

OF 2017 -1 - Consultation Consultation Procedure Guidelines



Launch Date: 4 April 2017

Closing Date for comments: 5 May 2017

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A. Introduction

1. The Utility Regulation and Competition Office (the '**Office**') is the independent regulator for the electricity, information and communications technology ('**ICT**'), water, wastewater and fuels sectors¹ in the Cayman Islands. The Office also regulates the use of electromagnetic spectrum and manages the .ky Internet domain.
2. Different decisions by the Office will affect persons and organisations throughout the country in different ways. It is therefore important that the Office makes regulatory decisions with the appropriate input from persons with sufficient interest or who are likely to be affected by the outcome of such decisions. Consultation is an essential aspect of regulatory accountability and transparency and provides the formal mechanism for these persons to express their views in this manner. The requirement for the Office to consult is mandated in its enabling legislation.
3. Section 6(4) of the *Utility Regulation and Competition Office Law 2016* ('**URC Law**') requires the Office, among other things, to act in a timely manner, a reasonable, proportionate, impartial and consistent manner, to operate transparently to the full extent practicable, and to engage in reasoned decision-making based on the administrative record. Section 7 (1) of the URC Law requires the Office, before issuing an administrative determination which in the reasonable opinion of the Office is of public significance, "... to allow persons with sufficient interest or who are likely to be affected a reasonable opportunity to comment on the draft administrative determination".
4. The Office is mandated by the URC Law to publish its standard procedure for seeking comments prior to issuing administrative determinations of public significance.² This affirms that consultation is an essential aspect of regulatory accountability and transparency and the importance of engaging the public, licensees and stakeholders in the Office's decision making process.
5. These Guidelines are relevant to all members of the public, licensees and stakeholders who could be affected by the regulatory decisions made by the Office.

¹ The Legislation giving the Office jurisdiction in the water, wastewater and fuels sectors were passed during the March Sitting of the Cayman Islands Legislative Assembly and are expected to come into effect on May 1, 2017.

² Section 7(2) of the URC Law.

B. Consultation Procedure Guidelines Objectives

6. This document sets out the Consultation Procedure Guidelines and principles to be followed by the Office in its approach to conducting consultations with members of the public, licensees and other stakeholders on administrative determinations which, in the opinion of the Office, are of public significance. As set out in the URC Law,³ these are administrative determinations which relate to a sectoral utility, and which are likely to lead to:
 - (a) a **major change** in the activities carried on by the Office under the URC Law or any other law;
 - (b) a **significant impact** on a sectoral provider; or
 - (c) a **significant impact** on members of the public.
7. The Guidelines will standardise the process by which consultations are conducted by the Office, and will conform to international best practice. As such, an effective consultation should:
 - (a) involve, as far as possible, all persons who are affected or are likely to be affected, whether big or small companies, industries, consumers and community groups or individuals;
 - (b) explain fully the different options being considered by the Office before a decision is made, if applicable; and
 - (c) assist those with views to respond fully and in an informed manner;
 - (d) provide a vehicle for the Office to hear, consider and respond to responses received.
8. While the Office will generally adhere to the Consultation Procedure Guidelines once in place, it recognises the need for the procedure to be sufficiently flexible and dynamic to address the exigencies of the relevant regulated sectors.
9. The Office is proposing to set the following objectives for conducting consultations with the public, licensees and other stakeholders:
 - (a) to obtain input, information and feedback from persons whose rights or interests may be materially affected by the proposed administrative determination;
 - (b) to ensure regulatory transparency and objectivity;
 - (c) to protect consumer interests, where appropriate;
 - (d) to ensure adequate and accurate information is shared between the public, licensees, other stakeholders and the Office;

³ Section 7(3) of the URC Law.

