



BERMUDA

REGULATORY AUTHORITY ACT 2011

2011 : 49

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SCHEDULE Regulated Industry Sectors

WHEREAS the establishment of an independent and accountable regulatory authority is necessary and in the public interest to protect the rights of consumers, encourage the deployment of innovative and affordable services, promote sustainable competition, foster investment, promote Bermudian ownership and employment and enhance Bermuda's position in the global market;

AND WHEREAS the regulatory authority should have the ability to supervise, monitor and regulate multiple industry sectors;

AND WHEREAS the regulatory authority should have the ability to make administrative determinations having legal effect;

AND WHEREAS the regulatory authority should be subject to procedures which ensure that, to the maximum extent feasible, decisions will be made in a transparent manner, based on the administrative record;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

PART 1 PRELIMINARY

Citation

- 1 This Act may be cited as the Regulatory Authority Act 2011.

[Section 1 effective 11 July 2012 by BR 49 / 2012 para. 2]

Interpretation

- 2 In this Act, unless the context otherwise requires—
 - “abuse of dominant position” means conduct by a sectoral provider that contravenes the prohibition contained in section 85;
 - “adjudication” means a proceeding conducted in accordance with the standards and procedures specified in sections 74 to 83 that establish the rights and obligations of the parties thereto;

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- “adjudicative decision and order” means a decision and order adopted by the Authority following an adjudication;
- “administrative determination” includes a general determination, order, direction, decision, or other written determination by which the Authority establishes the legal rights and obligations of one or more sectoral participants, but does not include an advisory guideline or an adjudicative decision and order;
- “advisory guideline” means a written statement, issued by the Authority pursuant to section 68, that provides the Authority’s views regarding a specific matter, but is not legally binding;
- “Authority” means the Regulatory Authority established under section 11;
- “authorization” means a licence (including an individual licence), permit or other type of permission that the Authority may grant by administrative determination, pursuant to section 48;
- “authorization holder” means a person that holds a valid licence, permit or other form of authorization, as the case may be, in accordance with sectoral legislation;
- “Board” means the Board of Commissioners of the Authority referred to in section 19(1);
- “business day” means any day other than a Saturday, Sunday or other public holiday;
- “Chairman” means the Chairman of the Board selected pursuant to section 22;
- “Chief Executive” means the person appointed as such by the Board pursuant to section 29;
- “class licence” means a licence that is granted by the Authority, in accordance with this Act, the provisions of sectoral legislation and the requirements established by the Authority, to all persons that fall within the class and have the required qualifications;
- “code of practice” or “code” means a set of requirements and procedures governing certain aspects of sectoral providers’ business conduct;
- “Commissioner” means a voting member of the Board referred to in section 19(3);
- “concentration” means a transaction described in section 87(4);
- “control” means, in respect of a corporation, the power, whether held directly or indirectly, to exercise decisive influence over a body corporate, including by directing its management and policies through ownership of shares, stocks or other securities or voting rights, or through an agreement or arrangement of any type, or otherwise, and “controls” and “controlled” shall be construed accordingly;
- “co-regulation” means a process by which a private sector body authorized by the Authority adopts and implements a code of practice, and performs any other

function specified by the Authority pursuant to this Act or sectoral legislation, in consultation with, and subject to the approval of, the Authority;

“covered services” means services provided by a sectoral participant that are subject to supervision by the Authority pursuant to sectoral legislation;

“decision” in relation to the Authority, means a decision issued by the Authority pursuant to section 65;

“dedicated charge” means a fee that a sectoral provider may assess on end-users, through a separate line item on its invoices, the proceeds of which the sectoral provider is to pay to the Authority or to an entity designated by the Authority.

“direction” means an administrative determination made pursuant to section 64 instructing a sectoral participant to do, or not do, such things as are specified in the direction;

“dominant position” means a position of economic strength in the relevant market or markets that affords an undertaking the power to behave to an appreciable extent independently of its competitors, customers and, ultimately, consumers, the abuse of which may provide the basis for enforcement action;

“end-user” means a person that uses goods or services provided by a sectoral provider on a retail basis;

“enforcement action” means any of the actions specified in section 93(5);

“*ex ante* remedy” means a regulatory obligation imposed by the Authority on one or more sectoral providers with significant market power in order to prevent anti-competitive conduct and promote competition;

“*ex parte* communication” means any written or oral communication made to a Commissioner, member of the staff or a presiding officer regarding a matter in issue in an ongoing public consultation or adjudication, other than—

- (a) a written submission made pursuant to a consultation document;
- (b) a written submission served on all parties to an adjudication; or
- (c) an oral statement made in a hearing for which a transcript is prepared;

“final Authority action” means a decision and order issued by the Authority in making an administrative determination or concluding an adjudication that is subject to appeal without any further administrative proceeding, and does not include the adoption of requests pursuant to section 10, advisory guidelines pursuant to section 68, a decision not to initiate a public consultation pursuant to section 69(4), or recommendations or reports pursuant to section 72;

“finite resource” means an input used to provide a covered service, for which the supply is limited;

“general determination” means a statutory instrument, made pursuant to section 62, that is applicable to all sectoral participants, or to such sub-category of sectoral participants as fall within the scope of the statutory instrument;

- “Government authorization fees” means the fees established in connection with the grant of an authorization pursuant to section 52;
- “individual licence” means a licence that is granted by the Authority to a specific person in accordance with this Act, the provisions of sectoral legislation and the requirements established by the Authority, for which a person must file an application and obtain the approval of the Authority;
- “industry sector” means a portion of the economy in which undertakings pursue a common business;
- “informal adjudication” means an adjudication conducted in the manner specified in section 81;
- “inspector” means a person appointed or designated as such, by the Authority, under section 92(1);
- “investigation” means the procedure described in section 89;
- “licence exemption” means an administrative determination made by the Authority that no form of authorization from the Authority is required in order to undertake an activity that would otherwise require authorization;
- “Minister”, in relation to a regulated industry sector, means the Minister responsible for that regulated industry sector;
- “Ministerial declaration” means a declaration issued by a Minister pursuant to section 4(2);
- “Ministerial direction” means a direction made pursuant to section 7;
- “net loss” means a situation in which, in any year, after accounting for bad and doubtful debts, depreciation in assets and other contingencies, the Authority’s costs exceed its revenues;
- “net surplus” means a situation in which, in any year, after accounting for bad and doubtful debts, depreciation in assets and other contingencies, the Authority’s revenues exceed its costs;
- “Operating Fund” means the Regulatory Authority Operating Fund established pursuant to section 39;
- “order”, in relation to an order issued by the Authority, means an administrative determination issued for any of the purposes specified in section 63;
- “presiding officer” means a person designated in accordance with section 76;
- “proportionate” means no more than reasonably necessary to achieve a given regulatory objective, taking into account the relative cost of compliance and the ultimate benefit to consumers;
- “public consultation” means the procedure, pursuant to sections 69 to 73, by which the Authority may establish rights and obligations of general applicability;

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- “Records Officer” means the person responsible for ensuring that the Authority complies with any statutory requirement regarding public access to information, privacy and data protection;
- “regulated industry sector” means an industry sector listed in the Schedule, such industry sector being subject to supervision, monitoring or regulation by the Authority, pursuant to sectoral legislation;
- “regulations” means a statutory instrument made by a Minister that is applicable to all sectoral participants in the sector for which the Minister is responsible, or to such sub-category of sectoral participants as fall within the scope of the statutory instrument;
- “Regulatory Authority fees” means the fees established to fund the operation of the Authority pursuant to section 44;
- “relevant market” means the market in which goods or services compete;
- “Reserve Fund” means the Regulatory Authority Reserve Fund established pursuant to section 40;
- “reserve price” means the minimum price that the Government will accept as a winning bid in an auction;
- “rule” means, when referring to the Authority, a rule of procedure or internal rule applicable to the conduct of the Authority’s activities or affairs;
- “Secretary” means the Secretary of the Authority;
- “sectoral legislation” means primary legislation empowering the Authority to supervise, monitor and regulate an industry sector and specifying substantive provisions governing that sector;
- “sectoral participant” means a person who provides, uses or seeks to use a good or service in a regulated industry sector, but does not include the Authority;
- “sectoral provider” means a person, whether or not an authorization holder, who provides a good or service in a regulated industry sector;
- “Selection Committee” means the committee established pursuant to section 20 to select the Commissioners;
- “self-regulation” means a process by which a private sector body authorized by the Authority adopts and implements a code of practice and performs any other function specified by the Authority pursuant to this Act or sectoral legislation;
- “significant market power” means a position of economic strength in the relevant market or markets that affords an undertaking, either individually or jointly with others, the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers, which may provide a basis for the imposition of *ex ante* remedies;

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“specified sectoral provider” means an authorization holder, designated by the Authority pursuant to section 87(1), that is required to obtain the Authority’s approval prior to entering into a concentration;

“staff” means the officers, servants and agents of the Authority appointed pursuant to section 28, and the Chief Executive, but does not include the Commissioners.

[Section 2 effective 11 July 2012 by BR 49 / 2012 para. 2]

Application

- 3 (1) The provisions of this Act shall apply in any case in which—
- (a) sectoral legislation empowers the Authority to supervise, monitor or regulate an industry sector; and
 - (b) the industry sector is listed in the Schedule.
- (2) The Minister responsible for an industry sector may, by order, amend the Schedule by designating that industry sector as a regulated industry sector.
- (3) To the extent possible, the provisions of this Act shall be construed consistently with the provisions of the relevant sectoral legislation.
- (4) In the event of irreconcilable conflict between this Act and the sectoral legislation, the provisions of the sectoral legislation shall prevail.

[Section 3 effective 11 July 2012 by BR 49 / 2012 para. 2]

PART 2

FUNCTIONS OF MINISTER RESPONSIBLE FOR A REGULATED INDUSTRY SECTOR

Functions of Minister and Ministerial declarations

- 4 (1) A Minister shall have those functions, in respect of a regulated industry sector for which he is responsible, that are specified in this Act and in sectoral legislation.
- (2) When provided for in sectoral legislation, a Minister may issue Ministerial declarations that establish policies for a regulated industry sector.
- (3) When adopting a Ministerial declaration, a Minister shall—
- (a) confer with the Authority when developing policies applicable to a regulated industry sector; and
 - (b) consult with sectoral participants.
- (4) Any Ministerial declaration made by a Minister pursuant to this section shall remain in effect until the earlier of—
- (a) any date specified in the Ministerial declaration; or

- (b) the date on which the Minister modifies or revokes the Ministerial declaration.

Regulations

5 (1) A Minister, on his own initiative or at the request of the Authority, may make regulations, that—

- (a) establish general requirements regarding the means by which the Authority is to implement this Act, sectoral legislation or approved sectoral policies; and
- (b) address any other matter that this Act or sectoral legislation specify are to be addressed by regulations made by the Minister.

(2) Where sectoral legislation authorizes a Minister to establish a fund or funding scheme for a specific purpose, the Minister, after giving due consideration to any recommendation made by the Authority, may make regulations, subject to the affirmative resolution procedure, to establish the fund or funding scheme.

(3) In exceptional circumstances, a Minister, on his own initiative or at the request of the Authority, may make regulations waiving, or authorizing the Authority to waive, the application of any provision of this Act, relevant sectoral legislation or any regulations in respect of a sectoral participant or a class of sectoral participants.

(4) A Minister may only grant or authorize an exceptional waiver, pursuant to subsection (3), if he has determined that application of the provision to a sectoral participant or class of sectoral participants is not necessary for any of the following purposes—

- (a) to promote the interests of residents and consumers;
- (b) to promote or preserve sustainable competition;
- (c) to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership; or
- (d) to fulfil any additional objects specified by sectoral legislation.

(5) Any regulations made by a Minister pursuant to subsection (3) granting or authorizing an exceptional waiver of any provision of this Act or of any sectoral legislation shall be subject to the affirmative resolution procedure.

(6) Notwithstanding subsection (4), when requested by the Authority, a Minister, for good cause shown, may waive—

- (a) any deadline imposed on the Authority by this Act or by sectoral legislation by publishing a notice in the Gazette; and
- (b) any deadline established by the Authority, pursuant to section 70(2)(f), in a public consultation document.

(7) The notice published in the Gazette pursuant to subsection (6) shall—

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- (a) state the reason why the Minister has concluded that there is good cause to grant the waiver; and
 - (b) specify a new deadline.
- (8) Prior to making any regulations pursuant to this Act, or pursuant to sectoral legislation, a Minister shall confer with the Authority and shall consult with sectoral participants.
- (9) In the event that more than one sector is designated as a regulated industry sector—
- (a) any regulations made by a Minister shall specify the regulated industry sector or sectors to which the regulations apply; and
 - (b) any regulations that must be applied to all regulated industry sectors may only be adopted with the concurrence of each and every Minister that is responsible for a regulated industry sector.

Request for Information

- 6 (1) A Minister, when necessary for the performance of his duties, may request the Authority to provide information regarding a regulated industry sector.
- (2) The Minister may specify a reasonable period of time for the Authority to provide the requested information.
- (3) The Authority shall submit a written report to the Minister containing the requested information within the time period specified by the Minister.
- (4) The report shall identify any information to which the Authority has granted confidential treatment.

Ministerial directions

- 7 (1) A Minister, after conferring with the Authority, may issue in writing a Ministerial direction to the Authority regarding any matter within his authority pursuant to sectoral legislation.
- (2) A Minister shall not direct the Authority regarding—
- (a) the application of general policies to specific matters before the Authority; or
 - (b) the specific rights or obligations of any individual sectoral participant or participants.
- (3) Any Ministerial direction shall be published in the Gazette, but the Minister may cause to be redacted any portion of the direction if he reasonably concludes that publication of that portion of the direction would—
- (a) jeopardize national security;
 - (b) result in the disclosure of confidential, proprietary or sensitive information; or

(c) harm the public interest.

(4) The Authority shall act in accordance with any Ministerial directions made pursuant to subsection (1).

Enforcement of Ministerial directions

8 (1) In any case in which a Minister concludes that the Authority has not complied within a reasonable period of time with a Ministerial direction that he has issued, the Minister may require the Board to provide a written response, within a reasonable period of time specified by the Minister, that identifies and explains the actions that the Authority has taken, or will take, to implement the Ministerial direction.

(2) If the Minister concludes that the Board's response does not resolve the matter, the Minister may require the Board to meet with the Minister, at a reasonable time specified by the Minister, to discuss the matter.

(3) Following the meeting with the Board, the Minister may issue—

- (a) a further Ministerial direction that clarifies, modifies or reaffirms the Ministerial direction; or
- (b) a notice that rescinds the Ministerial direction.

(4) The further Ministerial direction or notice, as the case may be, shall be published in the Gazette, and on the Authority's official website, but the Minister may cause to be redacted any portion of the direction or notice that he reasonably concludes meets the standards specified in section 7(3).

(5) In any case in which the Minister concludes that the Authority has not complied with a further Ministerial direction that the Minister issued pursuant to subsection (3), and is not likely to do so within a reasonable period of time, the Minister may apply to the Supreme Court for an order that the Authority comply with the direction.

