



BY EMAIL

Philip Micallef, Chief Executive Officer
Regulatory Authority
Cumberland House
3rd Floor
1 Victoria Street
Hamilton HM 11
Bermuda

June 20, 2014

Dear Mr. Micallef,

**Re: LinkBermuda Ltd. and Quantum Communications Limited (collectively, the “Companies”)
Comments to the Consultation: Adjudication Rules C14/1624 Dated: 6 June 2014
 (“Consultation”)**

The Companies respectfully submit the attached redline markup of the Consultation. For clarity, we highlight our substantive comments for consideration as follows:

Rule 61(5) - We believe Rule 61(5) should be revised to allow the Board to remove a presiding officer appointed under Rule 61(1) as well as an “independent” presiding officer appointed under Rule 61(2).

Rule 63(1) & (3) – We believe the two business day response time allotted in Rule 63(1) is insufficient time for a party to file a response to an intervention request. For purposes of fairness we propose that it be expanded to five (5) business days. Alternatively, Rule 63 (1) could be revised to provide that a party seeking to intervene must file the request at least seven (7) days before the prehearing conference date or initial hearing date, whichever occurs first. This will in turn grant the responding party an additional two (2) business days.

Rule 63(7) – We propose adding a new clause (7) to allow the presiding officer the right to award parties’ costs in the event a party is found to have used intervention to harass, cause delay or needlessly increase the cost of adjudication. This same authority is granted to the presiding officer in the discovery context (Rule 76(4)).

Rule 71(2)(b) – As we understand the Rules, an enforcement adjudication is triggered when the Authority files a complaint. In such instance, we believe it is more appropriate for all filing deadlines to be established by the presiding officer and not the Chief Executive, who is the “prosecuting” party in such action.

Rule 75(2) – We believe that in the context of considering a request for a postponement or extension of time in a Rule 60(1) enforcement adjudication in which the Authority is a party, that the criteria should be the same for both parties. Namely, the presiding officer should consider whether grant of the motion would prejudice any party and not be inconsistent with the public interest. However, as presently drafted, the presiding officer may in addition also consider whether the grant of the motion would be inconsistent with the Authority’s “administrative needs.” We don’t believe consideration of this additional criteria in the Rule 60(1) context is fair to the other party(ies). Specifically, it possibly creates an advantage for the Authority in respect of the outcome of any such postponement or extension of time motion.

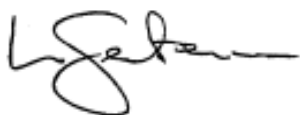
Rule 75(4), 78(2)(e) & (h) – We believe the Adjudication Rules in Chapter 9 may require further parsing to ensure that the role and responsibilities of the Authority are limited to those appropriate for a party to an enforcement adjudication. These three Rules empower the Authority to act as both prosecutor and judge in Rule 60(1) adjudications. We believe that this may not be intended under the Rules given the appointment of a presiding officer to oversee matters as well as the inherent unfairness to the other party(ies) in the proceeding.

Rule 90(1) – We propose increasing slightly the time allowed a party for challenging a preliminary adjudicative decision from ten (10) calendar days to ten (10) business days. Whilst we favor moving the proceeding forward quickly we believe this slight adjustment is appropriate and fair to all parties.

Rule 90(4) – Consistent with Rule 69(4) we propose adding the clarifying language in regards to the page limit on submissions and responses.

Otherwise, we believe the attached markup is self-explanatory. We are available to discuss any of the foregoing comments if helpful to you.

Respectfully submitted,



Lin Gentemann
Chief Legal Officer

cc: Kyle Masters, Legal Advisor



Consultation: Adjudication Rules

Consultation
Matter: C14/1624
Date: 6 June 2014

Link & Quantum
Markup 18 June 2014

Introduction:

Section 74(2) of the Regulatory Authority Act 2011 (the 'RAA') requires the Regulatory Authority (the 'Authority' or 'RA') to make a general determination establishing the procedures to be followed in any adjudication. An adjudication is a proceeding conducted by the Regulatory Authority (the 'Authority') that establishes the rights and obligations of the parties thereto.

