



13 March, 2020

Utility Regulation and Competition Office
85 North Sound Road
Alissta Towers, 3rd Floor
P.O. Box 10189
Grand Cayman KY1-1104
Cayman Islands

E-mail: consultations@ofreg.ky

Dear Sirs,

Re: OF 2020 – 1 Consultation on Proposed Dispute Resolution Regulations

We refer to the Notice of Consultation re the Proposed Dispute Resolution Regulations dated 4 March, 2020 and respond to the Consultation Questions as follows:

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?

CWC Response: No, we consider that there are significant drafting issues and that the scope of the Regulations should also cover the dispute resolution process in relation to OfReg decisions. Please see the attached table for more detailed comments.

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 propose Dispute Resolution Regulations?

CWC Response: The grounds for declining to deal with a decision request set out in Regulation 9(i) and (l) give unduly wide discretion to OfReg. It is not normally the function of a Regulator to determine what is in the best interests of the Islands.

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

CWC Response: The Notice of Consultation does not explain how OfReg determined that the proposed non-refundable processing fees are reasonable but has simply doubled the processing fee set out in the Information Communications and Technology Authority Dispute Resolution Regulations for "corporations" (which is not defined), and by 3 ½ times for individuals. Taking into account that the draft Regulations separately provide for awards of costs for "any and all of the costs of the Office" we consider that an appropriate reference point for a non-refundable processing fee is the filing fee for originating process in the Civil Division of the Grand Court, i.e. CI\$200.00.



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

CWC Response: Please see our detailed comments in the attached table.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "M. Thomaz", written over a horizontal line. The signature is stylized and extends slightly above and below the line.

Manuel Thomaz

General Manager

Cayman Water Company Limited

**CAYMAN WATER COMPANY LIMITED COMMENTS ON THE DRAFT UTILITY REGULATION
AND COMPETITION OFFICE (DISPUTE RESOLUTION) REGULATIONS**

<p>The Preamble</p>	<p>This states that the Regulations are made by Cabinet in accordance with section 111(1)(b) of the Utility Regulation and Competition Law ("URCL"). However, section 111(1)(b) simply gives a general power to make regulations and so the reference does not make clear which particular statutory power is being exercised. It should therefore also cite section 6(2)(cc) of the URCL. We consider that the Regulations should be broad enough to encompass the following:</p> <p>(a) appeals from customers of sectoral providers under section 59 of the URCL;</p> <p>(b) Alternative Dispute Resolution Schemes under section 61 of the URCL so that aggrieved persons are provided with an alternative. Regulation 7 does refer to appointment of mediators and acting as adjudicator but we do not consider this sufficient as a scheme; and</p> <p>(c) fair and speedy dispute resolution procedures for decisions of OfReg as an alternative to judicial review as provided for in paragraph 5(7) of the General Regulatory Principles (which are set out in the Schedule to the Water Sector Regulation Law) which states as follows:</p> <p><i>"The decisions of the Office shall apply the principles of administrative law relevant to all administrative decision-makers, such as legality, adherence to the principles of due process and natural justice, fairness, proportionality and rationality; and such decisions shall be the subject of fair and speedy dispute resolution procedures".</i></p>
<p>Regulation 2 (Definitions)</p>	<p>We consider that the definition of "dispute" is circular and unhelpful. This should be used to define the scope of the disputes, and who are properly parties to disputes, that are the subject of a decision request. For example, "...means any dispute or difference of whatsoever nature between sectoral providers or between sectoral providers and interested parties".</p> <p>The definition of "decision request" should refer to regulation 4 versus 5. We consider that a standard form should be developed for this purpose and attached in a Schedule to these Regulations.</p> <p>We consider that "Interested party" has an odd definition. It should actually define what an interested party is, e.g. "any person who has sufficient interest or is likely to be affected by any matter which is the subject of a notice of grievance". It is not clear why simply being a "corporation" makes one an interested party. "Sectoral participant" which is defined in the URCL as a person who provides, uses or seeks to use utility services in a sectoral utility, but does</p>

	<p>not include the Office” could be interpreted to include consumers which the Consultation document states it is not intended to include.</p> <p>The definition of “respondent” refers to a “notice of dispute” while regulation 3 refers to a “notice of grievance”. There should be consistency in terminology. The form of this notice should also be developed and attached in a Schedule to the Regulations.</p>
Regulation 3(3)	We consider that “use reasonable efforts” should be substituted for “attempt” which would also make it consistent with Regulation 7(b).
Regulation 3(4)	We consider this should read “...any of the complainant (vs. of the aggrieved) or the respondent may submit a decision request to the Office” to achieve consistency of terminology.
Regulation 5	This assumes that the referring party will not be the respondent, but under Regulation 3(4) it may be.
Regulation 9(b)	This should refer to “the Law” which is defined as the URCL
Regulation 9(j)	We consider the words “should continue to be governed by” should be deleted and replaced by “is”.
Regulation 15(2)(c)	This should read “any or all costs or any respondent...”.
Regulation 17(2)	If rulings are not administrative decisions as per the definition of “ruling” then it follows that they are not subject to the duty to consult under section 7 of the URCL so this provision is redundant. It should read “Rulings...are not subject to the Office’s duty to consult...”. Note that the definition of “administrative determination” in the URCL – “includes any order, regulation, direction, decision, or other written determination by which the Office establishes the legal rights and obligations of one or more sectoral participants, but does not include an advisory guideline”, so, strictly speaking, would include a ruling on a dispute since under Regulation 17 it is binding on the parties.



OF 2020 – 1 – Consultation: Proposed Dispute Resolution Regulations

Clean Gas Submissions

Introduction

Clean Gas welcomes the opportunity to make submissions and considers itself to be extremely well placed to offer commentary on the current and proposed dispute resolution regulations in the Cayman Islands.

Clean Gas is one of two propane providers in the liquified petroleum gas propane market in the Cayman Islands and is the newer entrant, having entered the market in March 2018. Clean Gas has used a real-life example of a dispute in these submissions to illustrate the problems that face other companies in the fuel market and utilities sector more generally, and particularly new entrants or smaller providers.

Clean Gas considers that all utilities providers will benefit from improved dispute resolution regulation, and the Cayman Islands and its citizens will benefit from the resulting enhancement to competition.