Delegation of functions to the Authority

9 (1) A Minister may, in writing, delegate to the Authority, either generally or for a particular occasion, any function of the Minister regarding a regulated industry sector for which he is responsible, provided that—

- (a) no delegation made under this section shall preclude the Minister from exercising or performing, at any time, any of the functions so delegated;
- (b) the Authority may not delegate to any person any function that the Minister has delegated to it under this section; and
- (c) the Minister may, in writing, revoke or modify such delegation at any time.

(2) In any case in which a Minister delegates a function to the Authority, the Minister, if requested by the Authority, shall either—

- (a) advance to the Authority; or
- (b) in a timely manner, reimburse the Authority for,

the reasonable costs and expenses, including the cost of staff and any advisors, necessary to perform the delegated function.

(3) In any case in which a Minister advances funds to the Authority pursuant to subsection (2), the Authority shall return any unexpended funds.

(4) The Authority shall maintain records detailing the amount of any actual expenditures and shall, upon request, provide such records to the Minister.

(5) In any case in which a Minister and the Authority do not agree regarding the amount of the reasonable costs and expenses, including the cost of staff, necessary to perform the delegated function, either one may refer the matter to the Minister of Finance, whose determination shall be final and binding.

Requests from the Authority

10 (1) A Minister shall have the power to approve, or decline to approve, actions of, or actions requested by, the Authority where expressly provided for in this Act or in sectoral legislation.

(2) A Minister shall notify the Authority whether or not he grants approval, within—

- (a) 30 days of receiving a request for approval; or
- (b) such other period as the Minister may specify by written notification submitted to the Authority within 30 days of receiving a request for approval.

(3) In any case in which a Minister declines to grant approval pursuant to subsection (2), the Minister shall provide the Authority with a written explanation as to the reasons why the Minister has declined to do so.

(4) Any notification from the Minister pursuant to subsection (2) shall be published in the Gazette, and on the Authority's official website, but the Minister may cause to be redacted any portion of the notification that he reasonably concludes meets the standards specified in section 7(3).

(5) In the event that more than one sector is designated as a regulated industry sector—

- (a) any notification of approval or disapproval made by a Minister shall specify the regulated industry sector or sectors to which the approval or disapproval applies; and
- (b) where an approval or disapproval must be applied to all regulated industry sectors, the request may only be approved with the concurrence of every Minister responsible for a regulated industry sector.

(6) The following requests by the Authority shall be subject to the requirement specified in subsection (5)(b)—

- (a) a request for consent to establish the remuneration of the Commissioners, pursuant to section 24;

- (b) a request to carry forward the financial loss from a prior financial year, pursuant to section 40(5);
- (c) a request for approval of the budget, pursuant to section 43(3); and
- (d) a request to exceed the approved budget, pursuant to section 43(7).

PART 3

ESTABLISHMENT AND ORGANIZATION OF THE AUTHORITY

Constitution

Establishment of the Authority

11 (1) There is established an authority to be known as the Regulatory Authority which shall have such functions as are assigned to it by this Act and by sectoral legislation.

(2) The Authority is a body corporate, having perpetual succession and a common seal.

(3) The Authority may sue and be sued in its corporate name and may for all purposes be described by that name.

[Section 11 effective 11 July 2012 by BR 49 / 2012 para. 2]

Principal functions

12 The principal functions of the Authority, in relation to any regulated industry sector, are—

- (a) to promote and preserve competition;
- (b) to promote the interests of the residents and consumers of Bermuda;
- (c) to promote the development of the Bermudian economy, Bermudian employment and Bermudian ownership;
- (d) to promote innovation; and
- (e) to fulfil any additional functions specified by sectoral legislation.

[Section 12 effective 11 July 2012 by BR 49 / 2012 para. 2]

General powers

13 For the purpose of the performance of its functions, the Authority, to the extent consistent with this Act, may—

- (a) collect, retain and expend funds;
- (b) appoint, promote, remove and discipline staff;
- (c) establish its internal organization and procedures;

- (d) conduct its internal administrative operations;
- (e) make administrative determinations, adjudicative decisions and rules;
- (f) provide advisory guidance to sectoral participants;
- (g) establish external advisory panels and take appropriate actions to foster industry self-regulation and co-regulation;
- (h) establish and maintain an official website;
- (i) enter into leases for real property and contracts for goods and services;
- (j) grant, modify and revoke authorizations;
- (k) collect Government authorization fees and Regulatory Authority fees;
- (l) establish operating and reserve funds, open bank accounts, and accept grants and loans;
- (m) allocate finite resources used by sectoral providers to provide covered services;
- (n) establish technical standards for the provision of covered services;
- (o) review and, as appropriate, approve, reject or modify tariffs filed by a sectoral provider governing the provision of covered services;
- (p) establish and enforce quality of service standards applicable to covered services;
- (q) define relevant markets, assess the competitiveness of relevant markets and identify sectoral providers that have significant market power in such markets;
- (r) adopt remedies to deter anti-competitive conduct by sectoral providers in any relevant market;
- (s) modify or find to be void, agreements involving one or more sectoral providers that unreasonably restrict competition in any relevant market;
- (t) review and, as appropriate, approve or reject proposed concentrations involving a specified sectoral provider;
- (u) prohibit unfair trade practices by sectoral providers in any relevant market;
- (v) resolve disputes between sectoral providers, and between sectoral providers and end-users;
- (w) conduct public consultations and adjudications;
- (x) require the production of documents and other information, conduct inspections and compel attendance at proceedings;
- (y) take appropriate enforcement action, including the imposition of monetary sanctions, in any case in which a sectoral participant has contravened this

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Act, sectoral legislation or any regulations or administrative determination;
and

- (z) take any other action, not expressly prohibited by law, that is necessary and proper to perform its duties under this Act and sectoral legislation.

[Section 13 effective 11 July 2012 by BR 49 / 2012 para. 2]

Prohibited activities

14 Except as expressly authorized by sectoral legislation, the Authority may not—

- (a) engage in trade or otherwise have a direct or indirect financial interest in any commercial, agricultural, industrial or other undertaking, except such interest as the Authority may acquire in the course of the satisfaction of debts due to it, in which case the Authority shall dispose of the interest at the earliest suitable opportunity;
- (b) purchase shares of any company;
- (c) make loans to any person; or
- (d) purchase, acquire or lease real property, except for use as a business premises for the Authority or for the performance of its functions under this Act.

[Section 14 effective 11 July 2012 by BR 49 / 2012 para. 2]

Scope of authority

15 (1) The Authority shall have the power to supervise, monitor and regulate any regulated industry sector, in accordance with this Act, sectoral legislation and any regulations or policies made by a Minister.

(2) The Authority, when acting within the scope of its authority, may make administrative determinations that are binding on sectoral participants, including general determinations to implement this Act, sectoral legislation and regulations and policies made by a Minister.

(3) The Authority, following an adjudication, shall have the power to issue an adjudicative decision as to whether a specific person satisfies the criteria specified in sectoral legislation and, therefore, is a sectoral participant.

(4) The Authority, when acting pursuant to sections 85 and 86, may make adjudicative decisions and orders that are binding on persons that are not sectoral participants, if the Authority determines that an action taken by any such person unreasonably restricts, or is likely to unreasonably restrict, competition in a regulated industry sector.

Regulatory principles

16 In performing its duties under this Act, the Authority shall—

- (a) act in a timely manner;
- (b) rely on market forces, where practicable;
- (c) rely on self-regulation and co-regulation, where practicable;
- (d) act in a reasonable, proportionate and consistent manner;
- (e) act only in cases in which action is needed;
- (f) operate transparently, to the full extent practicable;
- (g) engage in reasoned decision-making, based on the administrative record;
- (h) act without favouritism to any sectoral participant, including any sectoral participant in which the Government has a direct or indirect financial interest;
- (i) not act in an unreasonably discriminatory manner; and
- (j) act free from political interference.

Sectoral review

17 (1) The Authority shall periodically conduct a comprehensive review of each regulated industry sector, including all policies, legislation, regulations and administrative determinations applicable to the sector.

(2) The Authority shall initiate the review process by publishing a consultation document, pursuant to section 70, inviting comment regarding—

- (a) market conditions in the sector;
- (b) regulations and administrative determinations applicable to the sector that should be made, modified or revoked; and
- (c) any other issues found to be relevant by the Authority.

(3) Not later than six months after the date on which the Authority issues the initial consultation document, the Authority shall issue a preliminary report and, if appropriate, a preliminary recommendation or decision and order, in accordance with section 72(2).

(4) Not later than nine months after the date on which the Authority issues the initial consultation document, the Authority shall issue a final report and, if appropriate, a final recommendation or decision, in accordance with section 72(4).

(5) Unless sectoral legislation provides otherwise, for each regulated industry sector, the Authority shall initiate the first sectoral review no later than three years after the date of the coming into operation of the applicable sectoral legislation.

(6) The Authority shall initiate each subsequent sectoral regulatory review no later than three years after the date on which the Authority issues the final report specified in subsection (4).

Official website

- 18 The Authority shall maintain an official website, on which it shall publish—
- (a) a directory, which shall include the name, position, official telephone number and email address of each Commissioner and each member of the staff;
 - (b) a list of each open adjudication or public consultation;
 - (c) the full text of—
 - (i) this Act;
 - (ii) all sectoral legislation;
 - (iii) all regulations, policies, Ministerial directions (other than any portions thereof that have been redacted pursuant to section 7(3)), and Ministerial declarations made by the Minister pursuant to this Act and to sectoral legislation; and
 - (iv) all general determinations made by the Authority pursuant to this Act and to sectoral legislation;
 - (d) the full text of all other administrative determinations and all adjudicative decisions and orders, with the exception of any portion of any such administrative determinations or adjudicative decisions and orders that contain information that the Authority deems to be confidential;
 - (e) an index of this Act, of all sectoral legislation, and of all regulations and administrative determinations adopted pursuant to this Act or pursuant to sectoral legislation;
 - (f) the agenda of any Board meeting, and a summary of each action taken by vote at any meeting of the Board with the exception of any portion that contains information in respect of which the Board has ordered confidential treatment under section 33(5);
 - (g) the audited financial statements and reports adopted by the Authority pursuant to section 47; and
 - (h) any additional information that the Authority is required to publish on the website pursuant to this Act or sectoral legislation.

Board of Commissioners

Composition and function

- 19 (1) There shall be a Board of Commissioners of the Authority which, subject to the provisions of this Act and relevant sectoral legislation, shall be responsible for the actions of the Authority and the general administration of its affairs and business.
- (2) The Board shall consist of five Commissioners and the Chief Executive.
 - (3) Each Commissioner shall be a voting member of the Board, and—

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- (a) the initial Commissioners shall be appointed as follows—
 - (i) one for a term of two years;
 - (ii) one for a term of three years; and
 - (iii) one for a term of four years; and
 - (b) any subsequent Commissioner shall be appointed for a term of not less than one year and not exceeding three years.
- (4) The Chief Executive shall be a non-voting member, and shall serve for a term of three years.
- (5) The name of each Commissioner shall be published in the Gazette at the time the Commissioner is appointed and at the beginning of every calendar year.
- (6) The name, term of office, telephone number and email address of each Commissioner shall be published on the Authority's official website.

[Section 19 effective 11 July 2012 by BR 49 / 2012 para. 2; subsections (2) and (3) amended by 2016 : 2 s. 67 effective 28 October 2016]

Selection Committee

- 20 (1) There shall be a body known as the Selection Committee.
- (2) The Selection Committee shall consist of—
- (a) the Minister responsible for justice, who shall serve as the Chairman of the Committee;
 - (b) the Minister responsible for labour;
 - (c) the Opposition Leader or such other person as the Opposition Leader may designate; and
 - (d) each Minister responsible for a regulated industry sector.
- (3) If the Minister responsible for justice is unable to preside at a meeting of the Selection Committee, or perform any other function specified in this Act, and has not designated another member of the Selection Committee to perform that function, the Minister who has served on the Committee for the longest period of time shall perform the function.
- (4) A simple majority of the members of the Selection Committee shall constitute a quorum.
- (5) The Selection Committee shall make all decisions by simple majority vote and, except as provided in subsection (6), each member of the Selection Committee shall have a single vote.
- (6) In the event of an equality of votes of the Selection Committee, the Chairman of the Selection Committee, in addition to a deliberative vote, shall also have a casting vote.

[Section 20 effective 11 July 2012 by BR 49 / 2012 para. 2]

Selection and replacement of Commissioners

21 (1) The Chairman of the Selection Committee shall cause a notice soliciting applications for the position of Commissioner to be published in the Gazette—

- (a) in respect of the initial Commissioners, within 45 days of the coming into operation of this section; and
- (b) in respect of any subsequent Commissioner, at the earlier of—
 - (i) 90 days prior to the date on which a Commissioner's term is set to expire; or
 - (ii) 15 days after receiving a notice from a Commissioner stating that he intends to resign prior to the expiration of his term, or 15 days after a vacancy occurs for any other reason,

and the Authority shall, as soon as practicable, publish the notice soliciting applications on its official website.

(2) Applications shall be submitted to the Selection Committee, in writing, pursuant to the procedures specified in the notice.

(3) A person who has held office as a Commissioner, may apply in the manner specified in subsection (2) and, at the discretion of the Selection Committee, may be appointed for successive terms.

(4) Within 45 days after the date on which the notice specified in subsection (1) has been published, but not earlier than 21 days after such date, the Selection Committee shall select the person, or each person, who will serve as a Commissioner.

(5) When assessing a candidate, the Selection Committee shall consider—

- (a) the relevant training, experience and qualifications of the candidate;
- (b) the extent to which the candidate may have any conflict of interest that would preclude the candidate from fulfilling the obligations of a Commissioner; and
- (c) the need to ensure that, collectively, the members of the Board have a broad range of views, skills and training.

(6) Commissioner may resign prior to the conclusion of his term by giving written notice to the other members of the Board and the Chairman of the Selection Committee, and shall cease to be a member of the Board from the later of—

- (a) the date on which the Chairman of the Selection Committee receives the notice; or
- (b) the resignation date specified in the notice, provided that such date shall not be more than 90 days after the date on which the Chairman of the Selection Committee receives the notice.

(7) In the event that a Commissioner does not complete his term of appointment, the person appointed by the Selection Committee to fill the vacancy shall be appointed to

serve as a Commissioner for a period of time equal to the remaining portion of the prior Commissioner's term.

- (8) A person shall be ineligible to serve as a member of the Board if the person—
- (a) is a member of either House of the Legislature;
 - (b) is a public officer;
 - (c) is a director, officer or employee of a sectoral provider;
 - (d) has been declared bankrupt or has made an arrangement with his creditors; or
 - (e) has been convicted of an indictable offence.

(9) Where a Commissioner is temporarily unable to perform his functions as a Commissioner, the Chairman of the Selection Committee, after conferring with the Board, may appoint a person to act in the place of such Commissioner during the period of the Commissioner's absence from the Board.