Under the RAA, adjudications can be commenced by the Authority for a number of reasons, most notably, in order to enforce breaches of licence or other obligations by licence holders, or as a means to resolve disputes between providers or between consumers and providers.

In January 2013, mere days after the Authority began operations, it published a set of Administrative Rules called the Interim Administrative Rules. These rules were adopted on an interim basis and contain all of the rules relating to general administrative procedures undertaken by the Authority. The Authority expressly indicated, at the date of the publication of the rules, that it would conduct a public consultation specifically related to the rules governing adjudications ('the Adjudication Rules'). These rules are currently set out at Chapter 9 of the Interim Administrative Rules and have been reproduced for the purposes of review and consultation below.

In keeping with the indication made in January 2013 concerning its intention to consult regarding the Adjudication Rules, and in order to satisfy its obligations pursuant to section 74 of the RAA, the Authority is inviting comments on the proposed Adjudication Rules (set out below).

Responses to this consultation should be filed electronically in MS Words or Adobe Acrobat format. Parties filing comments should go to the Regulatory Authority's website www.rab.bm and follow the link to the Consultations and Responses page and click the "Click here to submit responses" icon which appears at the top of the page. All comments should be clearly marked "**Responses to Consultation Document C14/1624: Consultation on Adjudication Rules.**"

The Legal Advisor, Kyle Masters is the principal point of contact at the Regulatory Authority for interested persons during this consultation. He may be contacted by email at kmasters@rab.bm or by mail at:

Kyle Masters

Legal Advisor
Regulatory Authority
3rd Floor Cumberland House
1 Victoria Street
Hamilton HM 11
Bermuda

The deadline for receipt of responses for consideration is **Friday 20 June 2014**.

The Authority intends to issue a General Determination and Order on this matter by **Friday 4 July 2014** following which the a Final Version of the Administrative Rules will be published and come into effect.

Chapter 9
ADJUDICATIONS

Commencement and participation

60 Situation in which the Authority will conduct an adjudication

- (1) The Authority will 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 the Regulatory Authority Act 2011 or sectoral legislation.
- (2) The Authority may conduct an adjudication to resolve a dispute between an end-user and a sectoral provider, or between sectoral providers, in any case in which the Authority was not able to resolve the dispute using the informal dispute resolution procedures described in Rule 34 (of the Interim Adjudication Rules dated 31 January 2013).

61 Presiding officers

- (1) Prior to the commencement of an adjudication, the Chairman (of the Regulatory Authority) will select a qualified person to serve as a presiding officer. 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 the person from being able to act, and being perceived as acting, in an impartial manner in regard to the adjudication over which he or she is to preside; and
 - (c) must be a barrister, solicitor or attorney in good standing in the jurisdiction in which he or she practices.
- (2) In any case in which the Authority conducts an adjudication in connection with an enforcement action, the Chairman, with the consent of the Minister responsible for justice, will select an independent presiding officer who:
 - (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.
- (3) The presiding officer may 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.
- (4) If any party fails to comply with a valid order issued by a presiding officer, the Authority may issue a direction and, in addition, may either:
 - (a) initiate an enforcement action; or
 - (b) refer the matter to the Director of Public Prosecutions.
- (5) The Board may only remove an ~~independent~~ presiding officer:
 - (a) for cause;
 - (b) with the unanimous consent of the Commissioners; and
 - (c) with the approval of the Minister responsible for justice.
- (6) Any person, other than a member of the Authority staff, who serves as a presiding officer will receive remuneration for services rendered, in accordance with the Government Authorities (Fees) Act 1971. Any remuneration will be paid without regard to any substantive or procedural decision made by the presiding officer.

Rule 61(5) - We believe the Board should have the right to remove a presiding officer appointed under both Rule 61(1) and 61(2).

62 Commencement

- (1) An adjudication commences when the presiding officer gives notice to the parties that a pre-hearing conference or initial hearing will be conducted ("**Notice of Commencement**").
- (2) The notice will:
 - (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

Rule 62(1) - Added defined term - used later in Rule 85(1) but we could not find defined anywhere in Interim Administrative Rules (Jan 2013 version)

- (c) set the time and place of the conference or hearing, which will be at least fourteen (14) days after the date on which the notice is served on the parties.

