

OF 2020 - 1 - Consultation Proposed Dispute Resolution Regulations



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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, water, wastewater and fuels sectors 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. Under its foundational law, the Office, in order to promote resolution of non-consumer related disputes, may resolve disputes between sectoral providers, and between sectoral providers and sectoral participants. The Office may also initiate and conduct inquiries and investigations into any matter or complaint.
4. The purpose of this consultation paper is to seek the views of operators, the general public, and other interested parties, regarding the draft Utility Regulation and Competition Office (Dispute Resolution) Regulations (***‘the draft Regulations’***).

B. Legal Framework

5. The Office is guided by its statutory remit in developing the draft Regulations, notably the provisions which follow.
6. Section 6(2)(cc) of the Utility Regulation and Competition Law (as revised) (the ‘**URC Law**’) states that the Office, in performing its functions and exercising its powers under the URC Law or any other Law, may “*resolve disputes between sectoral providers, and between sectoral providers and sectoral participants*”.
7. In addition, section 6(2)(q) of the URC Law states that the Office may “*initiate and conduct inquiries and investigations into any matter or complaint, either on its own initiative or referred to it, which in the opinion of the Office, is not frivolous.*”

8. 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.*”
9. It is the position of the Office that it retains the right to propose amendments to the draft Regulations when appropriate but not so frequent so as to render the dispute resolution process arbitrary, but in any event only after consultation.

C. Draft Dispute Resolution Regulations Objectives

10. As a result of the establishment of the Office and its responsibility for the regulation of the utility sectors, one of the functions of the Office is to resolve disputes between sectoral providers, and between sectoral providers and sectoral participants. Therefore, the Office prepared the draft Regulations in order to outline the dispute resolution process that the Office expects sectoral providers, sectoral participants and interested parties to follow in relation to non-consumer related disputes.
11. The draft Regulations addresses the process in relation to how to prepare and submit a request to the Office for a decision on a non-consumer related dispute. In addition, the draft Regulations outline the requirements in relation to the submission of confidential documentation, the circumstances in which the Office may decline to entertain a decision request as well as how hearings would be conducted. The costs for submitting a decision request are also stated in the draft Regulations.
12. The draft Regulations are based on the former Information and Communications Technology Authority’s (“ICTA”) Dispute Resolution Regulations 2003, which will be repealed if the draft Regulations are made by the Cabinet and become legislation. The Office holds the position that it is necessary to repeal the former ICTA’s Dispute Resolution Regulations, as the proposed draft Regulations will be applicable to all providers and participants across all sectors regulated by the Office.
13. The draft Regulations are attached to this consultation document and are summarised in the paragraphs below. The Office strongly encourages respondents to read the draft Regulations prior to submitting comments, or to answering the consultation questions in the next section, as this summary is not intended to be exhaustive.

14. The attached draft Regulations consist of seventeen (17) Regulations which address the administrative process regarding the Office's proposed dispute resolution process as well as the following:
- Dispute referrals
 - Decision Requests
 - Preparation of Rulings
 - Hearings
 - Withdrawal of disputes
 - Use of experts
 - Costs
 - Effect of Rulings
15. The main objective of the draft Regulations is to outline the Office's proposed process to resolve disputes amongst licensees, sectoral participants, and interested parties, in relation to the regulation of the utility sectors in the Cayman Islands. The draft Regulations will apply to all licensees, sectoral providers and any other interested parties, where the dispute is not consumer related.

D. Consultation Questions

16. Based on the above, the Office invites all interested parties to submit their comments, with supporting evidence, on the following question:

Question 1: Do you agree that the draft Dispute Resolution Regulations clearly outline the Office's proposed dispute resolution process in relation to non-consumer related disputes?

Question 2: In your opinion, do you think that the reasons why the Office would decline to deal with a decision request are clearly outlined in the proposed Dispute Resolution Regulations?

Question 3: In your opinion, do you think that the amount of the proposed fees are appropriate?

Question 4: Please provide your views on any other matters you consider relevant to this Consultation.