(9A) Where there is a vacancy on the Board that is in the process of being, or is about to be, filled pursuant to subsection (1), the Selection Committee may, on its own initiative, appoint a person who has held office as a Commissioner to serve as a Commissioner for a period not exceeding three months from the date of the appointment or until a new Commissioner has been appointed, whichever is the earlier.

(10) Any person appointed pursuant to subsection (9) or (9A), when acting within the scope of the appointment, shall be deemed to be a Commissioner, and shall be eligible for remuneration commensurate to the service provided.

[Section 21 effective 11 July 2012 by BR 49 / 2012 para. 2; subsection (9A) inserted and subsection (10) amended by 2016 : 2 s. 67 effective 28 October 2016]

Chairman of the Board

22 (1) The Commissioners shall select, by simple majority vote, a Commissioner to serve as Chairman.

(2) In the event that no Commissioner receives a majority vote, the Chairman of the Selection Committee shall select a Commissioner to serve as Chairman.

(3) The Chairman shall be appointed for a two-year term, subject to his remaining a Commissioner, and no Commissioner shall serve more than two consecutive terms as Chairman.

(4) The Chairman shall ensure that the Authority performs the functions specified in this Act and in sectoral legislation, and shall be answerable to the Board for his actions and decisions.

(5) The Chairman, after conferring with the other members of the Board, shall establish the agenda, and shall preside at meetings of the Board.

(6) The Chairman shall have a deliberative as well as a casting vote in all matters to be decided by the Board.

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(7) If the Chairman is unable to preside at a meeting, or perform any other function specified in this Act, and has not designated another Commissioner to perform that function, the Commissioner who has served on the Board for the longest period of time shall perform the function.

(8) The Chairman may resign his position by giving written notice to the other Commissioners, in which event he may serve out the remainder of his term as a Commissioner.

[Section 22 effective 11 July 2012 by BR 49 / 2012 para. 2]

Removal

23 (1) The Selection Committee, after providing a Commissioner with written notice and an opportunity for a hearing, may revoke the Commissioner's appointment if the Committee concludes that the Commissioner—

- (a) is unable to perform the functions of his office;
- (b) has engaged in malfeasance in office;
- (c) has failed to disclose a conflict of interest, as required by section 31(2);
- (d) has failed, without adequate justification, to attend three successive meetings of the Board; or
- (e) has become ineligible to serve as a Commissioner pursuant to section 21(8).

(2) Prior to making a decision to revoke a Commissioner's appointment, the Selection Committee may establish an independent panel to review the matter and make a written recommendation, a copy of which shall be provided to the Commissioner.

(3) Any decision to revoke a Commissioner's appointment shall require the concurrence of at least two-thirds of the members of the Selection Committee.

(4) In any case in which the Selection Committee revokes a Commissioner's appointment, the Selection Committee shall—

- (a) provide a written explanation to the Commissioner whose appointment has been revoked; and
- (b) publish a notice in the Gazette and on the Authority's official website.

[Section 23 effective 11 July 2012 by BR 49 / 2012 para. 2]

Remuneration

24 The Authority may pay to the Commissioners reasonable remuneration and allowances, subject to the approval of all Ministers responsible for regulated industry sectors.

[Section 24 effective 11 July 2012 by BR 49 / 2012 para. 2]

Meetings

25 (1) The Board shall meet as often as necessary or expedient for the performance of its functions.

(2) Meetings of the Board shall be held at such places, on such days and at such times as the Chairman, or two Commissioners acting together, may determine.

(3) The quorum of the Board shall be two Commissioners.

(4) Subject to subsection (3), the Board may act notwithstanding any vacancy in its membership, and no act of the Board shall be deemed to be invalid only by reason of a defect in the appointment of any Commissioner.

(5) Members of the Board may attend meetings, and Commissioners may cast votes, by means of audio or video conference, but no Commissioner shall purport to vote by proxy or delegate voting authority to any other person.

(6) Except as otherwise expressly provided in this Act or in sectoral legislation, the Board shall act by simple majority vote of the Commissioners, and the vote of each Commissioner shall be recorded in the minutes.

(7) The Board may only meet without the presence of the Chief Executive with the unanimous consent of the Commissioners.

(8) The Secretary shall prepare minutes of every meeting of the Board, specifying any matters discussed and decisions made, and the Board shall approve the minutes at its next meeting, subject to any revisions.

(9) The Board may establish such committees, consisting of some or all members of the Board, as it deems necessary for the discharge of its functions.

(10) The Authority shall make rules consistent with this section establishing the procedures to be followed by the Board.

(11) For the avoidance of doubt, rules made under subsection (10) are not statutory instruments.

[Section 25 effective 11 July 2012 by BR 49 / 2012 para. 2]

Documentary procedures

26 (1) Any notice to the Authority shall be provided by service upon the Secretary.

(2) Copies of all official documents filed or deposited in the office of the Secretary and certified by the Chairman or the Secretary to be true copies of the originals shall be evidence in like manner as the originals in all courts.

(3) All deeds, documents and other instruments required to be made under seal shall be sealed with the common seal of the Authority in the presence of the Chairman and the Secretary.

(4) The seal of the Authority shall be authenticated by the signature of the Chairman and the Secretary and shall be judicially and officially noticed.

(5) All documents (other than those required by law to be under seal) made by the Board may be signified under the hand of the Chairman, Secretary or any member of the staff authorized to act on either of their respective behalves.

Delegation of the Authority's functions

27 Except to the extent prohibited by this Act, or by sectoral legislation, the Board may, by written instrument, delegate any function of the Authority to any Commissioner or to any member of the staff, and in particular may—

- (a) delegate a function subject to any conditions, qualifications or exceptions specified in the instrument of delegation;
- (b) authorize the further delegation of any function to other members of the staff;
- (c) revoke or vary any delegation by subsequent written instrument; and
- (d) exercise any function, notwithstanding the delegation.

The Staff

Appointment of staff

28 (1) The Authority shall appoint and employ as staff qualified persons necessary for the performance of its functions.

(2) No member of the staff shall be deemed a public officer during the period in which he is employed by, seconded to or under contract with the Authority.

(3) Consistent with its approved budget, the Authority shall establish the remuneration, terms and conditions of employment of each member of the staff.

(4) Notwithstanding subsection (2), the Authority may provide the members of the staff the option of participating in the Government pension and health insurance plans.

[Section 28 effective 11 July 2012 by BR 49 / 2012 para. 2]

Chief Executive

29 (1) There shall be a Chief Executive of the Authority, who shall be appointed by the Board.

(2) The Chief Executive shall have substantial knowledge and experience in economic regulation and in one or more of the following fields—

- (a) accounting;
- (b) economics;
- (c) finance;
- (d) law;
- (e) public policy; or

(f) any other field related to the functions of the Authority.

(3) The Chief Executive shall serve for a term of three years, and may be reappointed by the Board for one or more subsequent terms.

(4) The Chief Executive shall be the principal administrative officer of the Authority and shall be responsible, subject to the direction of the Board, for carrying out the functions of the Authority.

(5) The Chief Executive shall serve as—

- (a) a non-voting member of the Board;
- (b) the Secretary, but may, with the written consent of the Chairman, delegate this function to another member of the staff; and
- (c) the Records Officer, but may, with the written consent of the Chairman, delegate this function to another member of the staff.

(6) The Chief Executive, consistent with the direction of the Board, shall—

- (a) retain, suspend and dismiss staff as otherwise allowed by law;
- (b) supervise, direct and give assignments to the staff;
- (c) prepare the proposed budget, and monitor the finances, of the Authority;
- (d) engage persons having technical or special knowledge that the Authority requires to carry out its functions under this Act;
- (e) enter into contracts for the provision of goods and services required by the Authority for the conduct of its business; and
- (f) perform such other duties as the Board may direct.

(7) The Board, after providing the Chief Executive with notice and an opportunity to comment, by unanimous vote of the Commissioners, may suspend or revoke the Chief Executive's appointment for serious misconduct or unsatisfactory performance.

(8) No person may be appointed to serve as, or allowed to remain as, Chief Executive who is—

- (a) a current Commissioner; or
- (b) ineligible to serve as a member of the Board pursuant to section 21(8).

(9) In any case in which—

- (a) the Board has suspended or revoked the Chief Executive's appointment pursuant to subsection (7); or
- (b) the Chief Executive is unable to perform his duties for an extended period due to ill health or absence from the country or other good cause,
the Board shall appoint a member of the staff, or other qualified person, to serve as the interim Chief Executive.

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(10) Any person appointed pursuant to subsection (9), when acting within the scope of the appointment, shall exercise the full authority of the Chief Executive, and shall be eligible for remuneration commensurate to the service provided.

[Section 29 effective 11 July 2012 by BR 49 / 2012 para. 2]

Transfer between the Authority and Government service

30 Any public officer who accepts employment with the Authority, or is transferred to the Authority, may elect to continue to participate in the Government pension fund and health insurance plan as if he were continuing in the service of the Government, and shall remain subject to the Public Service Superannuation Act 1981.

[Section 30 effective 11 July 2012 by BR 49 / 2012 para. 2]

Other matters

Conflict of interest

31 (1) A conflict of interest shall be deemed to exist in any case in which a Commissioner or member of the staff participates in a decision-making or advisory capacity in any adjudication or public consultation that concerns—

- (a) a business in which that person, or that person's spouse, parent or child, is a member or shareholder or has any private interest, whether direct or indirect; or
- (b) any other matter in which the person's private interest may reasonably be perceived as conflicting with the person's official duties.

(2) In any case in which a conflict of interest exists, the Commissioner or member of the staff that has the conflict shall not participate in a decision-making or advisory capacity in the adjudication or public consultation unless he—

- (a) submits a written declaration to the Board that fully discloses the nature of the conflict; and
- (b) receives the unanimous approval of, the voting members of the Board; and
- (c) in the case of an adjudication, also receives the written consent of all parties to the adjudication at the time the conflict of interest is disclosed.

(3) The Chairman shall take all reasonable actions to ensure that no member of the Board contravenes the prohibition contained in subsection (2).

(4) The Chief Executive shall take all reasonable actions to ensure that no other member of the staff contravenes the prohibition contained in subsection (2).

(5) In any case in which a Commissioner is disqualified from participating in an adjudication or public consultation pursuant to subsection (2), the Chairman (or, in any case in which the Chairman is disqualified, the Commissioner who has served on the Board for the longest period of time), after conferring with the members of the Board who are not disqualified, may appoint a person to act in place of such Commissioner.

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(6) Any person appointed pursuant to subsection (5), when acting within the scope of the appointment, shall be deemed to be a Commissioner, and shall be eligible for remuneration commensurate to the service provided.

(7) Each Commissioner and each member of the staff shall submit an annual written declaration to the Chief Executive stating whether they, or their spouse, parent or child, has any direct or indirect financial interest in any sectoral provider or in any other person who has or may directly benefit from any regulations, or from any administrative determination made by the Authority, and the Chief Executive shall submit such a declaration to the Chairman.

(8) The Chairman or the Chief Executive, as the case may be, shall retain the declaration forms submitted pursuant to subsection (7) for not less than three years, and shall provide a copy of any declaration, to any person, on request.

(9) The Commissioners and the staff shall not accept any gift or gratuity, either directly or indirectly, from any sectoral provider or from any other person who has or may directly benefit from any regulations, or from any administrative determination made by the Authority, unless the Authority has granted a waiver pursuant to subsection (11).

(10) Contravention of either of the prohibitions contained in subsections (2) or (9) shall provide a basis for removal of a Commissioner or dismissal of a member of the staff.

(11) The Authority shall make rules specifying the circumstances and the procedures by which a Commissioner or member of the staff may be granted a waiver of the prohibition contained in subsection (9).

[Section 31(1), (2), (3) and (4) effective 11 July 2012 by BR 49 / 2012 para. 2. All other subsections Not In Force until Notice published in Gazette]

Liability

32 (1) No action, suit, prosecution or other proceedings shall lie against any member of the Board, any member of the staff or any person acting on behalf of the Authority in respect of any act done, or any omission made, in good faith in the execution or intended execution of any function under this Act.

(2) The Authority may procure any liability insurance that the Authority deems prudent.

[Section 32 effective 11 July 2012 by BR 49 / 2012 para. 2]

Confidentiality

33 (1) Any person submitting information to the Authority may request that the Authority treat such information as confidential.

(2) The Authority shall grant a request to treat information as confidential if the Authority concludes that the information is—

- (a) a trade secret of any person;

- (b) information, the commercial value of which would be, or could reasonably be expected to be, destroyed or diminished by disclosure;
 - (c) other information, the disclosure of which would have, or could reasonably be expected to have, an adverse effect on the commercial interests of any person to whom the information relates;
 - (d) information—
 - (i) that is given to the Authority by a third party (other than another public authority) in confidence on the understanding that it would be treated as confidential; and
 - (ii) the disclosure of which would be likely to prevent the Authority from receiving further similar information required by the Authority to properly fulfil its functions; or
 - (e) information, the disclosure of which would constitute a breach of a duty of confidence provided for by a provision of law.
- (3) A person claiming confidentiality in respect of any information submitted to the Authority must provide—
- (a) a full justification for its claim; and
 - (b) a version of such information without the confidential provisions and in a form that may be made available to the public.
- (4) Following receipt of any information submitted subject to a request for confidential treatment, the Authority shall issue a decision as to whether the justification offered by the submitting party meets the standard for confidential treatment specified in subsection (2).
- (5) If the Authority concludes that the justification offered by the submitting party meets the standard for confidential treatment, the Authority shall issue an order granting the request.
- (6) In any case in which the Authority grants a request for confidential treatment, the information may only be disclosed—
- (a) to the Minister responsible for the regulated industry sector;
 - (b) to the Commissioners;
 - (c) to the staff;
 - (d) to a court of competent jurisdiction; or
 - (e) where necessary to conduct a public consultation or adjudication, to specific parties pursuant to a non-disclosure agreement or protective order.
- (7) If the Authority concludes that the justification offered by the submitting party does not meet the standard for confidential treatment, the Authority shall—

- (a) issue an order denying the request; and
- (b) either—
 - (i) return the information to the submitting party, in which case the Authority shall not consider or rely on the information; or
 - (ii) after providing the submitting party with notice and an opportunity to comment, disclose the information, if doing so would be in the public interest.

Unauthorized disclosure of confidential information

34 A Minister, the Commissioners and the members of the staff shall not reveal or in any manner communicate to any other person, except as authorized or required by law, any information for which the Authority has granted confidential treatment.

Advisory, self-regulatory and co-regulatory bodies

Advisory panels

35 (1) The Authority may appoint advisory panels, consisting of knowledgeable persons from outside the Authority, to provide information and recommendations regarding any matter within the competence of the Authority.

(2) In any case in which the Authority appoints an advisory panel, the Authority shall publish on its official website a statement setting out—

- (a) the purpose for which the panel has been established;
- (b) the membership of the panel, including a brief statement setting out the current employment or other significant information regarding each member;
- (c) any financial, staffing or other resources that the Authority will provide to the panel;
- (d) any procedures to be used, or deliverables to be provided, by the panel; and
- (e) the duration of time in which the panel will remain in existence.