63 Intervention

- (1) Any person who seeks to intervene in an adjudication must file a written request to intervene at least five (5) business days before the prehearing conference date or initial hearing date, whichever occurs first. The Presiding Officer will grant a late-filed request to intervene only on a showing of good cause, including a satisfactory explanation of why the person did not timely file a petition.
- (2) Any request to intervene must contain:
 - (a) the petitioner's name and address;
 - (b) the petitioner's interest in the proceeding;
 - (c) the petitioner's position(s) with respect to the matters in controversy;
 - (d) whether the petitioner proposes to broaden the issues in the proceeding and, if so, a statement of the proposed issues; and
 - (e) the name and address of petitioner's **legal representative**, if any.
- (3) Parties may respond to any request to intervene. Responses may be written, or may be heard orally at a prehearing conference or at hearing. A party's written response to a petition to intervene must be filed and served at least two (2) business days before the next prehearing conference or hearing date, or at such other time as the presiding officer establishes.
- (4) The presiding officer will only 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.
- (5) The presiding officer may impose conditions or limitations upon an intervenor's participation in the proceedings at any time. Conditions may include:

For clarity, insert "legal" where it is intended.

Is Rule 63(5) "at any time" fair process?

- (a) limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;
 - (b) limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and
 - (c) requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.
- (6) The presiding officer will promptly give notice of the decision granting, denying, or modifying intervention to the petitioner for intervention and to all parties.
- (7) **Intervention must not be used to harass or cause delay or needlessly increase the cost of the adjudication. The presiding officer may impose reimbursement of parties' costs if it is so found.**

64 **Legal** representatives

- (1) Within five (5) days after the commencement of an adjudication, or within five (5) days after being granted leave to intervene, a party must designate any ^{legal} representative by written notice to the presiding officer.
- (2) Each party must supply the following information about the individual that it names as its ^{legal} representative:
 - (a) name;
 - (b) e-mail address;
 - (c) mailing address;
 - (d) telephone number;
 - (e) fax number (if any); and
 - (f) basis on which the person satisfies the qualifications contained in subsection (4) of this Rule.
- (3) A party must make any subsequent changes to the designation of its ^{legal} representative by written notice to the presiding officer, and must serve a copy on each other party in the proceeding.
- (4) A person may only serve as a ^{legal} representative of a party to an adjudicative proceeding if the person is:
 - (a) a member in good standing with a current practicing certificate issued by the Bermuda Bar Association; or
 - (b) an officer or employee of a party, if granted permission by the presiding officer to represent the party.
- (5) The presiding officer may refuse to allow a person who does not have the requisite degree of legal training, experience, or skill to appear in a ^{legal} representative capacity.

- (6) Persons appearing in adjudicatory proceedings in a ^{legal} representative capacity must be familiar with, and conform to, the requirements of the Barristers' Code of Professional Conduct 1981. If any ^{legal} **representative** fails to conform to those standards, the presiding officer may exclude the person from the proceeding. In addition, the Authority may report the ethical violation to the Bermuda Bar Council, and may refuse to permit the person to appear before it in a ^{legal} representative capacity in any future proceeding.

Conferences and hearings

65 Prehearing conferences

- (1) The presiding officer may require, by written notice or by oral notice on the record of the hearing, that all parties (and all persons who seek to intervene) attend a prehearing conference.
- (2) The presiding officer will provide reasonable notice of the time and place established for a prehearing conference and the matters to be addressed.
- (3) The following topics may be discussed at a prehearing conference:
 - (a) identification and simplification of the issues;
 - (b) the necessity or desirability of amendments to the pleadings;
 - (c) the possibility of obtaining stipulations of fact and to documents that might avoid unnecessary proof;
 - (d) limitations on the number of witnesses;
 - (e) coordinated examination of witnesses;
 - (f) procedure at the hearing;
 - (g) the need for, and timing of, distribution of written testimony and exhibits to the parties and the bench prior to the hearing;
 - (h) disposition of petitions for leave to intervene;
 - (i) resolution of discovery disputes;
 - (j) resolution of pending motions; and
 - (k) any other matters that may aid in the disposition of the proceeding, whether by decision or by settlement.
- (4) A party's failure to attend a prehearing conference constitutes the party's waiver of all objections to any order or ruling arising out of the conference or any agreement reached at conference, unless the party shows good cause for its failure to attend.