Summary of Clean Gas Submissions

Clean Gas would welcome the following amendments to the draft Dispute Resolution Regulations (the “proposed regulations”):

- Imposition of a robust timetable for dispute resolutions, with defined phases and obligations placed upon both providers and the Office;
- Transparency obligations relating to the process and progress of disputes;
- Penalties or cost implications for providers who act unlawfully or in breach of the regulatory requirements, who fail to respond to information requests in a timely or complete fashion or who otherwise delay the determination of disputes;
- Removal of thresholds of impacts on competition, society or the economy in Section 9 (reasons for rejection);
- Imposition of a robust timetable for any investigations resulting from decision requests;
- Consideration of imposition of interest payment by providers who have taken payment for work that remains outstanding during the course of a dispute;
- Consideration of how fees should be treated in circumstances where determinations are significantly delayed.

Clean Gas Responses to Consultation Questions

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?

1. Imposition of a timetable

Clean Gas’s overarching concern is that the proposed regulations do not address the failure of the current regulation to impose a defined timeline for disputes and, as such, will not have the necessary impact on anti-competitive behaviour in the Cayman Islands ICT market. Clean Gas believes that the proposed regulations



present a real opportunity for the Office to impose a defined timetable for disputes and requests that this opportunity not be overlooked.

Clean Gas considers that it is vital, in order for disputes to be resolved in an expeditious way (which is itself vital for competition to exist in the Cayman Islands market), for the proposed regulations to clearly outline a timeline for disputes that includes express targets for responses by the Office as well as the providers.

It is well understood globally that delays in dispute resolution limit competition. The World Bank and the ITU warn regulators that *'the failure to resolve disputes quickly can limit competition, cause delays in the introduction of new services and infrastructures, block or reduce investment in the sector, and impede liberalisation and development of the sector'*.¹

Clean Gas considers that this statement applies clearly to dispute resolution in the fuel sector in the Cayman Islands. To be effective, regulations must ensure that dispute resolution is timely and robust.

Dispute Resolution Regime in the United Kingdom

Clean Gas notes that other jurisdictions impose clear timelines for dispute resolution. For example, Ofgem, the UK regulator, has certain statutory duties under the Gas Act² to reach determinations relating to certain types of dispute within two months (with the potential to extend to four months if appropriate).

Further, the published Ofgem guidance³, provides, that *"where only one round of comments is required after written submissions, it may typically take three months from the date of receipt of the dispute to the publication of the Authority's determination"*.

Importantly, the Ofgem guidance provides that *"the case officer will write to the parties to **inform them of the timelines** and the relevant information expected at each stage of the determination process. The case officer will also **keep the parties informed of the timelines to be observed** throughout the case and monitor them"*.

Ofgem therefore is required to:

- maintain an appropriate timeline for disputes;
- keep the parties to a dispute on track with their own timing obligations; and
- keep the parties updated as to the timetable and Ofgem's own timing obligations.

Transparency is considered key and Ofgem is made responsible for, and given the right to monitor the behaviour of the parties in respect of, delay.

In the event that Ofgem decides to open an investigation, there are investigation guidelines⁴, which state that Ofgem must *"aim to carry out investigations as quickly as possible"*. Again, it is noted that a *"provisional timeline provided to the company at the outset of every investigation will be set on a case-by-case basis. It will be updated as the case progresses"*, reemphasising that transparency is vital. It is clear from the investigations

¹ Ss 6.6.2.3 World Bank, Info Dev and ITU 'ICT Regulation toolkit'

² Gas Act (1995 Revision) <https://www.legislation.gov.uk/ukpga/1986/44/contents>

³ https://www.ofgem.gov.uk/system/files/docs/2017/05/ofgems_guidance_on_determinations.pdf

⁴ https://www.ofgem.gov.uk/system/files/docs/2017/10/enforcement_guidelines_october_2017.pdf



page of Ofgem, that the majority of recent investigations were completed within months (many in one to two months)⁵.

Clean Gas considers that looking to jurisdictions with long term and successful dispute resolution mechanisms (such as the United Kingdom) is clearly appropriate when reviewing the Cayman Islands' framework. The World Bank and ITU note that, as early as 2003, regulators were “turning to international benchmarking and outside event consultants for assistance”.

By contrast to the United Kingdom regime, the proposed regulations only require the Office to act expeditiously, taking into account the subject the matter of dispute and its own objectives and functions. Whilst certain timelines are imposed upon providers, they do not impose any overall defined timeline or specific targets upon the Office, nor any requirement to keep parties updated or enforce information requests, leaving continued uncertainty and significant delay. Clean Gas does not believe that this is any real improvement to the current regime.

Illustration of current concerns

In May 2018, having faced multiple examples of what it believes to be anti-competitive behaviour by the incumbent monopolist, Clean Gas made a decision request (the “Decision Request”) to the Office.

The Office, “taking into account the limited remedies at its disposal at the time to address the complaint, decided in June 2018 to launch an investigation pursuant to s6(2)(q) and s71 of the URC Law”. In March 2020, Clean Gas received a draft of the Office’s Investigation report (the “Draft Report”). On this occasion, therefore, the current dispute resolution regime was only utilised by the Office in order to make the determination to launch a market investigation.

However, Clean Gas notes that, as of the date of these submissions, the Decision Request will have been outstanding for two years. At this time Clean Gas has received a Draft Report, and has made several submissions relating to its concerns with the investigation undertaken and the conclusions drawn by the Draft Report.

In particular, as illustration, Clean Gas notes the following concerns with the process undertaken by the Office in relation to the Decision Request (and resulting Draft Report) which could be mitigated by amendments to the proposed regulations:

Detrimental effect of current regime on Draft Report	Will this change under the proposed regulation?	Difference had the matter been dealt with under UK regime
The Office is under no timing obligations to complete a dispute resolution procedure, or an investigation. As such, the current dispute/investigation has been ongoing for two years.	No, there is no imposition a fixed timeframe that would improve this situation in the draft regulations.	Ofgem is required to undertake a dispute resolution procedure generally within two to four months. If an investigation is opened it is required to act as quickly as possible, and review of its recent investigations establish that