(3) In considering candidates for appointments to any advisory panel, the Authority shall give due regard to—

- (a) the qualifications and experience of the candidates; and
- (b) the need to ensure representation of diverse views.

(4) Each advisory panel shall provide a report to the Authority regarding its work, at such times as the Authority may specify, which the Authority shall publish on its official website.

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Self-regulatory and co-regulatory bodies

36 (1) The Authority, by general determination, may authorize the establishment of industry self-regulatory or co-regulatory bodies.

(2) The Authority may delegate to an industry self-regulatory or co-regulatory body the authority—

- (a) to adopt codes of conduct;
- (b) to conduct dispute resolution proceedings;
- (c) to refer matters to the Authority for investigation and, if appropriate, enforcement action; and
- (d) to take other actions specified in sectoral legislation.

(3) In any case in which the Authority authorizes or requires the establishment of an industry self-regulatory or co-regulatory body, the Authority shall publish in the Gazette and on its official website a statement setting out—

- (a) the specific authority being granted to the body;
- (b) the procedure by which membership in the body will be determined; and
- (c) any financial, staffing or other resources that the Authority will provide to the body.

(4) In any case in which the Authority establishes a co-regulatory body, the Authority may take actions reasonably necessary to oversee the work of that body.

PART 4

FINANCE AND BUDGET

Finances of the Authority

Financial year

37 The financial year of the Authority shall consist of 12 months, and shall end on 31 March.

[Section 37 effective 11 July 2012 by BR 49 / 2012 para. 2]

Funds of the Authority

38 (1) The funds of the Authority shall consist of—

- (a) the authorized and paid-up capital;
- (b) the Operating Fund; and
- (c) the Reserve Fund.

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(2) The Authority may create special funds with the express approval of the Minister of Finance.

(3) The authorized capital of the Authority shall be \$3.5 million, which shall be subscribed at such times and in such amounts as the Board, with the approval of the Minister of Finance, may require.

(4) The Authority may increase the authorized capital, subject to the approval of the House of Assembly signified by resolution.

[Section 38 effective 11 July 2012 by BR 49 / 2012 para. 2]

Operating Fund

39 (1) The Authority shall establish and maintain a fund, to be known as the Regulatory Authority Operating Fund.

(2) The Authority shall pay into the Operating Fund—

- (a) such monies as may be appropriated by the Legislature;
- (b) any Regulatory Authority fee that the Authority collects pursuant to section 44(11);
- (c) other revenues that the Authority, by virtue of this Act, or any sectoral legislation, may raise;
- (d) grants, contributions or endowments from any source; and
- (e) loans.

(3) The Authority, consistent with its approved budget, may authorize payment to be made out of the Operating Fund such funds as are necessary to—

- (a) remunerate the Commissioners, the staff and other persons employed or engaged by the Authority; and
- (b) meet all other costs and expenditures properly incurred in exercising the functions of the Authority.

[Section 39 effective 11 July 2012 by BR 49 / 2012 para. 2]

Reserve Fund

40 (1) The Authority shall establish a fund to be known as the Regulatory Authority Reserve Fund.

(2) At the conclusion of each financial year, before account has been taken of unrealised gains or losses, the Authority shall determine the net surplus or net loss, if any, after—

- (a) allowing for expenses of operations; and
- (b) provision has been made for bad and doubtful debts, and for depreciation of the assets of the Authority.

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(3) In any financial year in which the Authority incurs a net surplus, the net surplus shall be transferred to the Reserve Fund in the manner specified in section 41.

(4) In any financial year in which the Authority incurs a loss, the Authority may recoup the loss from the Reserve Fund, to the extent the Reserve Fund is sufficient.

(5) In any financial year in which the Authority incurs a loss and the Reserve Fund is not sufficient to meet the loss, the Authority, with the approval of all Ministers responsible for regulated industry sectors, may carry forward and recoup the losses from any future surplus, before payment is made to the Consolidated Fund.

[Section 40 effective 11 July 2012 by BR 49 / 2012 para. 2]

Transfer of net surplus

41 (1) In any year in which the Authority realises a net surplus, the Authority, after recouping any net losses pursuant to section 40(5), shall transfer any remaining surplus in the following manner—

- (a) 50% shall be transferred to the Consolidated Fund;
- (b) 25% shall be transferred to paid-up capital of the Authority; and
- (c) 25% shall be transferred to the Reserve Fund.

(2) Notwithstanding subsection (1), in any year in which making the payment specified in paragraph (1)(b) would cause paid-up capital and the Reserve Fund to exceed the Authority's authorized capital, the Authority, after making the payment specified pursuant to paragraph (1)(a), and making any payment necessary to cause paid-up capital and the Reserve Fund to equal the Authority's authorized capital, shall pay the balance of the net surplus to the Consolidated Fund.

[Section 41 effective 11 July 2012 by BR 49 / 2012 para. 2]

Investment

42 (1) The Authority may open bank accounts, and purchase the financial instruments specified in subsection (3), in its own name.

(2) The Authority shall maintain the Operating Fund in interest-bearing bank accounts within Bermuda.

- (3) The Authority shall maintain the Reserve Fund in—
- (a) interest-bearing bank accounts;
 - (b) certificates of deposit; and
 - (c) Treasury bills issued by the Government of the United States of America.

[Section 42 effective 11 July 2012 by BR 49 / 2012 para. 2]

Budget of the Authority

Work plan and budget

- 43 (1) The Authority shall prepare an annual budget, which shall include—
- (a) an estimate of total operating expenditures for the upcoming financial year, allocated to the extent feasible among regulated industry sectors;
 - (b) an estimate of the total capital expenditures for the upcoming financial year; and
 - (c) an estimate of the total revenues, by source.
- (2) Not later than six months before the commencement of each financial year, the Authority shall initiate a public consultation regarding its work plan for the upcoming financial year, which shall include—
- (a) the Authority's strategic priorities for the upcoming financial year;
 - (b) any major activities, such as public consultations, that the Authority anticipates undertaking during the upcoming financial year;
 - (c) any quantitative indicators that the Authority has adopted to measure its performance during the upcoming financial year; and
 - (d) a preliminary estimate of the Authority's budget for the upcoming financial year.
- (3) Not later than three months before the commencement of each financial year, the Authority, after giving due consideration to the comments submitted in the public consultation specified in subsection (2), shall submit to all Ministers responsible for regulated industry sectors and to the Minister of Finance—
- (a) a preliminary report setting out the Authority's proposed work plan for the next financial year; and
 - (b) a proposed budget, with a request for approval, in such form and in such detail as the Ministers may require, for the upcoming financial year.
- (4) The Minister of Finance shall—
- (a) consider—
 - (i) the documents submitted under subsection (3) and any other information submitted by the Authority; and
 - (ii) any information submitted by any Minister responsible for a regulated industry sector;
 - (b) make any modifications to the proposed budget that the Minister of Finance deems necessary and proper; and
 - (c) issue a written decision approving the budget.

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(5) The budget that is approved under subsection (4)(c) shall constitute the Authority's budget for the upcoming financial year and shall be published in the Gazette.

(6) Once the budget has been approved, the Authority shall issue a final report setting out the Authority's work plan for the next financial year.

(7) The Authority shall not, without the approval of all Ministers responsible for regulated industry sectors, spend in total in any financial year more than the total amount of expenditures specified in the approved budget for that financial year.

[Section 43 effective 11 July 2012 by BR 49 / 2012 para. 2]

Regulatory Authority fees

44 (1) At the same time that the Authority submits a proposed budget to the Ministers pursuant to section 43(3), the Authority shall also submit a request and recommendation that each Minister make regulations establishing the Regulatory Authority fees that some or all sectoral participants, in the regulated industry sector for which that Minister is responsible, shall pay to the Authority during the upcoming financial year.

(2) The Regulatory Authority fees recommended by the Authority shall be consistent with the Authority's budget, and shall consist of—

- (a) service fees, which shall be payable by a sectoral participant in connection with specific functions performed by the Authority; and
- (b) general regulatory fees, which shall be payable by a sectoral provider annually or at such other intervals as the Authority may establish.

(3) The service fees recommended by the Authority shall be designed to recover from a sectoral participant a reasonable estimate of the cost to the Authority of performing the function for which the fee is assessed.

(4) For each financial year, the general regulatory fees recommended by the Authority shall be designed to recover from all sectoral providers within a regulated industry sector, in the aggregate, an amount equal to—

- (a) the estimated costs incurred by the Authority that are directly related to the supervision of that regulated industry sector that are not recovered from service fees or other sources; and
- (b) a reasonable portion of the remaining operating costs of the Authority.

(5) The Authority may recommend that the general regulatory fee to be paid by a sectoral provider shall be based on—

- (a) a percentage of the sectoral provider's total or relevant turnover, to be calculated in the manner specified in sectoral legislation; or
- (b) any other basis provided for in sectoral legislation.

(6) The Authority may recommend that different bases for calculating general regulatory fees may be applied to—

- (a) sectoral providers in different regulated industry sectors; and
- (b) different categories of sectoral providers within a regulated industry sector,

provided that any differences in the basis for calculating general regulatory fees applicable to different categories of sectoral providers shall be based on objective and reasonable criteria, and that the obligation to pay the applicable general regulatory authority fee shall be applied to specific sectoral providers in a non-discriminatory manner.

(7) The Authority may recommend whether sectoral providers should be permitted to recover any Regulatory Authority fee through a dedicated charge.

(8) The regulations made by the Ministers pursuant to this section—

- (a) shall specify the amount, or the means of calculating, each Regulatory Authority fee to be charged; and
- (b) shall be subject to the affirmative resolution procedure.

(9) A sectoral provider may not recover any Regulatory Authority fee through a dedicated charge unless the regulations adopted by the Minister pursuant to this section specifically provide that sectoral providers may do so.

(10) In any case in which the Authority has determined that a sectoral provider is required to pay a Regulatory Authority fee, the Authority may collect from the sectoral provider any information the Authority deems necessary to have in order to assess the amount of the general regulatory fee owed by that provider.

(11) The Authority shall take all reasonable measures to collect all Regulatory Authority fees, including the issuance of a direction pursuant to section 64, and the initiation of enforcement action pursuant to section 93, and shall pay all revenue generated from Regulatory Authority fees to the Operating Fund.

(12) In any case in which a sectoral provider is required to pay the Authority a service fee designed to recover the costs that the Authority incurs in connection with the grant of an authorization, and a Government authorization fee pursuant to section 52, the Authority may collect a single charge, provided that the Authority shall inform the party required to pay the charge as to the portion of the charge attributable to the Government authorization fee and the portion of the charge attributable to the service fee.

(13) In any case in which a sectoral provider pays a single charge to the Authority pursuant to subsection (12), the Authority shall pay the portion of the charge attributable to the Government authorization fee to the Consolidated Fund and the portion of the charge attributable to the service fee to the Operating Fund.

(14) In the event that the regulations to be made by the Ministers pursuant to this section have not come into effect by the start of a financial year, the Regulatory Authority fees in effect during the prior financial year shall remain in effect, as adjusted based on the change in the Consumer Price Index from the prior financial year, until such time as the Ministers make, and the Legislature approves, regulations setting the Regulatory Authority fees for the balance of the financial year.

[Section 44 effective 11 July 2012 by BR 49 / 2012 para. 2]

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Grants and loans

- 45 (1) A Minister may, with the consent of the Minister of Finance—
- (a) make grants to the Authority for the purpose of enabling the Authority to incur or meet liabilities in respect of capital or revenue expenditures; and
 - (b) make loans to the Authority, in which case the Minister shall specify in writing the terms and conditions of the loan, including the duration of the loan and the rate of interest to be charged.
- (2) The Authority, with the consent of the Minister of Finance, may enter into loan agreements with licensed financial institutions, which may be secured by either—
- (a) the full faith and credit of the Government; or
 - (b) the future anticipated revenue that the Authority will derive from the payment of Regulatory Authority fees.
- (3) The Minister of Finance may provide a guarantee to any financial institution that makes a loan to the Authority pursuant to subsection (2).

[Section 45 effective 11 July 2012 by BR 49 / 2012 para. 2]

Accounts and audit

- 46 (1) The Authority shall—
- (a) keep proper accounts and records of its transactions and affairs;
 - (b) do all things necessary to ensure that all payments out of its moneys are properly authorized and correctly made, and that adequate control is maintained over its assets, or those assets in its custody, and its expenditure; and
 - (c) for each financial year, prepare financial statements in such form as the Accountant General may direct.
- (2) The accounts of the Authority shall be audited by the Auditor General or such other auditor as may be appointed annually by the Auditor General.
- (3) A person shall not be qualified for appointment as an auditor under subsection (2) unless he is a public accountant who is registered or deemed to be registered under the Chartered Professional Accountants of Bermuda Act 1973.
- (4) If the Auditor General appoints an auditor under subsection (2), the remuneration of that auditor shall be paid by the Authority.
- (5) Within three months of the end of its financial year, the Authority shall submit to the auditor its financial statements for the year and shall meet any reasonable request from the auditor for information relevant to the audit.
- (6) The auditor shall, as soon as practicable after the financial statements have been submitted for audit, conduct the audit and send a report of his audit to the Authority.

- (7) The auditor shall in the report state—
- (a) whether the financial statements shows fairly the financial transactions and the state of affairs of the Authority;
 - (b) whether proper accounting and other records have been kept, including records of all assets of the Authority, whether purchased, donated or otherwise;
 - (c) whether the receipts, expenditure and investment of moneys and the acquisition and disposal of assets by the Authority during the financial year were in accordance with the provisions of this Act; and
 - (d) such other matters arising from the audit as he considers necessary.

(8) The auditor shall also submit such periodical and special reports to the Minister and to the Authority as may appear to the auditor to be necessary or as the Minister or the Authority may require.

(9) The Authority shall provide the auditor with all reasonable cooperation including, at all reasonable times, full and free access to all accounting and other records relating, directly or indirectly, to the financial transactions of the Authority and the making of copies of, or extracts from, any such accounting and other records.

(10) In subsections (5) to (9), where an auditor has not been appointed under subsection (2), “auditor” includes the Auditor General.

[Section 46 effective 11 July 2012 by BR 49 / 2012 para. 2; amended by 2014 : 8 s. 16 effective 11 April 2014]

Publication of accounts and annual report

47 (1) The Authority, within 30 days of receiving the auditor’s report referred to in section 46(6), shall prepare and transmit to each Minister responsible for a regulated industry sector—

- (a) a report on the operations of the Authority during the preceding financial year, including a discussion of—
 - (i) the major activities undertaken;
 - (ii) any significant deviations from the work plan adopted by the Authority pursuant to section 43; and
 - (iii) the results achieved; and
- (b) a copy of the annual financial statements of the Authority certified by the auditor.