- (5) The presiding officer may make an oral statement on the record or may enter an order describing the actions taken at the prehearing conference and agreements among the parties concerning all of the matters considered. Parties may object to the oral statement on the record at the time the oral statement is made, or may object to any written prehearing conference order within ten (10) days after the date the order is served.
- (6) The results of the prehearing conference will control the course of the proceeding unless modified by subsequent order or decision of the presiding officer to accommodate the needs of the case.

66 Hearing Schedule

- (1) The presiding officer will set all hearings sufficiently in advance so that all parties will have a reasonable time to prepare, considering the procedural schedule, other pending matters, and the need to minimize postponements.
- (2) When a hearing is not concluded as scheduled, the time and place for continued hearing sessions may be set by the presiding officer:
 - (a) orally at the hearing; or
 - (b) by notice served on the parties.

67 Failure to appear at a hearing

- (1) The presiding officer may dismiss a party or find a party in default for failure to appear at the time and place set for hearing. When the presiding officer dismisses a party or finds a party in default, it will implement the dismissal or default by a written order. When a party is found in default, the order stating that finding may also dispose of the issues in the proceeding.
- (2) A party who is dismissed from a proceeding or found in default may contest the order of dismissal or default by written motion filed within ten (10) days after service of the order. The Board will decide such matters in the manner specified in Rule 87.

Submissions

68 Filings made to the Authority in an adjudication

- (1) Unless the presiding officer directs otherwise:
 - (a) all filings made in an adjudication must be made electronically.
 - (b) electronic filings must be completed by 5:00 p.m. on the date established for filing.
 - (c) All filings must be simultaneously served on all parties by e-mail or fax.
- (2) Courtesy or informational copies may be sent, by e-mail, to the presiding officer or other Authority employees.

69 Requirements for submissions

- (1) All pleadings, motions and other submissions filed in an adjudication must meet the following format requirements:
 - (a) The submission must be prepared on A4 size paper, with standard margins, and must be double spaced. The text must be in a standard double-spaced, 12-point font, with footnotes in the same font and of at least 10-point type.
 - (b) If longer than ten (10) pages, the submission must contain a table of contents, table of authorities, and a summary.
- (2) The cover or first page of all submissions must contain:
 - (a) the number of the matter;
 - (b) the title of the matter;
 - (c) the title of the pleading;
 - (d) the date on which it was served;
 - (e) the name, address, telephone number and email address of the party on whose behalf it is being filed; and
 - (f) the name, address, telephone number and email address of the attorney or representative by whom it was served.
- (3) Every submission of a party must be signed by the party, or by the party's representative.
- (4) Unless the presiding officers orders otherwise, submissions must not exceed fifty (50) pages (exclusive of exhibits, appended authorities, supporting affidavits and other documents).
- (5) All factual allegations must be supported. If a party relies on affidavits, deposition transcripts, or documentary evidence, the party must quote

the cited material verbatim or attach a photocopy of relevant pages to an affidavit that identifies and verifies the documents.

- (6) All legal arguments must be supported. The presiding officer may require a party to file copies of the text of authorities that are cited in the party's submission on which the party places substantial reliance.
- (7) The presiding officer may return a submission to a party for correction if the presiding officer finds the submission to be defective or insufficient.
- (8) The presiding officer will liberally construe submissions with a view to effect justice among the parties.
- (9) The presiding officer may allow amendments to submissions on such terms as promote fair and just results.
- (10) Parties must update their submission whenever necessary to ensure the completeness and accuracy of any factual assertion or legal argument.