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- (e) to strengthen public, licensee and other stakeholder understanding, participation and confidence in the regulatory process;
 - (f) to ensure that the public, licensees and other stakeholders are given the appropriate opportunity to express their views;
 - (g) to ensure that the Office has investigated the necessary aspects of an issue so that the public, licensees and other stakeholders are adequately informed of the issues surrounding a matter; and
 - (h) to acquire substantive information and knowledge from public, licensees and other stakeholders on any issue, in order for the Office to make informed decisions;

though the Office notes that not every consultation will be general in nature, and there may be instances where a consultation is targeted at specific persons who the Office believes has a material interest in the matter under consideration.

10. It is the Office's intention that these will become final guidelines as soon as possible but in any event no later than **15th July 2017**. All comments received before the deadline prescribed at the end of this consultation document will be considered and, as appropriate, these Guidelines will be amended, where it is relevant to do so, to reflect the comments received.
11. The Office will update these Guidelines from time to time to take account of best practice and ongoing experience with their application as well as comments received from interested parties. Although these Guidelines set out the approach the Office expects to take, they do not have binding legal effect. If the Office decides to depart from the Guidelines in any particular case, the Office will set out its reasons for doing so.⁴

C. Method of Consultation

12. The Office will determine the method of the consultation process to take place in respect of any administrative determination proposed to be issued by the Office, depending on the nature of the administrative determination itself,⁵ the number of parties potentially affected by the administrative determination, and the impact on the regulated industry and the consultations with the public, licensees and sectoral utility.

⁴ See section 7(2)(f) of the URC Law.

⁵ Different procedures and time frames may apply, for example, to adjudications under Part 8, to orders made under Part 13, or to the issuance of administrative fines under Part 14 of the URC Law.

D. Major Change/Significant Impacts

13. The Office notes that the statutory obligation to consult is where the proposed administrative determination is likely to lead to a **major change** in the activities of the Office and/or a **significant impact** on the relevant persons. Setting out in guidelines in what circumstances such changes/impacts may be relevant is not appropriate, as the impact of each change/impact will depend on the facts and circumstances of each proposed determination.
14. As a general approach, the Office envisages that it will consult in circumstances where the proposed administrative determinations are technically complicated with important legal and economic implications. These types of matters usually have the potential to impact a large number of parties and have significant public interest. For example, the determination of whether a licensee has significant market power (SMP) and is therefore dominant in a relevant market, or, the determination related to the pricing of services offered to other licensees between the licensees, are likely to be considered to be technically complicated.

E. Notice of Consultation

15. Notice of a consultation to be conducted by the Office initiates the formal consultation process. The Office recognises that there may be a need by the public, licensees and other stakeholders to plan in order to respond effectively to consultations. Interested parties may also need to allocate resources to a consultation to fully analyse the regulatory issues under consideration by the Office once the consultation has been published.
16. The Office proposes, as the norm, to publish a notice on the day of the launch of any formal consultation it intends to conduct on its website. The publication of the notice will be posted on the Office website at www.ofreg.ky. Notice of the consultation may also be effected through publication in national newspapers or public announcements on radio stations that broadcast throughout the Islands, if the Office considers the circumstances of the consultation to warrant it. In addition, the Office may email existing licensees and other stakeholders based on a circulation list developed as a result of previous consultations.
17. The Office proposes that the content of the notice of consultation should include the following:
 - (a) title of consultation;
 - (b) goals and substance of the consultation;
 - (c) address of website from which downloadable documents can be found;

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- (d) procedures and timelines for submission of responses and comments;
 - (e) contact information for the relevant Office personnel to which queries may be addressed; and
 - (f) any other relevant information.
18. The Office emphasises that there will be prescribed timelines for responding to the consultation, once the consultation has been published, and any comments received after the given deadline are unlikely to be considered. It is important to ensure the timely conduct of such consultations, for the resources of the Office to be efficiently utilised, that those persons responding to the consultation do so within the given timelines.