(2) The Minister responsible for telecommunications shall as soon as practicable after receipt thereof—

- (a) cause a copy of the report referred to in subsection (1)(a) and the annual financial statements to be laid before both Houses of the Legislature; and

(b) cause a copy of the annual financial statements to be published in the Gazette.

(3) As soon as practicable after the Minister has taken the actions specified in subsection (2), the Authority shall publish the report referred to in subsection (1)(a) and the financial statements on its official website.

[Section 47 effective 11 July 2012 by BR 49 / 2012 para. 2]

PART 5

FUNCTIONS OF THE AUTHORITY

Authorizations

Licences, permits and other authorizations

48 (1) The Authority may grant licences, permits or other authorizations, if authorized to do so by sectoral legislation.

(2) The Authority shall, by general determination, establish the procedures and criteria pursuant to which it will grant—

- (a) individual licences;
- (b) class licences; or
- (c) licence exemptions.

(3) In determining whether to grant an individual licence, a class licence or a licence exemption, the Authority shall—

- (a) comply with any requirements, and consider any factors, specified in sectoral legislation; and
- (b) give due consideration to the costs and benefits of each option.

(4) The Authority, by general determination, shall establish—

- (a) the process for obtaining a class licence, including whether a sectoral provider must notify the Authority in advance that it intends to offer a service for which a class licence is required; and
- (b) the process for obtaining an individual licence, including—
 - (i) any information that must be provided;
 - (ii) the standards and criteria that will be used to consider any application; and
- (c) the process for granting and terminating a licence exemption.

(5) In any case in which the Authority grants a licence, permit or other authorization, the Authority, consistent with sectoral legislation, may—

- (a) modify;
- (b) authorize the assignment of;
- (c) authorize the transfer of control of;
- (d) suspend; or
- (e) revoke,

the licence, permit or other authorization, pursuant to procedures to be established by the Authority by general determination.

(6) In the event of a conflict between any provision of an authorization granted by the Authority and—

- (a) this Act;
- (b) applicable sectoral legislation; or
- (c) any regulations,

the provisions of this Act, sectoral legislation or regulations shall supersede the provision of the authorization.

(7) When authorized by sectoral legislation, the Authority may use competitive bidding or other procedures specified to grant licences, permits or other authorizations.

(8) Unless subsequently modified or revoked, every licence, permit or other authorization granted by the Authority, shall be valid for—

- (a) the period specified in accordance with sectoral legislation, regulations or a general determination; or
- (b) in all other cases, for the period specified by the Authority in the authorization.

Grant, assignment and transfer of control

49 (1) The Authority shall, by general determination or as otherwise specified by sectoral legislation, establish the procedures to be followed by any person seeking to obtain, assign or transfer control of a licence, permit or other authorization that is granted on an individual basis, including—

- (a) any application form to be used;
- (b) any supporting information that must be provided;
- (c) the criteria, in addition to any criteria specified by a Minister, the Authority will use to assess the request;
- (d) the time frame within which the Authority will act on the application; and
- (e) any additional standards or procedures specified in sectoral legislation.

(2) In any case in which an application is filed in connection with an individual licence or permit, the Authority shall—

- (a) conduct a public consultation;
- (b) if requested by the applicant, conduct an investigative hearing; and
- (c) issue a decision and order.

(3) When authorized by sectoral legislation, a Minister may direct the Authority to use an auction or a comparative selection process to grant an individual licence.

(4) In any case in which an auction process is used, the reserve price shall be established by the Minister of Finance pursuant to the Government Fees Act 1965, as amended.

(5) Notwithstanding subsection (2), the Authority may grant a temporary licence or permit.

(6) Any temporary licence or permit granted pursuant to subsection (5) shall be issued for a period not to exceed six months, and shall be subject to such conditions as the Authority determines to be necessary.

(7) Nothing in this section shall be deemed to modify any obligation to obtain a licence, permit or authorization applicable to a sectoral provider pursuant to the Companies Act 1981 or any other Act.

Conditions

50 (1) The Authority may include, as a condition of any licence, permit or other authorization a requirement that the authorization holder—

- (a) pay any fees or penalties that may be imposed by the Authority;
- (b) comply with all duties specified in Part 7;
- (c) comply with applicable sectoral legislation;
- (d) comply with any regulations made by a Minister;
- (e) comply with any administrative determinations made by the Authority;
- (f) meet any consumer protection requirement specified by the Authority;
- (g) if found to have significant market power in any relevant market, comply with any remedy imposed by the Authority;
- (h) comply with any information request issued by the Authority; and
- (i) participate in industry self-regulatory or co-regulatory bodies, when directed to do so by the Authority.

(2) The Authority may only include, as a condition of any licence, permit or other authorization, any additional condition if the condition is—

- (a) specified by sectoral legislation; or
- (b) adopted with the consent of a Minister.

(3) Any condition imposed by the Authority shall be—

- (a) objective;
- (b) proportionate;
- (c) not unreasonably discriminatory; and
- (d) specified expressly in the authorization.

Modification, suspension or revocation

51 (1) The Authority, when authorized by sectoral legislation, on its own motion or at the request of an authorization holder, may modify or vary any term or condition of a licence, permit or other authorization if the Authority concludes that such modification or variation is necessary in the public interest.

(2) Before taking any action pursuant to subsection (1), the Authority shall give the authorization holder reasonable notice and an opportunity to comment, and shall take into account any representations made by or on behalf of the authorization holder.

(3) The Authority may issue a decision and order suspending or revoking any licence, permit or other authorization where the authorization holder has—

- (a) made false statements of material facts, committed fraud or made a misrepresentation in the application for the licence, permit or other authorization or in any subsequent statement to the Authority;
- (b) failed to comply with—
 - (i) any applicable requirements contained in this Act or in sectoral legislation;
 - (ii) any regulations made by a Minister or any administrative determination made by the Authority; or
 - (iii) the terms or conditions of the licence, permit or other authorization; or
- (c) failed to pay to the Authority any authorization fees, regulatory fees or any other required payment.

(4) The Authority may suspend or revoke any licence, permit or other authorization in—

- (a) any other circumstances provided for in sectoral legislation; or
- (b) any case in which the authorization holder has breached a condition in the authorization.

(5) Before the Authority issues a decision and order suspending or revoking a licence, permit or other authorization, the Authority shall provide written notice to the authorization holder.

(6) The notice specified in subsection (5) shall include—

- (a) the action that the Authority proposes to take;
- (b) the basis on which the Authority proposes to take the action;

- (c) the time frame within which the authorization holder may submit written comments regarding the proposed action; and
- (d) the actions that the authorization holder must take to avoid suspension or revocation, and the time frame in which such actions must be taken.

(7) The Authority shall specify the date on which any revocation shall occur, which shall be at least ten days after the effective date of the decision and order.

Government authorization fees

52 (1) The Government authorization fees payable in respect of any licence, permit or other authorization granted by the Authority, unless otherwise provided by sectoral legislation, shall be established by the Minister of Finance pursuant to the Government Fees Act 1965, as amended.

(2) The Authority shall submit a recommendation to the Ministers regarding the Government authorization fees to be adopted.

(3) In preparing the recommendation specified in subsection (2), the Authority shall act in accordance with any requirement contained in sectoral legislation, and shall give due consideration to—

- (a) the Regulatory Authority fees imposed on the industry;
- (b) the likely effect of the proposed fees on investment and employment in the sector;
- (c) the extent to which the proposed fees will promote Bermudian ownership and employment; and
- (d) any other relevant factors.

(4) The Authority may recommend whether sectoral providers should be permitted to recover any Government authorization fee through a dedicated charge.

(5) The Ministers, after giving due consideration to the recommendations made by the Authority, shall forward a recommendation to the Minister of Finance.

(6) A sectoral provider may not recover any Government authorization fee through a dedicated charge unless the Government Fees Act 1965 specifically provides that sectoral providers may do so.

(7) In any case in which the Authority has determined that a sectoral provider is required to pay a Government authorization fee, the Authority may collect from the sectoral provider any information the Authority deems necessary to have in order to assess the amount of the Government authorization fee to be paid by that provider.

(8) The Authority shall take all reasonable measures to collect all Government authorization fees, including the issuance of a direction pursuant to section 64, and the initiation of enforcement action pursuant to section 93, and shall pay the fees to the Consolidated Fund.

Reporting requirements

53 (1) An authorization holder shall submit to the Authority, by such date as the Authority may direct—

- (a) a copy of its annual report;
- (b) a copy of its annual financial statements and its auditor's report;
- (c) a list of shareholders owning one per cent or more of the total shares in the body corporate, their nationality, the number of shares held by each and whether or not control of the body corporate is vested in persons possessing Bermudian status within the meaning of the Bermuda Immigration and Protection Act 1956; and
- (d) the percentage of its employees possessing Bermudian status within the meaning of the Bermuda Immigration and Protection Act 1956.

(2) The Authority may require an authorization holder to submit, at the time specified by the Authority, any additional reports or information—

- (a) specified pursuant to sectoral legislation; or
- (b) that is required to be submitted pursuant to—
 - (i) an authorization condition; or
 - (ii) regulations or an administrative determination.

Register

54 (1) The Authority shall maintain a public register of all licences, permits or other authorizations that it grants, modifies, revokes or suspends.

(2) The register shall contain—

- (a) the name of the authorization holder;
- (b) the address of the authorization holder;
- (c) any additional information required by sectoral legislation; and
- (d) any additional information that the Authority determines would be useful to the public.

(3) The Authority shall update the register on a timely basis.

(4) The Authority shall make the register available for public inspection at its offices during normal office hours and shall publish a copy on its official website.

Consumer protection

Industry codes

55 (1) The Authority, by general determination, may authorize industry self-regulatory or co-regulatory bodies to adopt codes of practice concerning the provision of covered services to end-users.

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(2) Any code adopted pursuant to subsection (1) shall comply with any applicable requirements contained in sectoral legislation, and may contain any or all of the following—

- (a) procedures regarding disclosure of the rates, terms and conditions on which a sectoral provider will supply covered services to end-users;
- (b) quality of service requirements;
- (c) requirements regarding the accuracy, contents and timeliness of bills for covered services provided to end-users;
- (d) dispute resolution procedures designed to resolve end-user complaints; or
- (e) any additional consumer protection requirements.

(3) In any case in which the Authority has delegated to a co-regulatory body the power to adopt a code, the Authority, by general determination, may take any or all of the following actions—

- (a) review and, if appropriate, approve any code proposed by the co-regulatory body;
- (b) review and, if appropriate, approve any modifications to the code;
- (c) withdraw approval of the code; or
- (d) give notice that the Authority will not approve, or will withdraw its approval, unless the co-regulatory body makes specific modifications to the code.

(4) The Authority shall only approve a code of practice prepared by a co-regulatory body if the Authority concludes that the dispute resolution procedures contained in the code—

- (a) are administered by a person who is independent of both the Authority and the parties to the dispute;
- (b) are easy to use and effective;
- (c) allow end-users who are natural persons to use the procedures free of charge;
- (d) ensure that all information necessary to resolve the dispute is obtained;
- (e) ensure that disputes are effectively investigated;
- (f) include provisions conferring power to make awards of appropriate compensation; and
- (g) provide for review by the Authority.

Codes adopted by the Authority

56 (1) The Authority, by general determination, may adopt, modify or revoke codes specifying the obligations of sectoral providers, or of any category of sectoral provider, in the conduct of their businesses.

(2) In particular, any code adopted pursuant to this section may contain procedures governing end-user billing practices, including requirements regarding—

- (a) timeliness;
- (b) clarity;
- (c) accuracy; and
- (d) the identification of any dedicated charge.

Dispute Resolution

Resolution of disputes between users and sectoral providers

57 (1) The Authority, when requested to do so, shall seek to resolve disputes between an end-user and a sectoral provider resulting from an act or omission by a sectoral provider that allegedly contravenes this Act, sectoral legislation or any regulations made by the Minister or administrative determination made by the Authority.

(2) An end-user that has a dispute with a sectoral provider regarding a matter specified in subsection (1) must—

- (a) first seek to resolve the dispute through direct negotiations; or
- (b) if the sectoral provider is subject to an approved code that contains a dispute resolution procedure, the end-user must make use of that procedure;

(3) If the parties are unable to resolve a dispute through direct negotiation within 60 days, or within the time period specified in any applicable dispute resolution procedure contained in an approved code, the end-user may file a complaint with the Authority, which shall contain all relevant information, provided that any complaint filed with the Commission pursuant to this section must be filed—

- (a) within one year after the day on which the act or omission that gave rise to the complaint occurred; or
- (b) where the act or omission has been intentionally concealed, within one year after the earlier of the day on which the act or omission—
 - (i) was discovered; or
 - (ii) reasonably could have been discovered.

(4) If the Authority is unable to facilitate an informal resolution of the dispute within 30 days after receiving the complaint, the Authority shall—

- (a) if both parties consent, and the Authority concludes it would be appropriate, refer the matter to arbitration, at the parties' expense;
- (b) conduct an adjudication; or
- (c) if the Authority determines that the complaint is plainly without merit, issue a decision and order dismissing the complaint.

(5) If the Authority conducts an adjudication, it shall issue an adjudicative decision and order within three months after the commencement of the adjudication, unless the Board, by unanimous vote, establishes a longer period.

(6) In any case in which the Authority issues an adjudicative decision and order pursuant to this section, the Authority may, if appropriate, take one or more of the following actions—

- (a) issue a direction;
- (b) require the payment of restitution; or
- (c) take enforcement action.

Resolution of disputes between sectoral providers

58 (1) The Authority, when requested to do so, shall seek to resolve disputes between sectoral providers resulting from an act or omission by a sectoral provider alleged to have contravened this Act, sectoral legislation, any regulations made by a Minister, or any administrative determination made by the Authority.

(2) A sectoral provider that has a dispute with another sectoral provider regarding a matter specified in subsection (1) must first seek to resolve the dispute through direct negotiations.

(3) If the parties are unable to resolve the dispute after 90 days of direct negotiation, the sectoral provider may file a complaint with the Authority, which shall contain all relevant information, provided that any complaint filed with the Commission pursuant to this section must be filed—

- (a) within two years after the day on which the act or omission that gave rise to the complaint occurred; or
- (b) where the act or omission has been intentionally concealed, within two years after the earlier of the day on which the act or omission—
 - (i) was discovered; or
 - (ii) reasonably could have been discovered.

(4) If the Authority is unable to facilitate an informal resolution of the dispute within 60 days after receiving the complaint, the Authority shall—

- (a) if both parties consent, and the Authority concludes it would be appropriate, refer the matter to either binding or non binding arbitration;
- (b) conduct an adjudication; or

(c) if the Authority determines that the complaint is plainly without merit, issue a decision summarily dismissing the complaint.

(5) If the Authority conducts an adjudication, it shall issue an adjudicative decision and order within four months after the commencement of the adjudication, unless the Board, by unanimous vote, establishes a longer period.

(6) In any case in which the Authority issues an adjudicative decision and order, it may, if appropriate, take one or more of the following actions—

- (a) issue a direction;
- (b) require the payment of restitution; or
- (c) take enforcement action.