E. How to Respond to This Consultation

17. This consultation is conducted in accordance with the Consultation Procedure Guidelines determined by the Office and found on the Offices website.¹
18. The Office considers that because the draft Regulations are published as part of this consultation, this consultation will be conducted as a single-phase consultation over a period of **thirty (30) days**. Where, upon review of the responses to the consultation, it becomes clear that a second phase of consultation is required, a further notice will be issued accordingly. As noted above, **section 7(1)** of the URC Law states that prior to issuing an administrative determination of public significance, the Office shall “*issue the proposed determination in the form of a draft administrative determination.*” The Office considers the attached draft Regulations to be a “*draft administrative determination*” for the purposes of **section 7(1)**.
19. All submissions on this consultation should be made in writing and must be received by the Office by **5 p.m. on 03 April 2020** at the latest.
20. The Office will post any comments received within the stated deadline on its website by **5 p.m. on 17 April 2020**.
21. Submissions may be filed as follows:

By e-mail to:
consultations@ofreg.ky

Or by post to:
Utility Regulation and Competition Office
P.O. Box 10189
Grand Cayman KY1- 1002
CAYMAN ISLANDS

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

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<http://www.ofreg.ky/upimages/commonfiles/1507893545OF20171DeterminationandConsultationProcedureGuidelines.pdf>

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22. If a respondent chooses to file any information in confidence with OfReg, it should, *at the time of making its filing*, also file redacted versions for the public record along with the reasons for each confidentiality claim and the other requirements for confidentiality claims as specified in section 107 of the URC Law.
 23. If a respondent chooses to apply to the Office for an extension of the time to file comments or reply comment, it must do so no less than four (4) days before the day of the existing deadline, include a complete and detailed justification for the request, and copy all other respondents (if known) *at the same time* as it applies to the Office. The other respondents (if applicable) may comment on the application for an extension within two (2) days of submission of the application, copying all other respondents *at the same time*. The Office reserves the right not to accept applications for extensions that do not satisfy these requirements. However, at no time will the Office accept an application for an extension submitted after the deadline in question has passed.
 24. The Office expects to issue a Determination regarding the draft Regulations by the end of second (2nd) quarter of 2020.
 25. Upon issuing a Determination, the Office will make a recommendation to the Cabinet that the proposed Dispute Resolution Regulations become legislation, in accordance with section 111 of the Law.



APPENDIX 1

PROPOSED DISPUTE RESOLUTION REGULATIONS

CAYMAN ISLANDS



Supplement No.[...] published with Gazette No [...] dated [...].

**THE UTILITY REGULATION AND COMPETITION LAW (2019
REVISION)**

**THE UTILITY REGULATION AND COMPETITION OFFICE (DISPUTE
RESOLUTION) REGULATIONS, 20[XX]**

ARRANGEMENT OF REGULATIONS

1. Citation.
2. Definitions.
3. Dispute referral.
4. Decision Request.
5. Notice.
6. Confidentiality.
7. Office responses.
8. Similar complaint.
9. Declining to entertain a decision request.
10. Preparation of Rulings.
11. Hearings.
12. Interested parties.
13. Dispute withdrawal.
14. Experts.
15. Costs.
16. Office Rulings.
17. Effect of Rulings.

CAYMAN ISLANDS

**THE UTILITY REGULATION AND COMPETITION LAW (2019
REVISION)**

PART 1 - PRELIMINARY

**THE UTILITY REGULATION AND COMPETITION OFFICE (DISPUTE
RESOLUTION) REGULATIONS, 20[XX]**

The Cabinet, in accordance with section 111(1)(b) of the Utility Regulation and Competition Law (2019 Revision) (as revised), makes the following regulations-

1. These Regulations may be cited as the Utility Regulation and Competition Office (Dispute Resolution) Regulations, 20[XX].

2. In these regulations -

“dispute” means any dispute which is the subject of a decision request;

“ruling” is a decision made by the Office, but it is not an administrative determination as defined in the Law;

“decision request” means a written and signed submission made to the Office by a licensee or an interested party, and containing the information set out in regulation 5;

“interested party” includes a sectoral participant, a corporation or a potential licensee;

“Law” means the Utility Regulation and Competition Law;

“licensee” has the same meaning as in the Law;

“Office” has the same meaning as in the Law;

“referring party” means an interested party or licensee referring a dispute to the Office for a ruling; and

“respondent” means a licensee which has received a notice of a dispute issued by a referring party.

3. (1) A licensee or interested party which is aggrieved by any matter relating to another licensee may, by written notice, inform that other licensee of the grievance and the notice shall specify –

(a) the nature and circumstances relating to the grievance; and

- (b) the nature of any action which the complainant requires the other licensee to perform or refrain from performing.