70 Service of documents

- (1) Within five (5) days after the commencement of an adjudication, or within five (5) days after being granted leave to intervene, a party must designate one person to receive service of documents relating to the adjudication by written notice to the presiding officer.
- (2) Service on the is valid service upon the party.
- (3) Each party must supply the following information about the individual that it names to receive service:
 - (a) name;
 - (b) e-mail address;
 - (c) mailing address;
 - (d) telephone number;
 - (e) fax number (if any); and
 - (f) relationship to party.
- (4) The presiding officer will maintain a master service list, which will be served on each party.
- (5) A party must make any subsequent changes to the designation of the party to receive service on its behalf by written notice to the presiding officer, and must serve a copy on each other party in the proceeding.
- (6) Parties must serve documents on each other by e-mail, unless one or both parties confirms that it is unable to do so, in which case the parties must serve each other by one of the following methods:
 - (a) in person;

- (b) by mail, properly addressed with first class postage prepaid;
 - (c) by delivering to a commercial parcel delivery company and making or arranging payment of the pertinent fee; or
 - (d) by fax transmission.
- (7) Unless otherwise ordered by the presiding officer, service is complete as follows:
- (a) Personal service is complete when the document has been physically tendered to the recipient;
 - (b) Service by e-mail is complete when the document being served has been entirely received at the recipient's designated e-mail address.
 - (c) Service by mail is complete when a copy of the document is properly addressed, stamped, and deposited in the Bermuda mail.
 - (d) Service by commercial parcel delivery is complete when the parcel delivery company accepts a copy of the document for delivery.
 - (e) Service by fax transmission is complete when the document being served has been entirely received in the recipient's fax machine.
- (8) Each person making a filing that must be served on other parties must include with the filing the following certification:
- "I hereby certify that I have this day served this document upon all parties of record in this proceeding, by [state the authorized method of service]"
- Dated at this day of
. . .
- (signature of person who served the document)
- (9) All documents required to be served by the Authority in an adjudication will be served by e-mail unless a party certifies that it is unable to receive documents in that manner, in which case the Authority will serve the document by one of the methods described in sub-section (6).

Specific pleadings

71 Answers

- (1) In any case in which a party is required to file an answer, the answer must:
 - (a) contain a counter-statement of the facts;
 - (b) admit or deny specifically all material allegations of the complaint;
 - (c) fully and completely disclose the nature of the party's affirmative defences, if any; and
 - (d) provide a legal analysis in support of the answer.
- (2) The following time frames apply to the filing of an answer:
 - (a) If the complaint is filed by an end-user or a sectoral provider, the answer must be filed within ten (10) days after the complaint has been filed, unless the staff member designated pursuant to Rule 34(4) specifies a different period.
 - (b) If the complaint is filed by the Authority, the answer must be filed within twenty-one (21) days after the ~~Chief Executive~~ **Notice of Commencement** has served the complaint, unless the **Chief Executive** specifies a different period. **presiding officer**

72 Motions: General requirements

- (1) Parties must file written motions separately from any pleading or other communication with the Authority.
- (2) A written motion must include the following information in the body of its text:
 - (a) a statement of the specific relief requested;
 - (b) a succinct statement of the facts that the moving party contends are material to the requested remedy; and
 - (c) a concise statement of the legal issue or issues upon which the presiding officer is requested to rule.
- (3) Unless another Rule establishes a different deadline, a party who opposes a written motion may file a written response within five (5) business days after the motion is served, or may make an oral or written response at such other time as the presiding officer may set.
- (4) A party may make an oral motion during a hearing, unless the presiding officer rules otherwise. The presiding officer will provide an

opportunity for other parties to respond to any oral motion, either orally or in writing. The presiding officer may require that an oral motion be reduced to writing and, if so, will provide an opportunity for a written response.

73 Motions to dismiss

- (1)** A party may move to dismiss another party's complaint (in whole or part) on the grounds that the opposing party's complaint fails to state a claim on which the Authority may grant relief.
 - (a)** A party may file a motion to dismiss at any time during the period after the presiding officer issues a notice commencing the adjudication and the date of the first hearing.
 - (b)** A party who opposes a written motion to dismiss may file a response within ten (10) days after service of the motion, or at such other time as may be set by the presiding officer.
 - (c)** The presiding officer may allow oral argument at the first hearing following the filing of a response.
- (2)** Filing a motion to dismiss does not automatically stay any **scheduled** proceedings.