F. Consultation Documents

19. Consultations will typically include a consultation document setting out the background, issues to be considered, and questions to be answered. The content of a consultation document will usually be developed with the internal expertise of the Office. The specialised nature and subject matter of a regulatory issue may also require the Office to engage the services of consultants, advisory bodies, industry groups or other qualified persons. This level of external participation could be at any stage of the consultation process, or there could be more than one consultation process leading to the adoption of an administrative determination. The Office, therefore, proposes to engage consultants, industry groups and other such persons where it is deemed necessary in the consultation process to develop complex technical issues in the consultation document, and to assist with providing answers to responses from the public, licensees and other stakeholders to such issues.
20. The Office will follow a consistent approach in designing each consultation document. The Office proposes the consultation document to include:
- (a) a front cover with the name of the consultation and the closing deadline for responses;
 - (b) a page listing the contents;
 - (c) the main body of the document (which will state the reasons for the consultation, the preliminary position of the Office on a particular regulatory issue if applicable, the consultation process, etc.);
 - (d) a list of focused questions;

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- (e) the contact name of whom responses should be addressed to, and details of where responses should be submitted, along with other procedures for submissions including deadlines for responses and comments, and information on claiming confidentiality;
 - (f) annexes (which may include forms, graphs, tables, diagrams, etc.); and
 - (g) a glossary where necessary.
21. The Office also proposes to implement the following additional measures, as may be required on a case by case basis, with a view to making the consultation as effective as possible, and to acquiring as much information as possible to enable the Office to make informed decisions:
- (a) the use of research to understand the views, needs and behaviour of persons and organisations involved in, or concerned about the sectors regulated by the Office;
 - (b) the gathering of information on smaller companies and organisations by conducting surveys and opinion polls; and
 - (c) reaching out to people and community groups who have an interest in the decisions by having road shows, public meetings and open seminars.
22. When relevant, the Office also proposes to engage the public, Licensees and other stakeholders through other, more informal, methods from time to time. Such informal methods will complement the consultation process and should assist all potential respondents to consultations to better understand the issues under consideration. Such methods could involve:
- (a) holding face-to-face meetings in the available time;
 - (b) using the Office website (<http://www.ofreg.ky>) to gather feedback online and to provide detailed background information;
 - (c) briefing the media through news releases; and
 - (d) comments and reactions gleaned from social media, etc.
23. The Office will decide whether to apply these additional measures on a case by case basis.

G. Responses to Consultation

24. The Office will generally request written responses to its consultations. Written responses to consultations allow persons to fully express their views, and explain

- why they hold the views they do. Written responses also allow respondents to support their statements with evidence, and other interested parties to challenge the views and evidence presented by the respondents. Finally, written responses provide an avenue for respondents to raise issues that may not have been contemplated by the Office in the consultation process, to which the Office can effectively respond.
25. The importance of written responses to the Office's consultations is that they allow the Office to keep an accurate record of the position of the consultation respondents. There will be occasions where the number of responses to a consultation may be large. The Office has a statutory duty to give due consideration to all comments prior to issuing administrative determinations of public significance.⁶ It is therefore important that the Office avail itself of the written responses of each consultation respondent in order to properly inform its decision.

H. Confidential Responses to Consultation

26. The Office believes it is important for everyone interested in a regulatory issue to see the views expressed by the consultation respondents. In the interest of transparency and consistent with section 107 of the URC Law,⁷ the Office proposes to make all submissions received in response to its consultations available to the public subject only to the objective confidentiality of the information received. Although the Office will respect requests to keep certain views and information confidential, the Office will evaluate all requests for confidentiality in line with relevant legal provisions, and will not publish or

⁶ See section 7(1)(c) of the URC Law.

⁷ Section 107 of the URC Law provides that the Office is not required to publish or otherwise divulge information that in the view of the Office is:

- (a) a trade secret of any person;
- (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
- (c) other information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates;
- (d) information-
 - (i) that is given to the Office by a third party (other than another sectoral utility) in confidence on the understanding that it would be treated as confidential; and
 - (ii) the disclosure of which would be likely to prevent the Office from receiving further similar information required by the Office to properly fulfil its functions;or
- (e) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of a Law.