⁵ <https://www.ofgem.gov.uk/investigations>

		the majority of investigations are concluded within a matter of months.
There is no requirement for the Office to keep the parties to a dispute (or interested parties in an investigation) up to date on its progress. The failure to be transparent as to timelines resulted, after multiple requests for information, in Clean Gas being forced to make a formal complaint to the Ombudsman.	No, there is no requirement for transparency of process or timelines in the proposed regulations.	Ofgem is required to provide a provisional timeline at the outset of every investigation, which will be updated as the case progresses.
<p>The Draft Report indicates that the Office struggled to receive information requested on several occasions and was forced to conclude its investigation without the benefit of certain information from the industry monopolist.</p> <p>The Office has not penalised any person for failure to produce requested information in the course of the dispute resolution or the investigation.</p>	There is no provision for penalties or costs awards for failure to provide information within timeframes required. This means that there is no detriment (and the obvious benefit of delay) of causing delay, where a party to the dispute resolution wishes to maintain the status quo.	<p>The Ofgem dispute resolution guidelines confirm that they take delay seriously and consider it may be appropriate to <i>“recover our costs from one or both of the parties where their actions cause delay, including circumstances where the parties: fail to submit the full facts of the case available to them within the agreed timelines; ... withhold information which is relevant to the case ...”</i>.</p> <p>The Ofgem investigation guidelines notes that it takes delays in the provision of information extremely seriously and failure to cooperate fully with reasonable requests from the investigation team will result in penalties/redress. The guidelines note that:</p> <p><i>“in Competition Act cases, we may ... enter, and in some instances search, business and domestic premises ... In sectoral cases and those under the Enterprise Act and Consumer Rights Act, the Authority may apply to the court for an order requiring any default in complying with a notice to be made good (and costs) ... In Competition Act cases, the Authority may impose a civil sanction by way of a financial penalty on a person who fails to comply with a requirement [to provide information] ... Failure to fully comply with notices to</i></p>

		<i>produce documents or information may amount to a criminal offence and will be taken seriously."</i>
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It is notable that the Draft Report notes on multiple occasions that the Office is restricted in what action it can take by limited legislation and regulation to assist it with dispute resolution. Clean Gas therefore requests that the Office takes this opportunity to put in place a robust and transparent dispute resolution regime, including: (i) a clear timetable; (ii) requirements for transparency; and (iii) penalties (or cost implications) for parties who fail to comply with Office requests or who otherwise cause delay to the dispute resolution process.

Clean Gas losses caused by the current regime

There is an inevitable inference that the lack of clear dispute resolution targets in the Cayman Islands regulation has directly led to disputes taking years to be determined. The cost to Clean Gas of having such matters left unresolved is significant.

Clean Gas' current dispute arises from the incumbent providers' desire to protect its dominant position in the market. There is no benefit to the respondent in resolving the dispute and the failure of the proposed regulations to include a defined timetable or penalties for delay inevitably encourages respondents to continue the complained of anti-competitive behaviour during the dispute resolution process (and potentially to derail the process by failing to provide information requested). This directly leads to financial losses to the complainant provider as they remain unable to operate commercially in a competitive market.

Proposed timeframe

Clean Gas considers that mandated timeframes are appropriate and necessary in the Cayman Islands. Measures must be taken to make the Office's dispute resolution procedure fit for purpose and, ultimately, Clean Gas does not believe that the current proposals enhance the current procedure sufficiently in this respect.

Clean Gas has therefore set out below a proposal for a timeframe for disputes:

Phase	Action	Timeframe
Phase 1: Initial Enquiry	<p>Initial determination of request and whether decision request should be declined under S9 – confirmation of either rejection of the decision request or formal proceedings being opened. Decisions should be provided and the decision subject to judicial review.</p> <p>Alternatively, a decision to undertake an investigation is made at this time.</p>	Within 30 days of the decision request
Phase 2: Formal Proceedings	<p>To include, where relevant:</p> <ul style="list-style-type: none"> - requests for information from any person as may be affected; - hearing; 	Within 90 days of the opening of formal proceedings (and to the extent practical, "as soon in

	- mediation.	that period as practicable” within that period)
Phase 3: Determination	Publication of determination, subject to judicial review.	Within 14 days of the conclusion of Phase 2

If an investigation is opened, Clean Gas submits that it should be concluded within 90 days of the decision, with publication of the investigation report within 14 days of the conclusion of the investigation.

Impact of delay on competition and the industry

Clean Gas has outlined above the impact on Clean Gas of the failure to include a defined timetable for dispute resolution in the current regulations. However, it should be noted that the detriment is not limited to the financial and commercial impact upon Clean Gas. The delay in resolving disputes also inevitably leads to significant restrictions on competition within the industry, which has clear and very negative consequences for consumers and the Cayman Islands. The World Bank and the ITU note that “a successful market that attracts investors requires a predictable regulatory process”⁶.

As the Office has stated in its Draft Report, imposing competition regulation upon providers is vital. However, such regulation will not – and cannot - be effective, and will not therefore result in benefits to consumers, unless measures are adopted to enhance the Office’s effective enforcement.

2. Imposition of regulatory penalties

Clean Gas considers that the Office should include express provision for penalties for the following:

- Unlawful acts or breaches of regulatory requirements;
- Failure to provide information requested during the course of a dispute resolution process or investigation;
- Any act or omission leading to delay to the dispute resolution process or investigation.

Clean Gas notes that UK utilities regulators have powers to punish those who act unlawfully or in breach of the relevant regulatory requirements and in considering the size of a penalty may take into account **the extent to which the regulated body in breach has cooperated with its investigation.**

In the UK, the central objective of imposing a penalty is deterrence⁷. Whilst regulators are prepared and empowered to uplift a penalty where the provider fails to cooperate with the investigation or causes delay to

⁶ <http://ictregulationtoolkit.org/toolkit/1.2>, 1.2.3

⁷ For example, the UK’s ICT regulator, Ofcom notes in its Penalty Guidelines that “the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so. In particular, the level of the penalty must be sufficiently high to have the appropriate impact on the regulated body at an organisational level. It should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management recognises that it is not more profitable for a business to break the law and pay the



it, it should be noted that in order to ensure a swift resolution, regulators will reduce the level of the penalty imposed upon a provider if the defaulting provider voluntarily admits breach and accepts a streamlined administrative procedure for the remainder of the investigation or process. The intention is clearly to conclude the investigation or settlement process as swiftly and with as many resource savings as possible and, in line with that aim, the earlier the settlement, the greater the discount available. Similarly, where the regulator is concerned that a provider is causing delays or inefficiencies or failing to show full cooperation the regulator can reduce the available discount on account of the time taken and resources used.