74 Motions for summary determination

- (1)** A party may move for summary determination of one or more issues if the pleadings filed in the proceeding, together with any properly admissible evidentiary support (e.g., affidavits, fact stipulations, matters of which official notice may be taken), show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
 - (a)** A party must file any motion for summary determination at any time after the presiding officer issues the notice commencing the adjudication, unless the presiding officer establishes a specific date.
 - (b)** A party who answers a motion for summary determination must file its answer and any cross-motion for summary determination within twenty (20) days after the motion is served, unless the presiding officer establishes a different date.
- (2)** Filing a motion for summary determination does not automatically stay any scheduled proceedings.

75 Motions for postponement or extension of time

- (1) Any party may request a postponement or extension of time by oral or written motion. The presiding officer may require a written request if a party makes an oral request. The presiding officer may rule on such motions orally at a prehearing conference or hearing, or may issue an order.
- (2) The presiding officer will grant a postponement or extension of time if the requesting party demonstrates good cause and the request will not prejudice any party or the Authority and is not inconsistent with the public interest or ~~the Authority's administrative needs.~~ **in the case of Rule 61(2) adjudications only,**
- (3) A party must file any written motion for postponement or extension of time at least five (5) business days prior to the deadline as to which the postponement or extension of time is requested and must serve the motion by means that ensure its receipt by other parties the next business day after filing. Parties must file any written response within three (3) business days after the motion is served, or two (2) days prior to the deadline that is sought to be continued, postponement or extended, whichever is earlier. Parties may orally respond when a hearing session is held prior to the stated deadline for a written response.
- (4) A party must make any oral request for postponement or extension of time on the record in a proceeding at least two (2) business days prior to the deadline as to which the postponement or extension of time is requested. ~~The Authority~~ **The presiding officer** will permit oral responses at the time the oral request is made. **in any adjudication, and otherwise the Authority will so permit.**
- (5) The presiding officer may consider requests for postponement or extension of time that are made after the deadlines stated in this Rule if the requester demonstrates good cause that prevented a timely request.
- (6) The presiding officer will grant postponements or extensions of time only to a specified date.

Discovery

76 Right to discovery

- (1) Parties to an adjudication are entitled to discovery relating to matters in question in the adjudication.
- (2) Parties to an adjudication may agree:

- (a) to informal discovery procedures in addition to, or in place of, the procedures contained in these Rules; and
 - (b) to dispense with or limit the discovery to which they would otherwise be entitled.
- (3) Discovery requests must seek only information that is relevant to the issues in the adjudicative proceeding or that may lead to the production of information that is relevant.
- (4) Parties must not seek discovery that is unnecessary, unreasonably duplicative, or unduly burdensome or expensive. Discovery must not be used to harass or to cause unnecessary delay or needlessly increase in the costs of the adjudication.

77 Discovery methods

- (1) The presiding officer may establish a schedule for discovery in a prehearing order prior to the initial hearing. The schedule will provide deadlines sufficient to allow a timely opportunity for responses and for disputes to be resolved. The presiding officer may subsequently modify the time limits to the extent necessary.
- (2) The presiding officer may order any party to an adjudication to make and serve on any other party a list of the documents that are or have been in its possession, custody or power relating to any matter in question in the adjudication.
- (3) The presiding officer may permit other methods of discovery, to the extent necessary for disposing fairly of the matter and controlling costs, including:
 - (a) discovery by interrogatories;
 - (b) notices to admit facts; and
 - (c) examinations on oath.
- (4) Parties should use the Rules of the Supreme Court 1985 as a guide when conducting discovery.

78 Protective orders

- (1) The presiding officer may enter a protective order designed to promote the free exchange of information when parties reasonably anticipate that discovery in a proceeding will call for the production of confidential information.

