paper, with the assistance of PB and the Chair, before 21 November 2019, but due to the OAG Performance Audit, he had not completed it. An extension to the next meeting was granted.

4.2.4 Ombudsman Investigation

Allegations were made by Clean Gas Ltd that the Office had not investigated its complaint against Home Gas Ltd in a timely manner, and that the Office had not fully replied to Clean Gas Ltd.'s petition that the Office direct interim measures against Home Gas Ltd, a power found in section 79 URCL. The CFI, with the assistance of the GC, had provided a response to the Ombudsman, and was in the process of responding to a supplemental set of questions. Substantively, the CFI conducted the investigation within a reasonable time frame. The investigation report had been delivered to the CEO for review. The Office had not exercised the power of Interim Measures because in the judgment of the Office, it did not have enough evidence to cross the threshold found in section 79 of the URCL.

5. Regulatory Matters

5.1 Data Link and OfReg, decision in Judicial Review application

Datalink continued to seek payment of its costs and offered on a without prejudice basis to accept USD 380,000. GC provided an overview of the court process, the possibility of a high or low order of costs, the wisdom of settling and an update on the negotiations. The CEO had authorized an offer to settle the cost claim by payment of USD 100,000 on November 7. Should



- a counter-offer be made he was authorized to use his judgement and take action, up the amount of USD \$200,000.
- 5.2 Anti-Competitive Practices Penalties Rules**
The draft Cabinet Paper proposing the Rules was sent to the Cabinet Office on 19 August, 2019 and their action was still pending.
- 5.3 Truth in Advertising Rules**
The draft Cabinet Paper proposing the Rules was sent to the Cabinet Office on 19 August, 2019 and their action was still pending.
- 5.4 Water Sector (Licence, Fee, Offence and Penalty) Regulations, Draft Determination**
The draft Cabinet Paper proposing the Regulations was sent to the Cabinet in August, 2019 Office and their action was still pending.
- 5.5 Energy and Utilities**
- 5.5.1 E&U Monthly Report**
The EDEU's monthly report was presented and discussed.
- 5.5.2 WAC Fee Agreement**
The EDEU reported that he had communicated with WAC concerning the division of royalties, and that WAC had replied seeking first an opportunity to review the draft Water Sector (Licence, Fee, Offence and Penalty) Regulations. He provided a copy to WAC, and planned to contact WAC soon.
- 5.5.3 CWC Licence and Specialist Legal Services**
CWC had made a revised proposal for a licence dated 8 October 2019, which was placed in the Board Papers folder in October. GC, at the direction of EDEU, had obtained 3 estimates for specialist legal services on the matter and a law firm would be appointed next week.
- 5.6 Fuels**
- 5.6.1 Fuels Sector Monthly Dashboard**
The CFI presented his report and responded to questions.
- 5.6.2 Rubis South Church Street Terminal Fire Suppression Equipment**
The CFI reported the spill of fuel at the Rubis terminal, and reminded the Board that Rubis had failed to repair or replace non-functioning fire suppression equipment, in spite of his earlier efforts. It was appropriate to inform the Minister. CFI would continue to seek compliance by Rubis.
Motion, RE and seconded by PE: that the CEO dispatch a letter to Minister Hew informing him of Rubis' failure to repair or replace non-functioning fire suppression equipment, as it is an important safety issue and a matter of public importance, with immediate effect. CARRIED
- 5.7 ICT**
- 5.7.1 ICT Monthly Dashboard**
The EDICT presented his report and responded to questions. In addition, he provided an overview on the Sea Cat submarine communications cable replacement opportunity (a potential PPP venture of \$50 million) and reported that he met with Chief Officer Eric Bush regarding 'Inward Investment'.



6. **Chief Executive's Report**

The CEO gave a summary of his report and discussion ensued.

7. **Any Other Business**

7.1 Board and Staff Christmas Luncheon

The Board agreed to attend the annual luncheon with the staff on 5 December 2019 at Ristorante Pappagallo, beginning mid-day.

7.2 The Role of the Chair of the Risk and Audit Committee

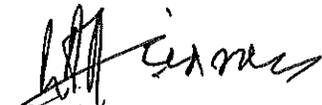
Reference was made to the responsibilities of the Chair under the URCL. PB was assured that the Chair of R&A had executed a non-disclosure agreement.

7.3 OAG Performance Audit

The Audit team sought a date to meet with the Office. The date of 12 December 2019 was to be proposed to the OAG.

8. **Date of next meeting**

16 January 2020 10:00 am


Chairman:

Date: 16/01/2020