It follows that the Office is expected to make available to the public all other information.

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- divulge information that is, in its opinion, deemed confidential in accordance with section 107 (3) of the URC Law.
27. The Office proposes to adopt the following procedure for the effective handling of confidential information submitted to it by consultation respondents:
- (a) any claim for confidentiality **must be accompanied at the same time as the submission** by detailed reasons justifying the claim;
 - (b) where it is asserted that specific harm would be caused to the person claiming confidentiality, sufficient details must be provided as to the nature and extent of such harm with supporting evidence;
 - (c) a person claiming confidentiality in connection with the information must file with the Office **at the same time as the submission** a redacted version of the information or response to be placed in the public domain;
 - (d) where the Office determines that the justification offered by the person claiming confidentiality meets the standard for confidential treatment in section 107 of the URC Law, the Office shall –
 - (i) issue an order granting the request;
 - (ii) refrain from publishing the full document or information in response to the consultation; and
 - (iii) publish the redacted version of the document or information.
 - (e) where the Office determines that the justification offered by the person claiming confidentiality does not meet the standard for confidential treatment in section 107 of the URC Law, the Office shall –
 - (i) issue an order denying the request; and
 - (ii) either-
 - return the information to the submitting party, in which case the Office shall not consider or rely on the information; or
 - after providing the submitting party with notice and an opportunity to comment, disclose the information, if the Office determines that disclosure would be in the public interest.
28. It is important to be aware that, in accordance with the terms of the URC Law, information that is determined to be confidential under this process may still be disclosed to the Minister responsible for the Office, to the Minister responsible for the sector to which the confidential information is relevant, to the Members of the Board or to the staff of the Office, to a court, or, where necessary to conduct a public consultation, to specific parties pursuant to a non-disclosure agreement.
29. Persons submitting redacted versions of a document or information are solely responsible for ensuring the redaction is complete or effective. The Office will

not make any determinations with respect to documents or information for which confidentiality was not claimed and will not redact any documents itself – such documents or information will be presumed to be public. Nor will the Office perfect any incomplete redaction or return to the submitting party for perfection an incomplete or imperfect redaction, for example, in situations where the information might still be visible notwithstanding the redaction. The onus is on the submitting party to make proper and complete claims for confidentiality, including redactions of documents or information.

30. The Office does not endorse or require any particular method of redacting documents or information, provided that chosen method is not misleading. A document or information will be considered to be properly redacted if the chosen method clearly indicates that text or information has been deleted and shows the location and extent of the deletion.

I. Comments to Written Responses

31. The overall responses to a consultation may demonstrate a misunderstanding by respondents of a position on a regulatory or other measure the Office proposes to issue. Additionally, the publication of the responses by respondents to a consultation may warrant follow-up comments by some respondents (cross-submissions). In such circumstances, the Office proposes to allow an intermediate stage in the consultation process period for respondents to view other responses and make comments on them, either for correcting factual errors, clarifying ambiguities or for putting forward counter arguments.
32. As these are intended to be comments, or responses to comments, or responses already filed, the Office proposes not to permit comments to written responses to be used as a means for respondents to raise new issues and will provide a shorter timeline in which to make such 'Reply' comments.

J. Decisions Made by the Office Following a Consultation

33. The Office will review and assess each response carefully and with an open mind. All submissions will be considered and analysed. The Office's analysis of the responses will be included with its administrative determination (i.e. its statement). The statement by the Office, which will also serve as a report on the consultation, will provide a general review of the submissions that were given during the consultation process. It will detail the Office's response to the submissions, and give reasons for its final position.
34. The Office will publish its administrative determinations in accordance with the URC Law, by publishing them on its website and maintaining copies at its

principal office for inspection by the public on request during normal business hours without charge.⁸

