



**REGULATORY  
AUTHORITY**  
OF BERMUDA

## **Adjudication Rules**

### **Decision and Order**

Date: 10 September 2014

## Introduction

1. This decision is made in accordance with the Regulatory Authority Act 2011 (**RAA**) section 65(a) (**Decision**). The Authority hereby issues this Decision concerning Adjudication Rules pursuant to the consultation entitled “*Consultation: Adjudication Rules*” Matter: C14/1624 dated 6 June 2014 (**Consultation**). Having considered the views put forward by the responding parties (**Respondents**) together with the relevant provisions of the Electronic Communications Act 2011 (**ECA**) and the RAA, the Authority provides the relevant facts and provides a reasoned decision for the Regulatory Authority’s (**Authority**) adoption of the General Determination establishing the procedures to be followed in an adjudication (**General Determination**).

## The Scope and Overall Purpose of the Consultation

2. The Consultation focused on the Adjudication Rules found in chapter 9 of the *Interim Administrative Rules* (**Interim Rules**). The Interim Rules were published by the Authority on 31 January 2013 and have remained in place on an interim basis pending the outcome of consultations on certain aspects, particularly the Adjudication Rules at Chapter 9 thereof. Chapter 9 of the Interim Rules contains a full set of procedures to be followed by the parties during an adjudication. Section 74(2) of the RAA requires the Authority to establish procedures to be followed in an adjudication by General Determination. Before a general determination can be made, the Authority must first conduct a consultation. This is the purpose of the Consultation. The outcome will be a standalone set of Adjudication Rules for use by the Authority in Adjudications.

## Comments

3. There were no comments received from the general public concerning the Consultation. There was input from Digicel Bermuda Limited (**Digicel**), Bermuda Cable Vision Limited (**BCV**) and jointly on behalf of Link Bermuda Limited and Quantum Communications Limited (**Link**). Taking each in turn;

## Digicel

4. Digicel stated that its main concerns “*relate[ed] to distinguishing between circumstances where the parties do, and do not, have similar market positions, keeping adjudication procedures manageable, and avoiding unnecessary costs*”. In line with their stated concerns, Digicel’s response fell into two broad categories: (1) When to use Informal Resolution and

When to use Adjudication; and (2) Responses Specific to the Rules themselves.

5. Digicel suggested that the Authority adopt a similar approach to that of Ofcom<sup>1</sup> when considering whether or not informal resolution of a dispute should be undertaken in the first place. The Ofcom model proposes that informal dispute resolution procedures should not be used to resolve disputes between a large number of parties and where one of the parties is dominant in the relevant market. Whilst the Ofcom model referred to us by Digicel appears to be a reasonable guide and would certainly assist in lowering the demand on the Authority's resources, it is clearly designed for a more mature regulated market as well as a much larger market. Also, and most importantly, the implementation of the Ofcom model would require amendments to the RAA.
6. RAA Section 58 (1) *requires* the Authority to attempt to settle disputes between providers by way of informal resolution. The governing Ofcom legislation gives the UK authority a greater degree of latitude. The guidelines from which Digicel has drawn its proposals state as follows: "*The [UK] Communications Act states that Ofcom may decline to resolve a dispute where alternative mechanisms exist and represent an appropriate means of resolving the dispute*" [emphasis added]. While Ofcom has an option to decline to resolve a dispute, once a complaint is made to the Authority, no such option exists. In the circumstances, the Authority cannot implement Digicel's suggestion in this regard. It must attempt to settle disputes between sectoral providers that they have not been able to settle for themselves by way of direct negotiation.
7. The balance of Digicel's submissions concentrated on the Adjudication Rules themselves. Digicel suggested limiting the volume of submissions filed by either party to 10 pages as opposed to 50 (exclusive of exhibits, affidavits, authorities and other documents). In support of this position, Digicel argued that documents of great length could "*greatly complicate proceedings... making the cost of going to dispute or responding to a dispute document prohibitively expensive.*" We agree that submissions of up to 50 pages could create longer response times and longer hearings. There is also less of an incentive to provide succinct and cogent submissions on issues to be resolved when the length of the submissions is limited to 50 pages. Limiting submissions to 10 pages, however, may prevent parties from fully airing their positions. It could lead to over simplification of matters or, worse, parties to disputes presenting only part of their argument in their submissions saving the rest for oral presentation. This would put the presiding officer in an unfair position and could result in poor quality decisions. In the circumstances, the Authority has determined

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/resp/summary/guidelines.pdf>

that a limit of 25 pages for all submissions (save in the instances where the presiding officer allows longer) and will amend the rules accordingly. This amendment will also be applied to rule 90(4).

8. Digicel petitioned for the automatic right of discovery to be limited to instances only where the presiding officer has acceded to an application for such relief. The Authority is not convinced such an approach will result in the time and cost savings Digicel seeks. It should be noted that the parties first have the opportunity to agree limited or modified discovery procedures (rule 76 (2) Adjudication Rules) and, further, the presiding officer has wide powers concerning what sort of discovery can be ordered and when it must be given (rule 77 and 78 Adjudication Rules). Rule 76(4) of the Adjudication Rules, prevents discovery that is unnecessary, unreasonably duplicative, or unduly burdensome or expensive. In the circumstances, creating an additional requirement for a party who intends to seek discovery to make a separate application would likely increase costs. The presiding officer would be placed in a position of having to make a ruling on the issue of discovery based on the same principles set out at rules 76- 78 of the Adjudication Rules. These principles are already a required consideration in any event.
9. Digicel's point concerning the requirement to allow the presiding officer to take into account the value of the claim when considering a request for discovery by a party is adequately addressed by rule 76(4) of the Adjudication Rules, which prevents parties from seeking discovery that is "... *unduly burdensome or expensive*". The costs of discovery incurred by a party to an adjudication can be recouped by way of a cost order pursuant to rule 89(3)(a) of the Adjudication Rules.