Supervision of entities with significant market power

Procedures for determining whether to impose *ex ante* remedies

59 (1) Without prejudice to its authority to impose obligations on sectoral providers pursuant to section 85, the Authority may impose *ex ante* remedies on a sectoral provider with significant market power, when authorized to do so by sectoral legislation.

(2) In any case in which sectoral legislation directs the Authority to conduct a market review prior to imposing or maintaining *ex ante* remedies on a sectoral participant, the Authority, in accordance with sectoral legislation, shall—

- (a) identify those relevant markets in which *ex ante* remedies may be appropriate;
- (b) conduct a market review of each relevant market identified to determine whether any sectoral provider has significant market power; and
- (c) determine whether imposition or maintenance of *ex ante* remedies on a sectoral provider with significant market power is necessary and, if so, impose or maintain proportionate remedies.

PART 6

ADMINISTRATIVE PROCEDURES

Administrative determinations and advisory guidelines

Informal fact-finding

60 (1) The Authority may perform research, conduct analysis and hold informal discussions with any person for the purposes of collecting information regarding any matter over which it has authority without commencing a public consultation or an adjudication.

(2) Any communications to the Authority in connection with any activity specified in subsection (1) shall not be subject to the restrictions on *ex parte* communications.

Selection of administrative procedures; use of evidence

61 (1) Except where this Act or sectoral legislation expressly requires the use of a specific administrative procedure, the Authority may choose whether to conduct either—

- (a) a public consultation; or
- (b) an adjudication.

(2) The Authority shall make rules, consistent with the provisions of this Act, setting out the procedures applicable to public consultations and adjudications.

(3) In making administrative determinations in accordance with this Act, the Authority shall base its conclusions on the best evidence that is reasonably available.

(4) The Authority shall have the power to access, review and rely on all relevant information in the possession of a Minister or any regulatory body previously authorized by law to supervise, monitor or regulate a regulated industry sector.

(5) In the absence of sufficient evidence that is specific to Bermuda, the Authority may consider and rely on international best practices, benchmarks and data from countries that the Authority concludes are relevant to Bermuda.

General determinations

62 (1) Except where this Act or sectoral legislation authorizes a Minister or the Minister of Finance to make regulations, the Authority may make general determinations to carry out the provisions and purposes of this Act, sectoral legislation or any regulations.

(2) Any general determination—

- (a) shall, subject to section 66, be made following a public consultation;
- (b) shall constitute a statutory instrument, pursuant to the Statutory Instruments Act 1977;
- (c) shall be subsidiary to this Act, sectoral legislation and any regulations; and
- (d) may be revoked or modified by the Authority through the adoption of a subsequent general determination.

(3) In any case in which the Authority makes a general determination, the Authority shall issue a decision and order adopting the general determination and shall promptly forward the general determination to the Cabinet Secretary, who shall—

- (a) assign a number to the general determination, pursuant to the Statutory Instruments Act 1977; and
- (b) subject to subsection (3A), cause it to be published in the Gazette.

(3A) A Schedule to a general determination made in accordance with this section is not required to be included in the publication in the Gazette under subsection (3)(b) if—

- (a) the Schedule is published on the Authority's official website;
- (b) the Schedule is available for inspection at the offices of the Authority; and

(c) the general determination gives notice that the Schedule—

(i) is published on the Authority's official website; and

(ii) is available for inspection at the offices of the Authority.

(4) Section 6 of the Statutory Instruments Act 1977 does not apply to any general determination made by the Authority.

[Section 62 subsections (2) and (3) amended and subsection (3A) inserted by 2014 : 1 s. 2 effective 24 March 2014]

Orders

63 (1) The Authority may issue orders that do any or all of the following—

(a) grant or deny any application or request received from a sectoral participant;

(b) approve, modify or disapprove any submission received from a sectoral participant;

(c) clarify the application of any statutory provision, regulations or administrative determination to a specific factual situation; and

(d) take any other action within the scope of its authority, other than an action that may only be taken by the adoption of a general determination or an adjudicative decision and order.

(2) The Authority shall provide written notice of the order to any sectoral participant specified in an order.

(3) Any order shall be binding on any sectoral participant specified therein.

Directions

64 (1) In any case in which the Authority concludes that a sectoral participant is acting in a manner that is not in accordance with its duties and obligations under this Act, sectoral legislation, any regulations, any administrative determination, an adjudicative decision or any authorization, the Authority may direct the sectoral participant to take, or refrain from taking, such actions as the Authority reasonably determines to be necessary to ensure that the sectoral participant acts in conformity with its duties and obligations.

(2) Before issuing a direction, the Authority shall give the sectoral participant notice and shall specify a reasonable period of time during which the sectoral participant may present its views or take action that would obviate the need for the direction.

(3) Any direction—

(a) shall be binding on the sectoral participant to which it is addressed; and

(b) may be modified or revoked by the Authority, after giving notice of the proposed modification or revocation and following the procedures specified in subsection (2), at any time.

Decisions

65 The Authority shall issue a written decision specifying the relevant facts and providing a reasoned explanation for its actions—

- (a) in connection with the adoption of any administrative determination; and
- (b) in any other circumstances in which it is required to do so pursuant to this Act or sectoral legislation.

Interim and emergency determinations

66 (1) The Authority may make a general determination on an interim basis, pending the completion of the public consultation, provided that the Authority—

- (a) issues a statement explaining the basis on which it has issued the general determination on an interim basis; and
- (b) files the interim general determination with the Cabinet Secretary for publication in the Gazette, at which point it will become effective.

(2) The 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.

(3) The Authority shall promptly publish on its official website any general determination made pursuant to subsection (2).

(4) Any general determination made pursuant to subsection (2) shall be effective, as applied to a specific sectoral participant, at the earlier of the date on which—

- (a) the sectoral participant has actual notice of the general determination; or
- (b) the general determination is published in two newspapers of general circulation in Bermuda, one of which shall be the Gazette.

(5) In any case in which the Authority makes a general determination pursuant to subsection (2), the Authority shall—

- (a) file the emergency general determination with the Cabinet Secretary for publication in the Gazette as promptly as possible; and
- (b) within 14 days after the day on which the Authority makes the emergency general determination, or any longer period approved by the Minister responsible for the regulated industry sector, commence a public consultation.

(6) Any general determination adopted on an interim or emergency basis pursuant to this section shall remain in effect for no more than six months, unless the Authority, with the approval of the Minister, causes a notice to be published in the Gazette extending the effective period for up to an additional six months.

(6A) For the avoidance of doubt, a Schedule to a general determination is not required to be included in a publication pursuant to this section, whether in the Gazette or in a newspaper, if—

- (a) the Schedule is published on the Authority's official website;
- (b) the Schedule is available for inspection at the offices of the Authority; and
- (c) the general determination gives notice that the Schedule—
 - (i) is published on the Authority's official website; and
 - (ii) is available for inspection at the offices of the Authority.

(7) Any general determination under this section shall not be subject to section 6 of the Statutory Instruments Act 1977.

[Section 66 subsection (6A) inserted by 2014 : 1 s. 3 effective 24 March 2014]

Effective date of administrative determinations

67 (1) Unless the Authority has granted confidential treatment, the Authority shall publish on its official website—

- (a) the administrative record of each public consultation; and
- (b) all administrative determinations.

(2) Subject to section 66(4), a general determination shall become effective on the later of—

- (a) the date on which it is published in the Gazette; or
- (b) the date specified by the Authority in the general determination.

(3) Any administrative determination, other than a general determination, shall become effective on the later of—

- (a) the date on which it is published on the Authority's official website; or
- (b) the date specified by the Authority in the administrative determination.

(4) For the avoidance of doubt, any administrative determination, other than a general determination, is not a statutory instrument.

[Section 67 subsection (2) amended by 2014 : 1 s. 4 effective 24 March 2014]

Advisory guidelines

68 (1) The Authority may issue advisory guidelines regarding any matter within the scope of its authority.

(2) Any advisory guideline—

- (a) may be adopted following a public consultation;
- (b) shall be published on the Authority's official website;
- (c) shall provide the Authority's reasoned views regarding the matter, but shall not impose legally binding obligations on the Authority or on any person; and

- (d) may be modified or revoked by the Authority at any time.
- (3) For the avoidance of doubt, an advisory guideline is not a statutory instrument.

Public Consultation

Request to initiate a consultation

- 69 (1) The Authority may initiate a public consultation in order to—
- (a) prepare a report;
 - (b) make a recommendation to a Minister; or
 - (c) adopt an administrative determination.
- (2) The Authority may initiate a public consultation—
- (a) on its own initiative; or
 - (b) in response to a written request from any person.
- (3) The Authority shall initiate a consultation when directed to do so by a Minister or where required to do so pursuant to this Act or sectoral legislation.
- (4) In any case in which a person submits a request to initiate a public consultation, but the Authority determines not to grant the request, the Authority, within six months of receiving the request, shall issue a decision and order denying the request.
- (5) Any decision and order issued pursuant to subsection (4) shall not be subject to appeal.

Consultation document

- 70 (1) The Authority shall commence a public consultation by publishing a consultation document on its official website.
- (2) The consultation document shall include—
- (a) the relevant factual and legal background;
 - (b) the issues on which public comment is sought;
 - (c) any tentative conclusions that the Authority has reached including, where appropriate, proposed language for any regulations that the Authority proposes to recommend to a Minister or any administrative determination that the Authority proposes to adopt;
 - (d) any questions that the Authority may request interested parties to address;
 - (e) the date by which responses must be filed;
 - (f) the deadline for completion of the consultation process and the issuance of a final report, recommendation or decision and order; and

- (g) the name and contact information for the staff member who will serve as the principal point of contact for interested persons during the public consultation.

Record

71 The administrative record in a public consultation shall include—

- (a) the consultation document;
- (b) any public notices issued by the Authority;
- (c) any responses submitted to the Authority;
- (d) the transcript of any hearing conducted by the Authority;
- (e) a record of any ex parte communications regarding the public consultation;
- (f) any additional material, not generally available to the public, on which the Authority relied;
- (g) any reports, recommendations or decisions, whether preliminary or final, adopted in the course of the public consultation; and
- (h) the decision and order adopting any administrative determination following a public consultation.

Preliminary and final reports, recommendations and decisions

72 (1) Within a reasonable period after the conclusion of the initial consultation period, the Authority shall issue—

- (a) a preliminary report;
- (b) a preliminary recommendation; or
- (c) a preliminary decision and order.

(2) The preliminary report, recommendation or decision and order shall—

- (a) summarise significant material in the administrative record;
- (b) provide a reasoned explanation of the basis on which the Authority made any significant factual finding, policy determination and legal conclusion;
- (c) in the case of a preliminary report, state the Authority's preliminary conclusions;
- (d) in the case of a preliminary recommendation, state any policy or regulations that the Authority proposes to recommend to a Minister;
- (e) in the case of a preliminary decision and order, state the proposed administrative determination that the Authority proposes to make; and
- (f) establish the procedures and time frames for submitting responses regarding the preliminary report, recommendation or decision and order.

(3) The Authority shall provide the public with a reasonable period in which to file written responses to the preliminary report, recommendation or decision and order.

(4) Within a reasonable period of time after the close of the period specified by the Authority pursuant to subsection (3), the Authority shall publish a final report, recommendation or decision and order, which shall—

- (a) summarise the responses received regarding the preliminary report, recommendation or decision and order;
- (b) provide a reasoned explanation of the basis on which the Authority revised any significant factual finding, policy determination or legal conclusion contained in the preliminary report, recommendation or decision and order;
- (c) in the case of a final report, state the Authority's final conclusions;
- (d) in the case of a final recommendation, state the policy or regulations that the Authority recommends the Minister adopt; and
- (e) in the case of a final decision and order, specify—
 - (i) any administrative determinations that the Authority has adopted; and
 - (ii) subject to section 67, the date on which such administrative determinations will become effective.

Restrictions on *ex parte* communications

73 (1) Unless the Authority provides otherwise, any interested person may make an *ex parte* communication during the course of a public consultation.

(2) In any case in which a person makes an *ex parte* communication to the Authority during the course of a public consultation, within two business days after the date on which the *ex parte* communication occurred, the person who made the *ex parte* communication shall submit to the Secretary—

- (a) a written description of the issues discussed and the positions espoused; and
- (b) a copy of any written materials provided.

(3) A Commissioner or member of the staff to whom an *ex parte* communication is made shall take all reasonable measures to ensure that the party that made the *ex parte* communication complies with the obligation specified in subsection (2).

(4) Within two business days after the submission required pursuant to subsection (2) is submitted to the Secretary, the Secretary shall cause to be posted on the Authority's official website—

- (a) a notice of the *ex parte* communication;
- (b) a copy of the submission specified in subsection (2)(a); and

- (c) any written materials submitted pursuant to subsection (2)(b), other than materials for which the Authority has granted confidential treatment.

Adjudication

Situation in which adjudication required

- 74 (1) The Authority shall proceed by means of adjudication—
- (a) when conducting an enforcement proceeding; or
 - (b) in any case in which the Authority is required to do so by this Act or by sectoral legislation.
- (2) The Authority, shall make a general determination establishing the procedures to be followed in an adjudication.

Notice

- 75 (1) The Authority shall commence an adjudication by giving notice to the parties that a pre-hearing conference or initial hearing will be conducted.
- (2) The notice shall—
- (a) contain a concise statement of the purpose for which the Authority has commenced the adjudication;
 - (b) summarise the rights and obligations of the parties to the adjudication; and
 - (c) set the time and place of the conference or hearing, which shall be at least 14 days after the date on which the notice is served on the parties.

Presiding officer

- 76 (1) In any adjudication, the Chairman shall select a qualified person to serve as a presiding officer, provided that the person selected—
- (a) must not have had any prior direct involvement in the matter that is the subject of the adjudication;
 - (b) must not have any conflict of interest or experience that would preclude him from being able to act, and being perceived as acting, in an impartial manner in regard to the adjudication over which he is to preside; and
 - (c) must be a barrister, solicitor or attorney in good standing in the jurisdiction in which he practices.
- (2) In any case in which the Authority conducts an adjudication in connection with an enforcement action pursuant to section 93, the Chairman, with the consent of the Minister responsible for justice, shall select an independent presiding officer who meets the standards specified in subsection (3).
- (3) A person may serve as an independent presiding officer in an enforcement proceeding, if the person—

- (a) meets the standards specified in subsection (1); and
- (b) is not—
 - (i) a member of the Board;
 - (ii) a member of the staff; or
 - (iii) an agent or legal representative of the Authority.
- (4) An independent presiding officer may only be removed by the Board—
 - (a) for cause;
 - (b) with the unanimous consent of the Commissioners; and
 - (c) with the approval of the Minister responsible for justice.

(5) Any person, other than a member of the Authority staff, who serves as a presiding officer shall receive remuneration for services rendered, in accordance with the Government Authorities (Fees) Act 1971, and any such remuneration shall be paid without regard to any substantive or procedural decision made by the presiding officer in the performance of his duties.