Clean Gas is in no doubt that if the Office imposed penalties for both breaches of the regulations AND failure to assist the Office in its processes and investigations, providers would be deterred from anti-competitive behaviour and behaviour that impedes dispute resolution processes being concluded. As such, Clean Gas would suggest that this is a vital requirement for inclusion in the regulations.

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?

Clean Gas has the following concerns with the reasons for declining a decision request as outlined in Section 9:

- In relation to Section 9(e), Clean Gas agrees that parties should make reasonable efforts to settle the dispute between them. However, Clean Gas notes that compliance with Section 3 should amount to “reasonable efforts to settle” and, therefore, if the referring party has complied with the provisions of Section 3, the decision request should not be declined under Section 9(e). Clean Gas is additionally concerned that the step in Section 3 simply delays the process further and would suggest that the process is limited to one meeting (within five days of notification of intention) in order to progress the matter as swiftly as possible.
- Clean Gas has concerns around the threshold in Section 9(g) that a ruling must “significantly advance competition” for a determination request to be accepted. In and of itself, the behaviour complained of in a decision request or its resolution may not have *significant* effect on competition generally. However, this does not mean it does not require resolution:
 - the Office’s determination that the behaviour is anti-competitive may deter the respondent provider (and others in the market) from further anti-competitive behaviour in the future;
 - this ignores the cumulative effect of multiple infractions by other providers - some minor, some major. Imposing a threshold of this nature will allow infractions to continue, with incumbent providers encouraged to weigh up their actions by reference to that threshold;
 - any infraction of the laws and regulations of the Cayman Islands should be regulated and policed, without a threshold as to size; and
 - persons affected by such infractions should not be discouraged from bringing complaints (notably, upon payment of a non-refundable fee) by such a threshold being imposed.
- Similarly, Clean Gas considers in relation to Section 9(i), that where the behaviour complained of is anti-competitive, it should never be the case that such behaviour is considered by the Office to be “not

consequences, than it is to comply with the law in the first instance, and that it should therefore discourage bad conduct and encourage good practices and a culture of compliance across the organisation”.



- *of significant social or economic importance*". By definition, anti-competitive behaviour, however small, is of social and economic importance. Each incident may only be considered to impact one fuel provider, but cumulatively such behaviour results in significant detriment to consumers and the market generally.
- In relation to Section 9(h), Clean Gas welcomes the Office's commitment to commence investigations into the market where the subject matter of the decision request is repetitive in that market, but considers that it is necessary, in such circumstances, to provide for a timetable for the commencement and conclusion of such investigation. Clean Gas has suggested above that the timetable for investigation should mirror that proposed for dispute resolution (i.e. 90 days from the decision to open the investigation).

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

Clean Gas notes that the level of fees has significantly increased from \$750 for the submission of a determination request, to \$1,500.

If the increased fee arises from an enhanced focus upon fuel disputes, with further resources being employed, and will result in the guarantee of determinations being made expeditiously – and preferably in accordance with a timetable defined in the proposed regulations - then Clean Gas will necessarily, albeit reluctantly support the increase.

However, in circumstances where there no timetable is imposed, if the result is that the Office is not required to make determinations within any timeframe (and as such that a determination may not be made), Clean Gas finds any increase (or any fee at all) to be a difficult proposition to support.

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

1. Emergency powers

Section 66 of Bermuda Regulatory Authority Act provides for an Emergency General Determination: "*Authority may make a general determination on an emergency basis without complying with the public consultation procedures specified in this Act whenever the Authority concludes that the urgency of a particular case requires that it do so*".

C3 submits that it would be appropriate for the Office to have an explicit right (and obligation) to make a determination outside of its standard process and procedures in circumstances which are determined by the Office to be an emergency or where the determination is urgent. For example, it may be that a provider is unable to access a route at a time of emergency (pandemic, hurricane, etc) and it becomes imperative that they are enabled to do so by immediate determination in order to ensure public safety or continuity of public service.

2. Regulatory resourcing

C3 is concerned that the Office does not have sufficient resourcing to be able to deal with the regulatory burden placed on it of reviewing and determining disputes. C3 considers that the Office should have a team of attorneys with subject matter experience from relevant jurisdictions in each of the utilities sectors the Office



is responsible for. Without such expertise and resourcing, it is very difficult to see how any improvement to the regime can be effected, regardless of what is enshrined in the proposed regulations.

OF 2020 – 1 – Consultation: Proposed Dispute Resolution Regulations

C3 Submissions

C3 welcomes the opportunity to make submissions and considers itself to be extremely well placed to offer commentary on the current and proposed dispute resolution regulations in the Cayman Islands, as an ITC provider which has submitted a number of decision requests in the preceding six years.

Summary of C3 Submissions

C3 would welcome the following amendments to the draft Dispute Resolution Regulations (the “proposed regulations”):

- Imposition of a robust timetable for dispute resolutions, with defined phases and obligations placed upon both providers and the Office;
- Transparency obligations relating to the process and progress of disputes;
- Penalties or cost implications for providers who act unlawfully or in breach of the relevant regulatory requirements, who fail to respond to information requests in a timely or complete fashion, or who otherwise delay the determination of disputes;
- Removal of thresholds of impacts on competition, society or the economy in Section 9 (reasons for rejection);
- Imposition of a robust timetable for any investigations resulting from decision requests;
- Consideration of imposition of interest payment by providers who have taken payment for work that remains outstanding during the course of a dispute;
- Consideration of how fees should be treated in circumstances where determinations are significantly delayed.

Background

C3 will refer, throughout its submissions in response to the specific questions asked by the Office, to the following current disputes:

Table 1: Current C3 Disputes

Date of decision request	Regulator	Description of dispute	Fee paid to Regulator (KYD)	Current status of dispute
8/1/2014	ICTA	Datalink Dispute	250.00	Ongoing
6/17/2015	ICTA	Lime Duct Dispute	850.00	Ongoing
10/14/2015	ICTA	Logic/Weststar Dispute	850.00	Ongoing
4/26/2017	OFREG	C3/Datalink Make Ready	750.00	Ongoing
6/19/2018	OFREG	World Cup 2018 Dispute	850.00	Ongoing
7/2/2019	OFREG	Flow Shamrock Rd Dispute	750.00	Ongoing

C3 notes that the real-life examples of disputes that it uses in these submissions should be viewed as illustrative of the problems that face other companies in the ITC market in the Cayman Islands, and particularly new entrants or smaller providers. Whilst C3 is best placed to focus upon its own experience, it notes that all ITC providers will benefit from improved dispute resolution regulation, and the Cayman Islands and its citizens will indirectly benefit from the resulting increase in competition.