- (2) Upon motion by a party or by the person from whom discovery is sought that establishes a need to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, the presiding officer may make any order, including one or more of the following, that:
- (a) the discovery will not be allowed;
 - (b) the discovery will be allowed only on specified terms and conditions;
 - (c) the discovery will be allowed only by a method of discovery other than the method selected by the party seeking discovery;
 - (d) certain matters may not be inquired into, or that the scope of the discovery will be limited to certain matters;
 - (e) discovery will be conducted with no one present except **in non-adjudication proceedings** or the presiding officer; **in adjudication proceedings,**
 - (f) the contents of a deposition will not be disclosed or will be disclosed only in a designated way;
 - (g) a trade secret or other confidential research, development, or commercial information will not be disclosed or will be disclosed only in a designated way; or
 - (h) the parties must file specified documents or information enclosed in sealed envelopes to be opened as directed by the Authority or the presiding officer: **in adjudication proceedings.**
in non-adjudication proceedings

79 Disputes

- (1) Parties must make good faith efforts to resolve informally all discovery disputes.
- (2) A party may file a written motion, or move orally at prehearing conference, to compel discovery if a dispute cannot be informally resolved.
- (3) The presiding officer will hear discovery disputes, on shortened notice, at the earliest reasonable time. The presiding officer may conduct telephone hearings or conferences for the argument of discovery disputes. The presiding officer may make discovery rulings orally on the record or by written order.
- (4) Any party may by motion, or the presiding officer may on his or her own motion, propose that sanctions be imposed if a party fails or refuses to comply with an oral or written order resolving a dispute under this rule.

Evidence

80 Evidentiary procedures

- (1) The presiding officer will regulate the course of the proceedings, in conformity with the procedures specified in these Rules.
- (2) The presiding officer, at appropriate stages of the proceeding, will give all parties full opportunity to submit and respond to pleadings, motions, objections and offers of settlement.
- (3) The presiding officer will establish the order of presentation of evidence. However, evidence will ordinarily be received in the following order:
 - (a) Party having the burden of proof;
 - (b) Parties supporting the party having the burden of proof;
 - (c) Parties opposing the party having the burden of proof;
 - (d) Rebuttal by the party having the burden of proof.
- (4) The presiding officer will administer an oath or affirmation to each witness before the witness testifies in an adjudicative proceeding.
- (5) The presiding officer will cause any hearing to be recorded by audio or video recording or by the preparation of a written transcript. Any party who seeks recording of the hearing by a means other than that selected by the presiding officer may request permission to do so, at its own expense.

81 Admissibility of evidence

- (1) The presiding officer may follow the rules of evidence governing civil proceedings under the Rules of the Supreme Court 1985, or may adapt them as appropriate.
- (2) The presiding officer may exclude evidence that is irrelevant, repetitive, or inadmissible, whether or not a party objects to the evidence. Parties objecting to the introduction of evidence must state the grounds for the objection at the time the evidence is offered. The presiding officer may permit the party offering rejected evidence to describe briefly for the record its nature and purpose as an offer of proof. A written offer of proof may be required.
- (3) The presiding officer may take official notice of any judicially cognizable fact. Examples of such facts include, but are not limited to:

- (a) regulations, rules, administrative rulings and orders, exclusive of findings of fact, of the Authority and other governmental agencies; **and**
 - (b) contents of authorizations issued by the Authority; and
 - (c) tariffs, classifications, and schedules regularly established by or filed with the Authority as required or authorized by law; **and**
 - (d) technical or scientific facts within the Authority's specialized knowledge; and
 - (e) codes or standards that have been adopted by a self-regulatory or co-regulatory body; and
 - (f) international best practices, and benchmarks and data from other countries that are relevant to Bermuda.
- (4) The presiding officer will notify parties of material officially noticed and its source. The presiding officer will afford parties an opportunity to contest facts and material so noticed. The presiding officer may require a party proposing that official notice be taken to provide copies of officially noted matter to the record and to all other parties.
- (5) Any evidence offered is subject to appropriate and timely objection. Parties that have objections must state them. Failure to object constitutes a waiver of the right to object.