## **BCV**

10. BCV had two very short comments. First, they noted that the requirement under rule 69(1)(a) of the Adjudication Rules for all submissions to be prepared on A4 paper was inappropriate. The Authority agrees. Submissions can be submitted on 8.5" x 11" paper. The rule will be amended accordingly.
11. Second, BCV proposed that the presiding officer should, in addition to the other requirements at section 61 of the Adjudication Rules, have at least 10 years post qualification experience. There was no explanation for why BCV thought a presiding officer should have so much experience before being allowed to act as adjudicator. In any event, the Authority is reluctant impose this requirement. The Chairman or the Authority as the case may be, should be entrusted to make the best choice for an appointment as presiding officer based on the relevant circumstances. Limiting those options further by requiring candidates to have a certain number of years

experience will likely result in making it more difficult to find a person willing and able to act as an adjudicator (sometimes with short notice).

## **Link**

12. Link had a number of suggestions most of which were provided in the form of written comments in their letter dated 20 June 2014. There were other, minor changes made to a revised version of the Adjudication Rules enclosed with Link's 20 June 2014 letter. This decision will only directly address the comments made in the 20 June 2014 letter. For the avoidance of doubt, however, The comments made by way of amendments to the Adjudication Rules enclosed with Link's letter have been considered.

### *Rule 61(5)*

13. This rule provides the Board the power to remove an independent presiding officer for cause, subject to having the unanimous consent of the Board and the consent of the Minister responsible for justice. Link proposed that this rule be revised to allow the Board to remove any presiding officer whether they are an independent presiding officer appointed by way of section 62(2) or appointed under rule 61(1). The Authority does not agree with this proposal. The Authority can see no reason to allow this power and Link has not provided any reason in support of its proposal.

### *Rule 63(1) & (3)*

14. A party seeking to intervene in an enforcement action may do so by application. The parties to the adjudication will have up until 2 days prior to the prehearing date within which to provide a response to that application. Link has sought to extend this response time to 5 days or, alternatively, require a prospective intervening party to apply 7 days in advance of a pre-hearing conference as opposed to the current 5 days.
15. The Authority does not agree that parties need more time respond to a request for intervention. The test for intervention is not complicated. The parties to the dispute ought to know the legal questions surrounding the adjudication as well the factual issues to be considered. Whether or not the party seeking to intervene has an interest in either of those categories will not be difficult to consider and provide a response to.

*Rules 63(7)*

16. Link have proposed the addition of a new clause under this rule which will allow a party to be awarded costs in the event a party is found to have used intervention to harass, cause delay or needlessly increase the costs of adjudication. An application for intervention, by its very nature is designed to be a brief review of the merits of whether a party seeking to intervene will add or detract from the matter being decided upon. The only costs incurred by the parties will be those incurred when answering the application. They will not likely be significant. In the circumstances, the Authority does not agree with the inclusion of the proposed rule other than to provide that intervention must not be used to harass or cause delay or needlessly increase the cost of the adjudication.

*Rule 71(2)(b)*

17. Link has proposed that the party responsible for authorizing a different period of time within which to answer a complaint be the presiding officer at all times. The Authority agrees with this proposal and rule 71(2) will be amended accordingly.

*Rule 75(2)*

18. Link has proposed that the Authority's administrative needs not be taken into consideration when an application for an extension of time or postponement is being made by any party. The concern is that the Authority would be given an advantage in respect of any application for a postponement or adjournment. The Authority does not agree with Link on this matter. The administrative needs of the Authority should be considered when a party makes an application for an extension or postponement. The reasons could be varied, however, one example that immediately comes to mind is the circumstance where there is more than one adjudication taking place within the same time period. Such a circumstance would obviously tax the Authority's administrative resources and should be considered when considering the length of a postponement and/or extension.

*Rules 75(4), 78(2) (e) (h)*

19. Link has pointed out wording within these rules that appear to give the Authority a power to act as a ruling party on application, which could potentially be made by an opposing side. It is agreed that those powers should rightly rest with the presiding officer and these rules will be amended accordingly.

*Rule 90(1)*

20. Link has sought to increase the length of time within which to challenge a preliminary adjudicative decision from 10 calendar days to 10 business days. The Authority takes no issue with this extension and will amend rules 90(1) and 90(3) accordingly.

*Rule 90(4)*

21. Link has helpfully proposed that the RA provide clarification as to what documents are excluded from the length of submissions. The Authority will make the suggested amendments.

**Order**

22. Taking into account the comments of the Respondents, and pursuant to section 63(1)(d) of the RAA, the Authority hereby Orders as follows;

- a. The Authority adopts the General Determination entitled Regulatory Authority (Adjudication Rules) General Determination 2014 dated 5 September 2014 and the Schedule thereto;
- b. The procedures set out in the Adjudication Rules General Determination shall be followed in any adjudication carried out by the Authority pursuant to the RAA.