C3 Responses to Consultation Questions

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?

1. Imposition of a Timeline for Disputes

C3’s overriding concern is that the proposed regulations do not address the failure of the current regulations to impose a defined timeline for disputes and, as such, will not have the necessary impact on anti-competitive behaviour in the Cayman Islands ICT market. C3 believes that the proposed regulations present a real opportunity for the Office to impose a defined timetable for disputes and requests that this opportunity not be overlooked.

C3 considers that it is vital, in order for disputes to be resolved in an expeditious way (which is itself vital for competition to exist in the Cayman Islands market), for the proposed regulations to clearly outline a timeline for disputes that includes express targets for responses by the Office as well as the providers.

It is well understood globally that delays in dispute resolution limit competition. The World Bank and the ITU warn regulators that *‘the failure to resolve disputes quickly can limit competition, cause delays in the introduction of new services and infrastructures, block or reduce investment in the sector, and impede liberalisation and development of the sector’*.¹

C3 considers that this statement applies clearly to dispute resolution in the ITC sector in the Cayman Islands. To be effective, regulations must ensure that dispute resolution is timely and robust.

Contrast between the proposed regulations and other regimes

C3 notes that other jurisdictions impose clear timelines for dispute resolution. For example, Ofcom, the United Kingdom’s ITC regulator, has a statutory duty to reach a determination within 4 months,² and to the extent practical, *“as soon in that period as practicable”* before the 4-month deadline³. Looking to jurisdictions with long term and successful dispute resolution mechanisms is appropriate when reviewing the Cayman Islands’ framework. The World Bank and ITU note that, as early as 2003, regulators were *“turning to international benchmarking and outside event consultants for assistance”*.

In the Cayman Islands, the Customer Appeals Procedure Guidelines (“customer guidelines”), applicable to ITC customers, provide some timeframes for decision making by the Office. Whilst C3 considers that the framework provides by the customer guidelines could be greatly enhanced by the introduction of an overall time limit for the resolution of customer complaints, it notes that the customer guidelines do impose a 15 day

¹ Ss 6.6.2.3 World Bank, Info Dev and ITU ‘ICT Regulation toolkit’

² Section 188(5) Communications Act 2003.

³ Section 188(6) Communications Act 2003.

requirement upon the Office to provide a decision after it receives information from the parties, and therefore gives more clarity and structure to disputes than the proposed guidelines.

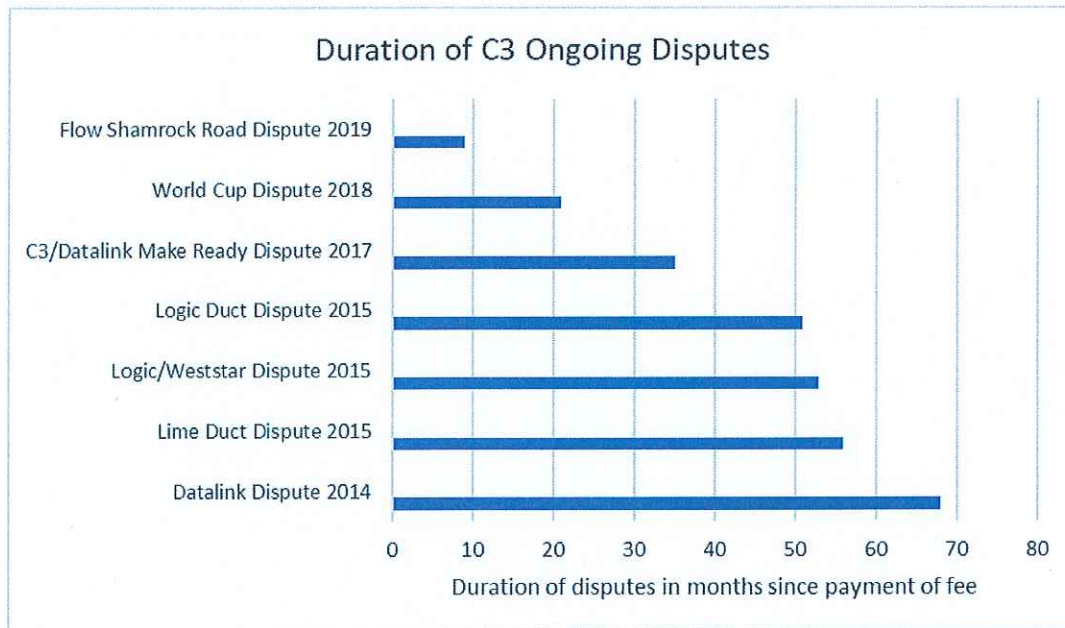
In relation to provider disputes, the Office is currently only under an obligation to act expeditiously, taking into account the subject the matter of dispute and its own objectives and functions.

C3 notes that the proposed regulations do not enhance the current obligations upon the Office in this respect, and, whilst certain timelines are imposed upon providers, they do not impose any overall defined timeline or specific targets upon the Office, leaving continued uncertainty and significant delay.

Illustration of current delays

The following table sets out the duration (as of the date of these submissions) of each of the disputes resulting from decision requests made by C3, under a regime without a defined timetable:

Table 2: Duration of C3 current disputes



Several of the disputes noted in Table 2 remain undetermined after several years. It is noted that the most recent of the disputes, now in its tenth month, would have been determined more than five months ago in the UK, a jurisdiction with a clear and defined dispute resolution timeline. The oldest would have been determined over five years ago.

This leads to an inevitable inference that the lack of clear dispute resolution targets in the Cayman Islands regulation has directly led to such disputes remaining undetermined.

Losses occasioned by the current regime

The cost to C3 of having such matters unresolved is significant. For the avoidance of doubt, for every decision request that it has made, C3 has incurred both the Office fee for submitting a decision request, potentially significant legal fees involved in following the process of the dispute resolution (including trying to resolve the dispute in good faith), and – as the more recent market entrant - the inevitable cost of being unable to operate

commercially until the dispute is resolved. For some of the disputes listed above C3 has additionally invested the significant cost of commissioning a route clearance survey and undertaking clearance work. It is noted that such work can cost hundreds of thousands of dollars⁴. There is no realisable benefit in C3's investment in the Islands' ITC infrastructure whilst a dispute remains undetermined.