K. Duration of Consultation

35. The Office is of the opinion that the period for consultation should always take place within a reasonable timeframe. Under the URC Law, the Office must specify a minimum time for responding to consultations. Unless the URC Law requires the Office to follow a specific timeframe for issuing a specific regulatory measure, the Office has discretion to shorten or lengthen this timeframe depending on the circumstances. However, the Office also believes that where a consultation is too short, some of those with important views to share may not have sufficient time to prepare responses. If a consultation lasts too long, the sectoral utility may have changed significantly, or opportunities to act in an efficient manner may be missed. The Office must therefore strike a balance between the two.
36. The Office therefore proposes that, in the normal course, a period of four [4] weeks be provided to respond to consultations.
37. Where consultations are complex and/or interest to a wide range of persons, licensees and stakeholders (especially those who may require a longer time to respond), a period of between six [6] and eight [8] weeks will normally be allotted for responses to such consultations.
38. However, there may be circumstances where a shorter timeframe is appropriate and the Office proposes a period of up to three [3] weeks for consultations which fall within one or more of the following categories:
 - (a) It is a matter of urgency due to public safety or security issues;
 - (b) where there is a need to complete a proceeding within a specified timetable because of market developments or other factors which require that the matter be concluded within a short period (e.g. promotional events by telecommunications service providers);
 - (c) the issue has already been the subject of a recent consultation;
 - (d) a proposal by the Office will have limited effect on a sectoral utility;
 - (e) a proposal by the Office is only a limited amendment to existing policy or regulation, or

⁸ See section 8 of the URC Law.

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- (f) where the matter is procedural or a requirement imposed for instance in a policy direction that is deemed as urgent.
39. In these circumstances, the Office may issue the draft determination with the initial consultative document.
40. For complex matters, the Office may issue a series of consultations to solicit the views of stakeholders. The Office may, for example, initially issue a consultation that addresses the high-level issues and the Office's preliminary approach to addressing those issues. The Office would then review the comments to this initial high-level consultation before launching a second consultation, which would focus on issues of implementation.
41. In some circumstances, the Office may initially intend to conduct a single-phase consultation but, upon review of the responses to the consultation, it may become clear that a second phase of consultation is required. This is particularly likely to be the case where the responses propose a significant change in approach, or it appears that licensees may need to require assistance from external advisers, such economic or financial advisers, to respond fully to the consultation.
42. Whenever the Office launches a consultation it will provide clear timelines for each phase of the consultation, including the anticipated date for the publication of its administrative determinations.

L. Consultation Questions

43. Based on the above, the Office invites all interested parties to submit their comments, with supporting evidence, on any or all of the following questions:

Question 1: Provide your views on how the Office might best encourage input from interested parties.

Question 2: Provide your views on the process the Office proposes to adopt for consultations where the regulatory or other measures are technically complicated with important legal and economic implications. What considerations should be used to determine when there should be a particular form of consultation?

Question 3: Provide your views on the proposed structure and content of notices of consultation, consultation documents, and consultation decisions.

Question 4: Provide your views on whether the Office should make all submissions and documents filed with the Office available to the public as a matter of course, subject to any justified confidentiality claims.

Question 5: Provide your views on the proposed procedures to assess and make determinations on confidentiality claims.

Question 6: Provide your views on the proposed time frames for the various types of consultations.

Question 7: Provide your views on any other matters you consider relevant to this consultation.

M. How to Respond to This Consultation

44. All submissions on this consultation should be made in writing, and must be received by the Office by **5 p.m. on 5 May 2017** at the latest.
45. The Office will post any comments received on its website by **5 p.m. on 12 May 2017**.
46. Submissions may be filed as follows:

By e-mail to:

consultations@ofreg.ky

Or by post:

Utility Regulation and Competition Office
P.O. Box 2502
Grand Cayman KY1- 1104
CAYMAN ISLANDS

Or by courier:

Utility Regulation and Competition Office
3rd Floor, Alissta Towers
85 North Sound Rd.
Grand Cayman
CAYMAN ISLANDS

Or by fax to: (345) 945 8284