(2) Where, pursuant to paragraph (1), a licensee receives a notice of grievance it shall, no later than five (5) business days after receiving the notice, provide a written response to the notice.

(3) Where a licensee has issued a notice of grievance and it has received a written response to such notice in accordance with paragraph (2) it shall, in good faith, attempt to resolve such grievance within thirty (30) days following the date of receipt of the notice by the licensee.

(4) Where any grievance as set out in paragraph (1) has not been resolved between all the relevant parties within a period of thirty (30) days following the receipt of the relevant notice of grievance, any of the aggrieved or the notified licensees may submit a decision request to the Office.

4. A decision request –

- (a) shall include the identity and address of the respondent;
- (b) shall include the details of all relevant infrastructure or services, if applicable, to which the issues relate;
- (c) shall set out the issues in dispute and any associated issues that have been agreed by the parties;
- (d) shall be accompanied by a written account which includes –
 - (i) dates, and copies of any correspondence, setting out any efforts that have been taken by either the referring party or the respondent to settle the dispute;
 - (ii) the matters which the referring party wishes the Office to determine; and
 - (iii) a clear and concise statement of the relief sought by the referring party;
- (e) where the decision request relates to a grievance under regulation 3 it shall be accompanied by –
 - (i) an affidavit, unless otherwise directed by the Office, signed by a person authorised by the referring party attesting to the fact that the matters set out in the decision request are to that person's knowledge and belief true and accurate;
 - (ii) subject to (e)(iii), a non-refundable processing fee in the amount \$1500 and an undertaking in respect of any and all costs arising from any process or procedure initiated by the Office in respect of the decision request in the event that it

is determined that the referring party should pay such costs; and

- (iii) where the referring party is an individual and not acting as an agent for a corporation, the Office may use its discretion to reduce the processing fee to a minimum of \$350.

5. (1) The referring party shall provide a copy of the decision request to the respondent on the same date on which it has submitted the decision request to the Office.

(2) The respondent shall file with the Office and provide the referring party with a written response within twenty (20) days of receiving the decision request.

(3) The Office may, if the circumstances so require, notify the respondent that the respondent should file a written response within a shorter period of time than that specified under paragraph (2).

6. Section 107 “Confidentiality” of the Law shall apply to all dispute resolution submissions made to the Office.

7. Upon receipt of a decision request, the Office may take one or more of the following actions –

- (a) request such other information from any person as may be affected by the dispute as it may deem necessary;
- (b) direct the parties to commence or continue reasonable efforts to resolve the dispute;
- (c) decline to determine the dispute on the basis of one or more of the grounds set out in regulation 9;
- (d) issue a notice for a public hearing pursuant to regulation 11 setting out procedures and issues to be addressed; and the Office may issue a notice to other licensees, interested parties and the general public advising of the public hearing and inviting submissions on the issues to be addressed;
- (e) require, if the Office considers it appropriate and reasonable in the circumstances, parties to proceed on an expedited basis with respect to all matters provided for in these regulations;
- (f) appoint a mediator to deal with the dispute and in such event may establish the terms of reference of any mediator which shall include –
 - (i) whether the outcome of any such mediation will be binding;
 - (ii) the procedures for such mediation;
 - (iii) any dates by which the mediation process will be concluded; and

- (iv) guidelines for the allocation of costs among the parties;
- (g) act as adjudicator of the dispute and, where it decides to do so, it shall establish its own terms of reference and procedures for such adjudication which shall include –
 - (i) whether the outcome of any such mediation will be binding;
 - (ii) The procedures for such mediation process;
 - (iii) any dates by which the mediation process will be concluded;and
- (iv) guidelines for the allocation of costs among the parties; or
- (h) such other course of action as it considers necessary to resolve the dispute.

8. Where the Office has received two (2) or more decision requests of a similar nature involving one or more of the same parties it may, for reasons of efficiency and consistency, elect to deal with such decision requests as if they were a single dispute. In these circumstances, the cost of the dispute will only be CI \$750 and the Office will notify the referring parties accordingly.