Whilst a dispute is ongoing, the respondent provider typically continues the behaviour being complained of. The majority of the C3 disputes outlined in this paper arise from incumbent providers' desire to protect their dominant position in the market. It is noted that the Office has the ability, under the proposed regulations, "to direct the parties to commence or continue reasonable efforts to resolve the dispute"⁵. C3 complied with this requirement in the current regulations for each of its disputes and notes that it was not successful in any case. C3 therefore is concerned that this step simply delays the process further and would suggest that the process is limited to one meeting (within five days of notification of intention). C3 notes there is no benefit whatsoever to a respondent in resolving a dispute and the failure of the proposed regulations to include a defined timetable inevitably encourages respondents to continue the complained of anti-competitive behaviour during the dispute resolution process. This directly leads to financial losses to the complainant provider as they continue to be unable to operate in a competitive market.

The cost to C3 of the delay in the resolution of disputes is immeasurable, as it is impossible to correctly calculate the losses occasioned by its continued lack of access to subscribers (which is the ultimate and inevitable result of the failure to determine a dispute). It is clear that having access to ducts in George Town could have added several thousands in monthly revenue. It is also clear that delays in determinations have allowed other providers to continue to set unreasonable fees (as there is no determination to deter that endemic behaviour). C3 is therefore acutely aware of, and well placed to comment on, the cost to local business of there being no defined timelines in the current regulations.

Current investigatory framework

C3 notes that the Office has specific powers to initiate an investigation if there is a dispute regarding network access and the infrastructure sharing provisions. However, the framework does not provide a clear route for an ICT provider to trigger such an investigation. Under this route the Office is required to provide a timetable to the parties for determining the dispute, but in practice the Office seldom takes this approach, typically taking a more reactive approach to dispute between ICT providers.

Appropriate timeframes

C3 notes that the regulator in the UK, Ofcom, has dispute resolution guidelines which provide detail as to process and therefore significant predictability and certainty.⁶

The guidelines provide for an enquiry phase (typically 15 working days) during which Ofcom considers: (i) whether the statutory grounds for a dispute referral have been met; and (ii) 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.

⁴ For example, C3 paid over \$200,000 to Datalink for make ready work in relation to the Datalink 2017 Dispute – for the avoidance of doubt it will not have the benefit of any of this investment until the dispute is resolved

⁵ Paragraph 7(b) proposed regulations

⁶ Ofcom Dispute Resolution Guidelines for the handling of regulatory disputes (7 July 2011)

https://www.ofcom.org.uk/data/assets/pdf_file/0020/71624/guidelines.pdf

During the formal proceedings phase, Ofcom will determine the dispute following consultation with, and taking account of any submissions from, the Parties to the dispute (and any other interested parties that have a view to the dispute). Ofcom must determine the dispute within 4 months of its decision that it is appropriate for it to handle the dispute, except in exceptional circumstances.

C3 submits that an equivalent approach, with mandated timeframes, is appropriate and necessary in the Cayman Islands. C3's experience with the various disputes listed above illustrates that measures must be taken to make the Office's dispute resolution procedure fit for purpose. Unfortunately, C3 does not believe that the current proposals enhance the current procedure in this respect.

C3 has set out below a proposal for a timeframe for disputes, largely modelled on the UK framework.

Table 4: Proposed Timeframe

Phase	Action	Timeframe
Phase 1: Initial Enquiry	Initial determination of request and whether decision request should be declined under S9 – confirmation of either rejection of the decision request or formal proceedings being opened. Decisions should be provided and the decision subject to judicial review. Alternatively, if the Office decides to open an investigation, the timeline for an investigation should be triggered at this stage	Within 30 days of the decision request
Phase 2: Formal Proceedings	To include, where relevant: <ul style="list-style-type: none"> - requests for information from any person as may be affected; - hearing; - mediation. 	Within 90 days of the opening of formal proceedings (and to the extent practical, "as soon in that period as practicable" within that period)
Phase 3: Determination	Publication of determination, with judicial review available	Within fourteen days of the conclusion of Phase 2

If an investigation is opened, C3 submits that it should be concluded within 90 days of the decision, with publication of the investigation report within 14 days of the conclusion of the investigation.

Impact of delay on competition and the industry

C3 has outlined above the impact on C3 of the failure to include a defined timetable for dispute resolution in the current regulations. However, it should be noted that the detriment is not limited to financial and

commercial impact on smaller providers such as C3. The delay in resolving disputes also inevitably leads to significant restrictions on competition within the industry, which has clear and very negative consequences for consumers and the Cayman Islands. The World Bank and the ITU note that “a successful market that attracts investors requires a predictable regulatory process”⁷.

Imposing competition regulation upon providers is vital. However, such regulation will not – and cannot - be effective, and will not therefore result in benefits to consumers, unless measures are adopted to enhance the Office’s effective enforcement.

2. Imposition of regulatory penalties

As none of C3’s decision requests have been determined at this time, it cannot comment on the Office’s appetite for imposition of penalties. However, it considers that the Office should include express provision for penalties for the following:

- Unlawful acts or breaches of regulatory requirements;
- Failure to provide information requested during the course of a dispute resolution process or investigation;
- Any act or omission leading to delay to the dispute resolution process or investigation.

C3 notes that the UK regulator, Ofcom has powers to punish those who act unlawfully or in breach of the relevant regulatory requirements under Section 392 Communications Act 2003 and has published Penalty Guidelines⁸.

Ofcom takes into account multiple relevant factors when determining what level of penalty is appropriate, including: the seriousness and duration of the contravention; the degree of harm, whether actual or potential, caused by the contravention, including any increased cost incurred by consumers or other market participants; any gain (financial or otherwise) made by the regulated body in breach (or any connected body) as a result of the contravention; the extent to which the contravention occurred deliberately or recklessly; any steps taken for remedying the consequences of the contravention; whether the regulated body in breach has a history of contraventions; and **the extent to which the regulated body in breach has cooperated with its investigation.**

Ofcom notes that “the central objective of imposing a penalty is deterrence. The level of the penalty must be sufficient to deter the business from contravening regulatory requirements, and to deter the wider industry from doing so. In particular, the level of the penalty must be sufficiently high to have the appropriate impact on the regulated body at an organisational level. It should incentivise the management (which is ultimately responsible for the conduct and culture of the regulated body) to change the conduct of the regulated body as a whole and bring it into compliance, achieving this, where necessary, by changing the conduct at different levels within the organisation. The level of the penalty should be high enough that the management recognises that it is not more profitable for a business to break the law and pay the consequences, than it is to comply with the law in the first instance, and that it should therefore discourage bad conduct and encourage good practices and a culture of compliance across the organisation”.