Intervention

77 (1) Any person who seeks to intervene in an adjudication shall file a request with the presiding officer stating the basis on which the person seeks to intervene.

(2) The presiding officer shall grant a petition for intervention upon determining that—

- (a) the person seeking to intervene has—
 - (i) a legal interest in the matter that is the subject of the adjudication that will be affected by the outcome of the adjudication; or
 - (ii) any other substantial interest that will be affected by the outcome of the adjudication; and
- (b) intervention by that person will not impair the orderly conduct of the proceedings.

(3) The presiding officer may impose conditions or limitations upon an intervenor's participation in the proceedings, at any time.

Hearing Procedures

78 (1) The presiding officer shall regulate the course of the proceedings, in conformity with the procedures established by the Authority pursuant to section 74(2).

(2) The presiding officer shall have the power to issue orders necessary for the conduct of the proceedings, including orders—

- (a) convening hearings;
- (b) summoning witnesses, expert or otherwise;

- (c) requiring the examination of witnesses on oath or otherwise; and
- (d) compelling the production of any document, record or thing relevant to the subject matter of the proceeding.

(3) If any party fails to comply with a valid order issued by a presiding officer, the Authority may issue a direction pursuant to section 64(1) and, in addition, may either—

- (a) initiate an enforcement action; or
- (b) refer the matter to the Director of Public Prosecutions.

(4) The presiding officer, at appropriate stages of the proceeding, shall give all parties full opportunity to submit and respond to pleadings, motions, objections and offers of settlement.

(5) The presiding officer, at appropriate stages of the proceeding, shall give all parties full opportunity to submit and respond to pleadings, motions, objections and offers of settlement.

Record

79 The administrative record in an adjudication shall include—

- (a) notices of all proceedings;
- (b) any order;
- (c) any motions, pleadings or stipulations filed by the parties;
- (d) all evidence submitted;
- (e) any intermediate rulings;
- (f) the recording or transcript of any hearing; and
- (g) any preliminary adjudicative decision and order, final adjudicative decision and order or adjudicative decision and order on reconsideration.

Preliminary and final adjudicative decisions and orders

80 (1) The presiding officer shall prepare a preliminary adjudicative decision and order, which shall be submitted to the Board and provided to the parties.

(2) The preliminary adjudicative decision and order shall contain—

- (a) a summary of the positions of the parties;
- (b) proposed findings of fact and conclusions of law; and
- (c) the proposed disposition of the matter, including any enforcement action to be taken or damages to be awarded.

(3) The preliminary adjudicative decision and order also may propose requiring the payment of costs, which may include either or both of the following—

- (a) costs incurred by a party in connection with the adjudication; and

(b) administrative costs and expenses incurred by the Authority in connection with the adjudication.

(4) The Board shall provide the parties to the proceeding with an opportunity to respond to the preliminary adjudicative decision and order.

(5) After the Commissioners have made any revisions to the preliminary adjudicative decision and order that they conclude are appropriate, they shall adopt a final adjudicative decision and order which shall be—

(a) served on the parties; and

(b) published on the Authority's official website.

(6) In the event that any Commissioner concurs with, or dissents from, the final adjudicative decision and order, the Authority shall publish any formal statement issued by the concurring or dissenting Commissioner.

Informal adjudication

81 (1) Unless this Act or any sectoral legislation requires an adjudicative hearing, the Authority may conduct an informal adjudication.

(2) In any informal adjudication, the presiding officer may prepare a proposed preliminary adjudicative decision and order, solely on the basis of written pleadings filed by the parties.

(3) Once the presiding officer has prepared the preliminary adjudicative decision and order, the adjudication shall be conducted in the manner specified in section 80.

Reconsideration

82 (1) Any party to an adjudication may seek reconsideration of the Authority's adjudicative decision and order on the grounds that they are—

(a) inconsistent with this Act or with any applicable sectoral legislation, regulations or general determination;

(b) procedurally improper; or

(c) not supported by the administrative record.

(2) Any party seeking reconsideration must submit a written petition for reconsideration to the Board within 21 days of the date on which the final adjudicative decision and order is published on the Authority's official website, unless the Board specifies a longer period.

(3) Any petition for reconsideration must specify in reasonable detail the basis on which the party seeks reconsideration.

(4) A petition for reconsideration shall not—

(a) repeat arguments that were made during the adjudication; or

- (b) without good cause shown, introduce new arguments, or new evidence, that could have been, but were not, presented during the adjudication.
- (5) Within a reasonable period of time following the close of the period for filing petitions for reconsideration, the Board shall issue an adjudicative decision and order on reconsideration which—
- (a) denies the petition in full;
 - (b) grants the petition in part, and denies it in part; or
 - (c) grants the petition in full.
- (6) The adjudicative decision and order on reconsideration shall be—
- (a) served on the parties; and
 - (b) published on the Authority's official website.
- (7) A final adjudicative decision and order shall not constitute final Authority action until either—
- (a) the time for filing petitions for reconsideration has ended, and no party has filed a request for reconsideration; or
 - (b) one or more petitions for reconsideration has been filed and the Authority has issued an adjudicative decision and order on reconsideration.

Prohibitions on *ex parte* communications

- 83 (1) A presiding officer may not initiate or receive an *ex parte* communication regarding any issue in the adjudication over which he is presiding.
- (2) Notwithstanding subsection (1), a presiding officer may receive aid from staff members who—
- (a) are subject to the presiding officer's supervision;
 - (b) have no conflict of interest or who have complied with the procedures specified in section 31(2); and
 - (c) have not had any prior direct involvement in the specific matter that is the subject of the adjudication.
- (3) Notwithstanding subsection (1), a presiding officer may—
- (a) provide information to persons employed by the Authority regarding scheduling and administrative matters related to the adjudication; and
 - (b) conduct settlement negotiations with the parties.
- (4) A presiding officer who receives a prohibited *ex parte* communication shall, within one business day after receiving the communication, place a notice in the administrative record stating the substance of the communication received, and the identity of each person from whom the presiding officer received such a communication.

(5) The presiding officer shall not consider any information provided as a result of a prohibited *ex parte* communication in making any adjudicative decision.

PART 7

DUTIES OF SECTORAL PROVIDERS

General Duties

- 84 (1) All sectoral providers shall comply with—
- (a) any applicable requirement or prohibition contained in this Part, including the *ex post* competition rules specified in sections 85 and 86;
 - (b) any applicable requirement or prohibition contained in sectoral legislation;
 - (c) all terms and conditions contained in any authorization granted by the Authority;
 - (d) any applicable regulations made by a Minister or any applicable administrative determinations made by the Authority; and
 - (e) any information requests made by the Authority.
- (2) In any case in which the Authority has reason to believe that a sectoral provider has contravened one of the requirements or prohibitions contained in this Part, the Authority may conduct an investigation pursuant to section 89 and, if appropriate, either—
- (a) initiate an enforcement action pursuant to section 93; or
 - (b) refer the matter to the Director of Public Prosecutions.

Prohibition of abuse of dominant position

- 85 (1) A person that occupies a dominant position in any relevant market shall not use its dominant position in a manner that unreasonably restricts, or is likely to unreasonably restrict, competition in any market for a covered service, and a contravention of this prohibition is an abuse of its dominant position.
- (2) A person occupies a dominant position in a relevant market if the person occupies a position of economic strength that allows it to behave to an appreciable extent independently of its competitors, customers and ultimately consumers.
- (3) In making the finding that a person meets the standard specified in subsection (2), the Authority may, in its discretion, rely on—
- (a) the administrative record compiled during an adjudication; or
 - (b) any relevant findings made by the Authority during a market review completed not more than 18 months before the date on which the adjudication commenced.

(4) A person that occupies a dominant position in a relevant market engages in unilateral conduct that restricts, or is likely to restrict, competition in the market for a covered service if such conduct—

- (a) substantially restricts output below the level that would exist if the market were competitive, increases prices above cost, reduces quality below the level that end-users seek, reduces end-users' choice or deters innovation in the market for the covered service; or
- (b) preserves or enhances the dominant position of a participant in the market for a covered service by deterring or precluding undertakings from participating in the market for a covered service by means other than competing based on service availability, price and quality.

(5) Without limiting the generality of subsection (4), a person that occupies a dominant position in a relevant market abuses its dominant position if the sectoral provider engages in—

- (a) predatory pricing;
- (b) a price squeeze;
- (c) unreasonable discrimination;
- (d) exclusionary refusals to deal;
- (e) tying; or
- (f) any other anti-competitive conduct that may be stipulated in sectoral legislation,

and such conduct unreasonably restricts, or is likely to unreasonably restrict, competition in the market for a covered service.

(6) The Authority, giving due regard to international best practices, shall establish the criteria to be used to determine whether a person has contravened any of the prohibitions specified in subsection (5)—

- (a) by issuing a general determination; or
- (b) in an adjudication.

(7) In any case in which the Authority determines that a person that occupies a dominant position in a relevant market has engaged in conduct that constitutes an abuse of dominant position, the Authority may take any or all of the following actions—

- (a) direct the person to cease the abusive conduct; or
- (b) take any other enforcement action.

Prohibition of unreasonable restraints of trade

86 (1) A person shall not enter into any agreement, whether or not legally enforceable, that unreasonably restricts, or is likely to unreasonably restrict, competition in any market for a covered service.

(2) A person contravenes subsection (1) if the person agrees, expressly or tacitly, to—

- (a) fix prices;
- (b) restrict output;
- (c) co-ordinate separate bids;
- (d) allocate customers or geographic markets; or
- (e) not to do business with a specific supplier, sectoral participant or customer,

and such conduct has the potential to affect competition in the market for any covered service.

(3) The Authority, giving due regard to international best practices, shall establish the criteria to be used to determine whether a person has entered into an agreement that falls within one of the categories specified in subsection (2)—

- (a) by issuing a general determination; or
- (b) in an adjudication.

(4) In any case in which a person has entered into an agreement that falls within one of the categories specified in subsection (2), no assessment of the actual or likely effects of the agreement on competition in the market for a covered service need be made in order to conclude that the person has contravened subsection (1).

(5) A person also contravenes subsection (1) if—

- (a) the person agrees, expressly or tacitly, to perform an act that does not fall within one of the categories specified in subsection (2); and
- (b) the actual or likely effect of the agreement is to unreasonably restrict competition in the market for any covered service.

(6) In any case in which the Authority, by means of an adjudication, determines that a person has entered into an agreement that has unreasonably restricted, or is likely to unreasonably restrict, competition in any relevant market, the Authority may take any or all of the following actions—

- (a) direct the person to modify the agreement to remove the unreasonable restriction;
- (b) declare the agreement to be void, in whole or in part; or
- (c) take any other enforcement action.

(7) A Minister, when authorized by sectoral legislation, may make regulations exempting all persons or specific classes of persons from the prohibitions contained in this section in connection with one or more categories of agreements.

Concentration review

87 (1) The Authority, with the consent of a Minister, shall establish standards by which a sectoral provider will be classified as a specified sectoral provider.

(2) The Authority shall annually publish in the Gazette, and on its official website, a list of sectoral providers that the Authority has concluded constitute specified sectoral providers.

(3) No specified sectoral provider, and no person seeking to enter into a concentration that would provide it with control of a specified sectoral provider, shall close any transaction that would constitute a concentration without notifying the Authority and obtaining the Authority's prior written approval.

(4) A transaction shall be deemed to constitute a concentration if it results in—

(a) a lasting change in control of a sectoral provider as a result of—

(i) a merger involving one or more previously independent sectoral providers; or

(ii) the acquisition of direct or indirect control of one or more sectoral providers; or

(b) the creation of a joint venture involving one or more sectoral providers performing on a lasting basis all of the functions of an autonomous economic entity.

(5) The notification required pursuant to subsection (3) shall contain—

(a) a description of the proposed transaction;

(b) an assessment of the likely impact of the proposed concentration on competition in any relevant market within a regulated industry sector; and

(c) any proposed undertakings or conditions that the entity created by the concentration would agree to accept in order to mitigate or eliminate potential anti-competitive effects.

(6) The Authority shall issue a standard form to be completed by any specified sectoral provider and any person specified in subsection (3) in order to complete the notification process.

(7) The Authority may require any person seeking to enter into a concentration with a specified sectoral provider to provide any information that the Authority reasonably requires in order to conduct its review.

(8) Within four months of receiving the completed notification, or any longer period approved by the Minister, the Authority shall issue a final order, which may—

(a) approve the proposed concentration;

(b) approve the proposed concentration, subject to conditions designed to reduce any adverse effect of the concentration on competition; or

(c) reject the proposed concentration.

(9) The four-month review period shall not include the period between the date on which the Authority issues an information request pursuant to subsection (7) and the date on which the Authority determines that the person to whom the information request is directed has submitted a complete response.

(10) The Authority shall not approve a concentration where the Authority determines that the proposed concentration is likely to have one or more of the following effects—

- (a) create an entity with a dominant position or enhance an existing dominant position in any relevant market;
- (b) substantially lessen competition in any relevant market; or
- (c) harm the public interest.

(11) Where necessary to prevent a concentration from having any of the effects specified in subsection (10) the Authority may approve the concentration subject to one or more of the following conditions—

- (a) compliance with any of the *ex ante* remedies specified in sectoral legislation;
- (b) partial divestiture to a purchaser approved by the Authority; or
- (c) any other condition that the Authority, with the approval of the Minister, may adopt.

Prohibition of unfair trade practices

88 (1) A sectoral provider shall not engage in unfair trade practices.

(2) A sectoral provider engages in an unfair trade practice—

- (a) where the sectoral provider engages in an improper, unethical or unscrupulous practice; and
- (b) the improper, unethical or unscrupulous practice has provided, or is likely to provide, the sectoral provider with a competitive advantage for itself or an affiliate in any regulated market in Bermuda, for reasons unrelated to the availability, price or quality of the service that the sectoral provider or its affiliate offers.

(3) For the purpose of this section an “affiliate” means a person who directly or indirectly controls, is controlled by or is under common control of another person.

(4) The Authority, giving due regard to international best practices, shall establish specific practices that constitute unfair trade practices—

- (a) by issuing a general determination; or
- (b) in an adjudication.

(5) In any case in which the Authority determines that a sectoral provider has engaged in an unfair trade practice, the Authority may take any or all of the following actions—

- (a) direct the sectoral provider to cease engaging in the unfair trade practice;
- (b) declare void any agreement that was entered into as a result of the unfair trade practice; or
- (c) take any other enforcement action.

PART 8

INVESTIGATION AND ENFORCEMENT

Investigations

89 (1) The Authority may conduct an investigation, either on its own initiative or at the request of any person, for any or all of the following purposes—

- (a) to gather information prior to, or as part of, a public consultation;
- (b) to assess whether to initiate enforcement action;
- (c) to respond to a request for information from a Minister pursuant to section 6;
- (d) for any purpose provided for by sectoral legislation; or
- (e) in other situations in which the Authority determines that doing so would be expedient.