9. The Office may decline at any time to deal with a decision request if it decides that -

- (a) the matter is not within the Office's jurisdiction;
- (b) the subject matter of the decision request does not sufficiently concern any obligation under the Utility Regulation and Competition Law (as revised), any other law in effect in the islands or any agreement entered into by a licensee or any order of the Office which deals with or relates to electricity, information and communications technology, water, wastewater and fuels sectors;
- (c) the decision request is vexatious;
- (d) the decision request is an abuse of process;
- (e) the referring party has not made reasonable efforts to settle the dispute with the respondent;
- (f) the subject matter of the decision request is trivial, misconceived, defective or lacking in substance;
- (g) the ruling is unlikely to significantly advance competition in the market;
- (h) the subject matter of the decision request is repetitive in a particular market, and the Office has instead decided to commence an investigation into the whole market;
- (i) the subject matter of the decision request is not of significant social or economic importance;

- (j) the subject matter of the decision request should continue to be governed by the terms and conditions of an existing contract between the referring party and respondent;
- (k) the subject matter of the decision request is also the subject of current court litigation as between the parties;
- (l) it is not in the best interests of the Islands for the decision request to be granted; or
- (m) the referring party failed to pay fees or give undertaking, or owed any other funds to the Office.

10. In determining a dispute, the Office shall act expeditiously, and in doing so may have regard to –

- (a) the subject matter of the decision request;
- (b) the need to inquire into and investigate the decision request;
- (c) the objectives and functions of the Office; and
- (d) all matters affecting the merits, and fair settlement of the dispute.

11. (1) The Office may elect to conduct a hearing to assist it in its ruling of a dispute.

(2) In conducting a hearing, the Office shall not be bound by the rules of evidence governing the admissibility of evidence in judicial proceedings.

(3) A hearing shall be held in public unless the Office determines that information to be disclosed in a hearing is “confidential” as defined in the Law in which case the Office may direct that any hearing, or part of a hearing, shall be conducted in private.

(4) The Office may require that any submission by any party or any witness to the hearing be verified by affidavit and shall identify the person from whom such verification is required.

(5) The Office shall notify parties in advance of the date and subject matter of any proposed hearing and shall afford the parties and its witnesses, if any, a reasonable opportunity to be heard at the hearing.

(6) The parties to the dispute may elect to be represented at a hearing in whole or in part by a third party, including a legal representative.

(7) The parties to the dispute shall file a written brief no later than fifteen (15) days prior to the hearing outlining their position and shall include any materials in support of such position.

(8) A member of the Office is authorised to administer to a witness an oath or affirmation sincerely and truly declaring to provide true evidence.

12. (1) The Office may hear submissions or allow participation in a proceeding, public or otherwise, from interested parties, other licensees or members of the public to assist in making a ruling concerning a dispute.

(2) Where the Office proceeds in accordance with paragraph (1) the Office shall send copies to such persons of the decision request and, if received, a copy of the response of the respondent and thereafter such persons shall file their written submissions within twenty (20) days of receipt of notice with the Office and copy the other parties to the dispute.

(3) The Office may request further written submissions from some or all parties as it considers appropriate.

13. A referring party may withdraw a dispute before the Office makes its final ruling, provided that it agrees and settles any costs occasioned by the decision request or any matter arising from such request as determined by the Office.

14. The Office may, in its discretion, appoint an independent third-party expert to assist it in the resolution of a dispute and any costs arising from such appointment may be allocated to either party by the Office as part of any ruling or dispute withdrawal.

15. (1) In any proceeding pursuant to these regulations, the Office may elect to receive submissions as to costs and the Office may, having regard to the circumstances of the dispute, award costs to be paid by any party to a dispute.

(2) An award of costs may include –

- (a) any or all of the costs of the Office;
- (b) any or all the costs of any referring party; or
- (c) any respondent and any or all costs of any interested party or licensee.

(3) An award of costs may also include the cost of an expert retained by the Office or any party for assistance in a specific dispute.

(4) In determining costs the Office may request relevant information from parties such as their legal, consulting and other professional fees and the Office may take into account prevailing market rates for professional services, the reasonableness of any costs incurred and any other relevant matter.

16. (1) The rulings of the office, whether preliminary or final, shall be in writing and state the reasons upon which they are based.

(2) The Office shall make its written rulings available to the public.

17. (1) Subject to paragraph (2), a ruling of the Office shall be binding upon the parties.

(2) Rulings of the Office in response to a decision request is not subject to the Office's duty to consult as stated in section 7 of the Law.

(3) Nothing in these regulations precludes a party to a dispute from appealing a ruling to the Grand Court.

Made in Cabinet the [...] day of [...], 20[XX]

[]

Clerk of the Cabinet