Whilst Ofcom is prepared to uplift a penalty where the provider fails to cooperate with the investigation or causes delay to it, it should be noted that in order to ensure a swift resolution, it will reduce the level of the penalty imposed upon a provider if the defaulting provider voluntarily “admits it has breached relevant

⁷ <http://ictregulationtoolkit.org/toolkit/1.2>, 1.2.3

⁸ (https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf)

regulatory requirements and accepts that the remainder of the investigation or process will follow a streamlined administrative procedure”.

C3 notes the following:

“Our aim will be to conclude the settlement process as swiftly as possible. In line with this aim, the earlier the settlement, the greater the discount available, as the resource savings that Ofcom could achieve would be greater.”

“Where we are concerned that the process is not progressing as swiftly as possible due to delays or inefficiencies caused by the regulated body or that it is not showing its full cooperation with the settlement process, Ofcom may reduce the available discount on account of the time taken and resources used.”

C3 is in no doubt that if the Office imposed penalties for both breaches of the regulations AND failure to assist the Office in its processes and investigations, providers would be deterred from anti-competitive behaviour and behaviour that impedes dispute resolution processes being concluded. As such, C3 would suggest that this is a vital requirement for inclusion in the regulations.

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?

In relation to Section 9(e), C3 agrees that parties should make reasonable efforts to settle the dispute between them. However, C3 notes that compliance with Section 3 should amount to *“reasonable efforts to settle”* and, therefore, if the referring party has complied with the provisions of Section 3, the decision request should not be declined under Section 9(e). C3 has noted its suggested amendments to Section 3 above, being a five-day window for one meeting between the parties, in order to progress the matter as swiftly as possible.

C3 has concerns around the threshold in Section 9(g) that a ruling must *“significantly advance competition”* for a determination request to be accepted. In and of itself, the behaviour complained of in a decision request or its resolution may not have *significant* effect on competition generally. However, this does not mean it does not require resolution:

- the Office’s determination that the behaviour is anti-competitive may deter the respondent provider (and others in the market) from further anti-competitive behaviour in the future;
- this ignores the cumulative effect of multiple infractions by other providers - some minor, some major. Imposing a threshold of this nature will allow infractions to continue, with incumbent providers encouraged to weigh up their actions by reference to that threshold;
- any infraction of the laws and regulations of the Cayman Islands should be regulated and policed, without a threshold as to size; and
- persons affected by such infractions should not be discouraged from bringing complaints (for a non-refundable fee) by such a threshold being imposed.

Similarly, C3 considers in relation to Section 9(i), that where the behaviour complained of is anti-competitive, it should never be the case that such behaviour is considered by the Office to be *“not of significant social or economic importance”*. By definition, anti-competitive behaviour, however small, is of social and economic importance. Each incident may only be considered to impact one ITC provider, but cumulatively such behaviour results in significant detriment to consumers and the market generally.

It is noted in this respect that the UK regulator, Ofcom, takes into account the *“degree of harm caused by the contravention”* when considering what, if any, penalty should be applied to a provider which has behaved

unlawfully or in contravention of regulatory requirements⁹. Ofcom clearly notes, however, that *“the level of the penalty ... as explained above, is to ensure that the management of the regulated body is incentivised to modify the behaviour of that body (and deter other regulated bodies accordingly). Any quantified harm/gain is only one of the factors in determining the appropriate and proportionate level of the penalty”*. As such, Ofcom’s policy implicitly acknowledges that the very fact of a breach of competition regulation is the relevant point (and may result in penalty) regardless of the impact of such breach.

In relation to Section 9(h), C3 welcomes the Office’s commitment to commence investigations into the market where the subject matter of the decision request is repetitive in that market, but considers that it is necessary, in such circumstances, to provide for a timetable for the commencement and conclusion of such investigation. C3 has proposed a timeframe for investigations above.

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

C3 notes that the level of fees has significantly increased from \$750 for the submission of a determination request, to \$1,500.

C3 notes that it has a concern with any fee being payable in circumstances where a determination is never reached. Table 1 sets out the fees that have been paid by C3 to the Office since 2014, in respect of which no determinations have been made to date. These fees total KYD\$4,300.

If the increased fee arises from an enhanced focus upon ITC disputes, with further resources being employed, and will result in the guarantee of determinations being made expeditiously – and preferably in accordance with a timetable defined in the proposed regulations - then C3 will necessarily, albeit reluctantly, support an increase.

However, in circumstances where there no timetable is imposed and the Office is not required to make determinations in perpetuity, C3 finds any increase (and any fee at all) to be a difficult proposition to support.

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

1. Emergency powers

Section 66 of Bermuda Regulatory Authority Act provides for an Emergency General Determination: *“Authority may make a general determination on an emergency basis without complying with the public consultation procedures specified in this Act whenever the Authority concludes that the urgency of a particular case requires that it do so”*.

C3 submits that it would be appropriate for the Office to have an explicit right (and obligation) to make a determination outside of its standard process and procedures in circumstances which are determined by the Office to be an emergency or where the determination is urgent. For example, it may be that a provider is unable to access a route at a time of emergency (pandemic, hurricane, etc) and it becomes imperative that they are enabled to do so by immediate determination in order to ensure public safety or continuity of public service.

2. Regulatory resourcing

⁹ https://www.ofcom.org.uk/data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

C3 is concerned that the Office does not have sufficient resourcing to be able to deal with the regulatory burden placed on it of reviewing and determining disputes. C3 considers that the Office should have a team of attorneys with subject matter experience from relevant jurisdictions in each of the utilities sectors the Office is responsible for. Without such expertise and resourcing, it is very difficult to see how any improvement to the regime can be affected, regardless of what is enshrined in the proposed regulations.



Digicel

Digicel Response to the Public Consultation


by

The Utility Regulation and Competition Office

on

Proposed Dispute Resolution Regulations

1st May 2020




We thank you for the opportunity to provide our comments on the consultation document “Proposed Dispute Resolution Regulations” dated 4 March 2020 (the “Consultation”).