(2) In order to conduct an investigation, the Authority may do any or all of the following—

- (a) convene an investigative hearing pursuant to section 90;
- (b) issue an order pursuant to section 91 requesting the production of information; and
- (c) appoint or designate inspectors to gather information pursuant to section 92.

Investigative hearings

90 (1) In any case in which the Authority chooses to conduct an investigative hearing, the Chairman shall designate a presiding officer.

(2) A presiding officer—

- (a) shall meet the standards specified in section 76(1); and
- (b) shall have the authority specified in sections 78(1) and (2).

(3) The presiding officer shall cause the investigative hearing to be recorded or transcribed.

(4) At the conclusion of the hearing, the presiding officer shall submit a report to the Board.

(5) The presiding officer's report shall—

- (a) summarise the evidence gathered;
- (b) state any factual findings; and
- (c) make any appropriate recommendations.

Order to produce information

91 (1) Where necessary to perform its obligations under this Act or under sectoral legislation, the Authority may issue an order requiring a person to take any or all of the following actions—

- (a) furnish such information as the Authority may reasonably require;
- (b) produce to the Authority any documents specified or described; or
- (c) keep such records as may be specified or described.

(2) An order under subsection (1) may specify the means by which, and the period during which, it is to be complied with.

(3) The power under this section to require a person to produce documents includes the power—

- (a) if the documents are produced, to take copies of them or extracts from them; or
- (b) if the documents are not produced, to require the sectoral participant who was required to produce them to state, to the best of the sectoral participant's knowledge and belief, where they are located.

Inspectors

92 (1) The Authority may from time to time designate for such period as it deems fit any member of the staff, or appoint any other qualified person, to be an inspector for the purposes of this Act.

(2) An inspector may—

- (a) at any reasonable time, without a warrant, enter any premises for the purpose of inspecting—
 - (i) anything required to be maintained or kept by any provision of this Act or sectoral legislation; or
 - (ii) any records maintained in connection therewith which are maintained by a sectoral provider in connection with the provision of covered services.

(b) subject to subsection (3), where authorized by the Authority—

- (i) enter, search and, if necessary, seal the premises;
- (ii) seize any document or object; and
- (iii) take any other reasonable action necessary to obtain relevant information.

(3) The Authority shall first obtain a warrant from a magistrate in any case in which it seeks to have an inspector—

- (a) search or seal any premises; or
- (b) seize any document or object.

(4) A magistrate may issue a warrant under this subsection if satisfied on information given under oath by a representative of the Authority that there are reasonable grounds for suspecting that—

- (a) a person has contravened, or is about to contravene, this Act, sectoral legislation, regulations or a general determination; and
- (b) there is on the premises specified in the warrant recorded information relevant to whether that contravention has been, is being or is about to be committed.

(5) The Authority shall provide every inspector with a written instrument of appointment, which shall specify the scope of the inspector's authority.

(6) An inspector, when acting within the scope of his authority, shall, upon request, produce the instrument of appointment and, if any, the warrant.

(7) All persons shall give the inspector all reasonable assistance in their power, and shall furnish him with such access and information as he may reasonably require.

(8) In this section "premises" includes any British ship, aircraft, hovercraft, platform or rig registered in Bermuda whether within or outside Bermuda, or any structure or formation attached to any submarine area adjacent to the coast of Bermuda in respect of which Bermuda has the right to the exploitation of the seabed and subsoil thereof and used for any purpose authorized by or pursuant to any Act.

Enforcement procedures

93 (1) The Authority, at the direction of the Chief Executive, may initiate enforcement proceedings in any case in which there is reason to believe that a sectoral participant has contravened any or all of the following—

- (a) this Act;
- (b) sectoral legislation;
- (c) any regulations;
- (d) any administrative determination;
- (e) any adjudicative decision and order; or

(f) a condition contained in any authorization.

(2) The Authority shall initiate the enforcement proceedings by sending a written notice to the sectoral participant that the Authority believes committed the contravention, which shall—

- (a) set out the alleged facts;
- (b) state the statutory, administrative or authorization provisions that the person allegedly contravened; and
- (c) state the time frame and procedures by which the person must respond.

(3) The Authority shall determine whether a contravention has occurred by conducting an adjudication, whether formal or informal, which shall be conducted by an independent presiding officer appointed in the manner specified in section 76.

(4) In lieu of initiating an adjudication, the Authority, with the consent of the affected sectoral participant may refer the matter to—

- (a) voluntary mediation; or
- (b) binding arbitration.

(5) If the Authority determines that a sectoral participant has committed a contravention, the Authority may take one or more of the following actions—

- (a) issue a warning;
- (b) direct the sectoral participant to take such actions as may be necessary to remedy the violation;
- (c) impose financial penalties in accordance with section 94;
- (d) require the sectoral participant to make restitution to any person directly injured as a result of the contravention; or
- (e) issue a decision and order modifying, suspending or revoking any authorization held by the sectoral participant.

(6) In lieu of imposing financial penalties, the Authority may refer a matter that involves an offence specified in this Act, or sectoral legislation, to the Director of Public Prosecutions for prosecution of an offence.

(7) As used in this section, the term “sectoral participant”, shall be deemed to be any person that the Authority has reason to believe has contravened any of the prohibitions contained in section 85 or 86.

Financial penalties

94 (1) Upon finding that a sectoral provider (or, in the case of section 85 or 86, a person) has contravened—

- (a) this Act;
- (b) sectoral legislation;

- (c) any regulations;
- (d) any administrative determination; or
- (e) any condition contained in any authorization held by the sectoral provider,

the Authority may impose a penalty of up to 10% of total annual turnover.

(2) In determining the amount of any financial penalty, the Authority shall consider all relevant factors including—

- (a) the seriousness of the contravention;
- (b) the duration of the contravention;
- (c) whether the contravention resulted in harm to third parties;
- (d) whether the person acted wilfully, recklessly or in a grossly negligent manner;
- (e) whether the person has a previous history of contraventions; and
- (f) whether the person disclosed or sought to conceal the contravention.

(3) The Authority may issue advisory guidelines which describe the process that it will use to establish the amount of any financial penalty.

(4) The Authority shall specify the date by which any such financial penalty must be paid.

(5) The Authority shall pay all penalties collected to the Consolidated Fund.

Undertakings in lieu of enforcement

95 (1) In lieu of taking enforcement action pursuant to section 93, the Authority may issue a decision and order accepting, from any persons subject to enforcement action, an undertaking to take or not take specific actions.

(2) In considering whether to accept an undertaking in lieu of taking enforcement action, the Authority shall consider the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect caused by the conduct that provided the basis for the enforcement action.

(3) The authority may—

- (a) allow an undertaking to be varied or superseded by another undertaking made in accordance with subsection (1); or
- (b) release a person from an undertaking under this section.

PART 9

APPEALS TO THE SUPREME COURT

Appeals to the Supreme Court

96 (1) Any person aggrieved by a final Authority action may appeal on that account to the Supreme Court.

(2) Except as provided in subsection (3), any appeal shall be limited to points of law or mixed fact and law.

(3) In any case in which a sectoral participant appeals from the imposition of an enforcement action pursuant to section 93, the appellant may seek a rehearing regarding all disputed matters of fact and law before the Court.

(4) An appeal under subsection (1) or (3) shall be lodged in the Registry within 21 days after the effective date of any final Authority action, or such longer period as the Court may allow.

(5) On any such appeal the Court may make such order, including an order for costs, as it thinks fit, provided that the Court may not issue an order requiring the Authority to pay compensatory or punitive damages for actions taken in the performance of its official duties.

(6) When requested by the Authority, the Attorney-General shall represent the Authority in any matter before the Supreme Court, at no cost to the Authority, unless—

- (a) the matter involves a dispute between the Authority and a Minister; or
- (b) the Attorney-General notifies the Authority, in writing, that a conflict exists that precludes the Attorney-General from providing the requested representation.

(7) Section 62 of the Supreme Court Act 1905 shall be deemed to extend to the making of rules to regulate the practice and procedure on an appeal under this section.

(8) An appeal under subsection (1) shall not result in a stay of the administrative determination of the Authority appealed from, unless the party seeking the stay can demonstrate to the court that it—

- (a) is likely to prevail on the merits; and
- (b) will suffer irreparable harm if the stay is not granted.

PART 10

OFFENCES

Failure to obtain required authorization

97 Unless sectoral legislation provides otherwise, any sectoral participant that knowingly provides a service for which a licence, permit or other authorization is required pursuant to sectoral legislation who fails to obtain the required licence, permit or

authorization commits an offence triable either way and, is liable on conviction to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to comply with a direction of the Authority

98 Any sectoral participant that knowingly refuses or fails to comply with a direction issued to it by the Authority directing the sectoral participant to comply with its duties and obligations under this Act, sectoral legislation, any regulations, any general determination or any authorization condition commits an offence triable either way and, unless sectoral legislation provides otherwise, is liable on conviction to a fine of up to \$5,000 for each day during which the refusal or failure continues.

Failure to comply with statutory duties or regulations

99 Any sectoral participant that knowingly contravenes any statutory duty contained in this Act, or who contravenes any regulations made by a Minister pursuant to this Act or to sectoral legislation, commits an offence triable either way and, unless sectoral legislation provides otherwise, is liable on conviction to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to comply with general determinations

100 Any sectoral participant that knowingly fails to comply with any general determination commits an offence triable either way and, unless sectoral legislation provides otherwise, is liable on conviction to a fine of up to \$30,000 or imprisonment for up to one year, or both.

Failure to comply with orders issued by a presiding officer

101 Any sectoral participant that knowingly fails to comply with any order issued by a presiding officer in an adjudication or an investigative hearing commits an offence triable either way and is liable on conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Violation of requirements and prohibitions regarding anti-competitive conduct

102 Any person that knowingly fails to comply with the applicable requirements and prohibitions contained in Part 7, or the regulations adopted pursuant to that Part, commits an offence triable either way and is liable on conviction to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Failure to file reports

103 The secretary of a sectoral provider that is a body corporate and is required to submit a report required by the Authority pursuant to section 53, or by sectoral legislation, commits an offence triable either way in any case in which the secretary knowingly fails to submit the report at the specified time without prior written approval from the Authority, and is liable on to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Failure to comply with information requests

104 Any person that knowingly fails to comply with an order to produce information issued by the Authority pursuant to section 91 commits an offence triable either way and is liable on conviction to a fine of up to \$50,000 or imprisonment for up to two years, or both.

Obstruction of the Authority

105 Any person who wilfully obstructs, or knowingly fails to comply with a reasonable request for information by, any Commissioner or any member of the staff or any inspector appointed by the Authority in the exercise of any function conferred by this Act or by sectoral legislation commits an offence and is liable on summary conviction to a fine of up to \$20,000 or imprisonment for up to six months, or both.

Disclosure of confidential information by the Authority

106 Any Commissioner or member of the staff who knowingly contravenes section 34 commits an offence which shall be punishable—

- (a) on summary conviction by imprisonment for up to one year or a fine of up to \$20,000, or both; or
- (b) on conviction on indictment by imprisonment for up to two years or a fine of up to \$50,000, or both.

Liability where offence committed by corporation

107 (1) Where an offence under this Act committed by a person that is a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, company secretary or other officer of the sectoral participant, he, as well as the body corporate, is guilty of an offence and is liable to be proceeded against and punished in the manner specified in this Part.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with the member's functions of management as if the member were a director of the body corporate.

Liability where offence committed by unincorporated entity

108 (1) Where a person that is a partnership is guilty of an offence under this Act, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) Where any other association, incorporated or not, is guilty of an offence under this section—

- (a) every officer of the association who is bound to fulfil any duty of which the breach is the offence; or
- (b) if there is no such officer, every member of the governing body other than a member who is proved to have been ignorant of or to have attempted to prevent the commission of the offence,

is guilty of the offence and is liable to be proceeded against and punished accordingly.

Repeat offences

109 Any penalty provided for in this Part—

- (a) may be doubled where the party has been convicted of the same offence on one previous occasion; and
- (b) may be trebled where the party has been convicted of the same offence on more than one previous occasion.

PART 11

TRANSITIONAL PROVISIONS

Transitional authority of the Minister responsible for telecommunications

110 From the date of the Governor's assent to this Act, and until such time as the Board holds its initial meeting, the Minister responsible for telecommunications may take all necessary and proper actions to facilitate the establishment of the Authority and, without derogating from the generality of the foregoing, in particular may—

- (a) designate officers of the Department of Telecommunications as staff of the Authority until such time as the Authority employs its own staff;
- (b) employ a person with the necessary knowledge and experience as the interim Chief Executive, who shall serve until such time as the initial Chief Executive is employed under section 29 by the Board at its initial meeting; and
- (c) enter into contracts, leases and other arrangements on behalf of the Authority.

[Section 110 effective 11 July 2012 by BR 49 / 2012 para. 2]

Initial paid-up capital

111 On or before the day on which the Board conducts its initial meeting, the Government shall make an initial payment of \$2 million as paid-up capital, which shall be used—

- (a) to fund the start-up of the Authority; and
- (b) to cover the operating expenses that the Authority incurs during the period from the establishment of the Authority until the later of—
 - (i) 31 March of the year following the date of the initial meeting of the Board; or
 - (ii) the date by which the Authority has collected sufficient revenues from Regulatory Authority fees to cover operating expenses on a going forward basis.

REGULATORY AUTHORITY ACT 2011

[Section 111 effective 11 July 2012 by BR 49 / 2012 para. 2]

Initial Budget

112 (1) Notwithstanding section 43, at its initial meeting, the Board, subject to the approval of the Minister of Finance and the Minister responsible for telecommunications, shall adopt an initial budget covering the period from the date of the initial meeting of the Board until 31 March of the year following the date of the initial meeting of the Board.

(2) The Board shall publish the first report required pursuant to section 47 within four months after the end of the period covered by the initial budget.

[Section 112 effective 11 July 2012 by BR 49 / 2012 para. 2]

PART 12 FINAL PROVISIONS

Crown binding

113 This Act binds the Crown.

[Section 113 effective 11 July 2012 by BR 49 / 2012 para. 2]

Parliamentary scrutiny

114 Unless this Act or sectoral legislation expressly provides to the contrary, any statutory instrument made by a Minister pursuant to this Act, or pursuant to sectoral legislation, shall be subject to the negative resolution procedure.

[Section 114 effective 11 July 2012 by BR 49 / 2012 para. 2]

Commencement

115 This Act, or any provision of this Act, shall come into operation on a day or days appointed by the Minister responsible for telecommunications by notice in the Gazette.

[Section 115 effective 11 July 2012 by BR 49 / 2012 para. 2]

SCHEDULE

(section 3)

REGULATED INDUSTRY SECTORS

The following sectors constitute regulated industry sectors—

1. Electronic communications (other than broadcasting)
2. Electricity.

[Schedule effective 11 July 2012 by BR 49 / 2012 para. 2; amended by 2016 : 2 s. 67 effective 28 October 2016]

[Assent Date: 18 December 2011]

[Operative Date: 28 January 2013]

[Amended by:

2014 : 1
2014 : 8
2016 : 2]