Digicel Cayman Limited, (“Digicel”), respectfully submits its comments and responses to the Consultation.

The comments as provided herein are not exhaustive and Digicel's decision not to respond to any particular issue(s) raised in the draft Regulations or any particular issue(s) raised by any party relating to the subject matter generally does not necessarily represent agreement, in whole or in part nor does any position taken by Digicel in this document represent a waiver or concession of any sort of Digicel’s rights in any way.

Please do not hesitate to refer any questions or remarks that may arise as a result of these comments by Digicel to: -

Raul Nicholson-Coe
Chief Executive Officer
Digicel Cayman Limited
Email: Raul.Nicholson-Coe@digicelgroup.com



Responses to consultation questions

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?


Digicel Response:

Digicel believes that the proposals conflate two separate processes. The first is the direct determination of a dispute by the Office and the second is the use of Alternative Dispute Resolution (ADR) procedures to resolve disputes.

The first process is contemplated under 6(2)(cc) of the Utility Regulation and Competition Law (the "Law"). This provides that *"In performing its functions and exercising its powers under this or any other Law, the Office may ... resolve disputes between sectoral providers, and between sectoral providers and sectoral participants;"* In Digicel's view this provides for the Office to directly resolve disputes. The procedure for the Office to determine disputes should be set out in a sequential manner. Digicel notes that the EU regulatory framework sets out a defined end to end timeline for the determination of regulatory disputes. Digicel also notes that where the draft regulations specify timelines they in general apply to the activities of complainants or respondents. They do not in general provide even indicative timelines for the activities which are carried out by the Office. This imbalance undermines the value of having recourse to the Office as there is no certainty as to how quickly matters might be resolved. While there may be a view that it is impossible to set timelines given the range of possible disputes this same logic could be applied to the activities ascribed to the parties to the dispute. If it is possible to specify timescales for their activities then it should be possible for the Office to similarly set out the duration of its parts of the dispute resolution process.

This second process relating to Alternative Dispute Resolution is provided for under Part 10 of the Law. This appears to contemplate a separate and distinct process to the main dispute resolution mechanism provided for under Section 6(2)(cc). It is not clear to Digicel that the Office has powers to force either a complainant or respondent to adopt such alternative procedures.

Even if the Office does have such powers, then the provisions relating to costs and those relating to the withdrawal of a request for determination being conditional on payment of costs mean that complainants and respondents require significantly more clarity on costs before the



ADR process commences. Therefore a step is required which allows for the parties to review and consider any proposed referral to ADR.

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?

Digicel Response:

Digicel is of the view that scope of what constitutes a dispute for the purposes of this Regulation is too wide. In particular Digicel is of the view that the disputes which are amenable to this Regulation should be confined to matters over which the Office has vires to make binding determinations absent a dispute. To do otherwise would extend the powers the Office beyond what is set out in the governing legislation simply because an issue has been formulated as a dispute.


Similarly it is Digicel's view that the wording of Section 3 is also too wide in scope. The proposed Regulation 3(1) currently states that grievances amenable to requesting a dispute determination can relate to "any matter relating to another licensee". The scope of Regulatory disputes should be firmly anchored in the obligations of licensees. Any request for a determination should set out the specific regulatory obligation which the complainant asserts that the respondent has failed to meet.

Provided that the scope for regulatory disputes is defined in the manner set out above then the proposed grounds for declining to accept a dispute are adequately set out in Regulation 9 of the Draft procedures.

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

Digicel Response:

Digicel does not believe that the level of the fees are appropriate. From time to time there are varying levels of application of Office resources to different players based on the conditions in that market at that time. The Office is funded by contributions from sectoral participants. The contribution does not vary according to the application of resources. Digicel believes that as a core function of the Office the cost of determining of disputes should be drawn from the overall budget of the Office.



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

Digicel Response:

The timelines in the draft regulations should all reference business days.


The timeframe provided to a licensee to respond to a notice of grievance under regulation 3(2) is currently set at 5 business days. 5 days to respond to a notice of grievance is not sufficient, especially as a notice is likely to contain significant details of the nature and circumstances relating the grievance and nature of action required. A responding licensee should therefore be given sufficient timeframe to review the nature of the grievance, to discuss the grievance internally with its management and relevant team members, to investigate the alleged claims, and then to put together a well set out response.

Regulation 3(3) should be amended such that an attempt to resolve the dispute should be made within 30 days following the date on which the aggrieved party receives a response, and not from the date the notice of grievance is received by a licensee. In essence, as currently written, this only gives the parties 24 or less days to attempt a resolution.

Regulation 3(4) should be amended corresponding to the changes made to regulation 3(3) as set out above.

Regulation 5(2) provides that the respondent must file a submission with 20 days after the decision request has been lodged. However this means that the respondent must commence drafting its response before it knows whether the Office will decline to accept the request for decision. To avoid this there should be a preliminary step where the Office determines the admissibility of the request and any response period should only commence once this decision has been advised to the respondent.

The essence of a dispute is that it is a matter between the directly affected parties. One party has a grievance with the other. This is reflected in the wording in Regulation 3 of the draft regulations. Digicel is strongly of the view that it is therefore inappropriate to allow submissions or participation from third or interested parties on the substance of the dispute. Such third parties have their own interests and the dispute is not between them and either the complainant or respondent. Digicel notes that scope of the Office's powers under Sections 6(2)(cc) is to "*resolve disputes between sectoral providers, and between sectoral providers and sectoral participants*". If they are not party to the dispute then unless it is to provide evidential material to support the facts of the matter then there should be no role for third parties in the process.



The Office has a variety of formal information gathering powers with sanctions for non-compliance or the provision of inaccurate information. In this context the requirements for affidavits etc. are unduly onerous and add un-necessary cost and complexity to the process particularly for the complainant.

Regulation 11 sets out that where it decides to hold a hearing then the default is that such hearing shall be held in public. Digicel disagrees strongly with this approach. Any hearing relates to a dispute between named parties and is for the purposes of facilitating the Office's resolution of the dispute. Digicel cannot identify any compelling reason to incur the additional cost and efforts of such hearings being in public.

If the matter is determined solely on written submissions then these would not be made public throughout the conduct of the dispute process. There is no reason why oral submissions should be treated in any other manner.

Digicel believes before any ruling is finalised a preliminary ruling should be made available to the parties to the dispute to afford them an opportunity to comment on the proposed ruling.