82 Stipulation of facts

- (1) The parties may agree to stipulate some or all of the facts involved in a dispute. The parties to a stipulation may file it in writing or enter it orally into the record.
- (2) The presiding officer may reject the stipulation or require proof of the stipulated facts, despite the parties' agreement to the stipulation.
- (3) If the presiding officer accepts the stipulation:
 - (a) it is binding on the stipulating parties; and
 - (b) the parties may present it as evidence at a hearing.

83 Documentary evidence

- (1) A party who offers evidence that consists of a portion of a document must designate the portion that is offered.
- (2) Official records contained in official publications or nationally recognized reporting service publications that are in general circulation and readily accessible to all parties may be introduced by reference.

The presiding officer may require the party offering such evidence to provide a copy for the record and to each party.

84 Official record in an adjudication

- (1) The official record in an adjudication includes:
 - (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.

85 Prohibitions on ex parte communications

- (1) A member of the Board may not initiate or receive an ex parte communication regarding any issue in an adjudication once the **Notice of Commencement** has been issued.
- (2) A presiding officer may not initiate or receive an ex parte communication regarding any issue in the adjudication over which he or she is presiding.
- (3) A member of the Board or a presiding officer may receive aid from staff members who:
 - (a) are subject to the presiding officer's or Board Member's supervision;
 - (b) have no conflict of interest or who have complied with the procedures specified in Rule 14; and
 - (c) have not had any prior direct involvement in the specific matter that is the subject of the adjudication.
- (4) A member of the Board or 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.
- (5) A member of the Board or a presiding officer who receives a prohibited ex parte communication will, within one (1) business day

"Notice of Commencement" now defined in Rule 62(1)

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.

- (6) The member of the Board or presiding officer will not consider any information provided as a result of a prohibited ex parte communication in making any adjudicative decision and order.

86 Informal adjudication

- (1) Unless the Regulatory Authority Act 2011 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.

Orders and Post-order Process

87 Interlocutory orders

- (1) The Board may review interlocutory orders issued by a presiding officer in an adjudication if:
 - (a) the ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
 - (b) a review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
 - (c) a review could save the Authority and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.
- (2) Any party may petition the Board for review of an interlocutory order. Petitions for interlocutory review must be filed and served on other parties within ten (10) days after service of the order or issuance of the ruling for which review is requested. The petition must state why the ruling is in error or should be changed and why interlocutory review is necessary, and must cite reasons that support the petition. Answers must be filed within five (5) days after the petition is filed. The Board may alter these filing deadlines for good cause shown.

88 Post-hearing process

- (1) The presiding officer will confer with the parties concerning ^{the} post-hearing process.
- (2) The presiding officer will determine whether oral argument, briefs, or both will be required. The presiding officer may establish a common format or outline to be used by all parties if briefs are required.
- (3) The presiding officer may require parties to file proposed findings of fact and conclusions of law.

89 Preliminary adjudicative decisions and final orders

- (1) The presiding officer will prepare a preliminary adjudicative decision and order, which will be submitted to the Board and provided to the parties, typically within thirty (30) days after the submission of all pleadings and the conclusion of any hearing.
- (2) The preliminary adjudicative decision and order will 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:
 - (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.

90 Responding to a Preliminary Adjudicative Decision and Order

- (1) Unless the Board directs otherwise, any party that seeks to challenge any aspect of the preliminary adjudicative decision and order must do so within ^{business} ten (10) days of the day on which they are served with the order. The Board will accept only one submission from any party.
- (2) Submissions challenging a preliminary adjudicative decision and order must clearly identify the evidence, law, rule or other authority that the submitting party relies upon to support the challenge, and state the modifications that the submitting party seeks.

- (a) A submission that challenges a finding of fact must cite the pertinent page or part of the record or must otherwise state the evidence it relies on to support its petition, and should include a recommended finding of fact.
- (b) A submission that challenges a conclusion of law must cite the appropriate statute, rule, or case involved and should include a recommended conclusion of law.
- (3) Any party to the adjudication may respond to another party's submission. Any response to a submission must be filed and served within ten (10) days after the submission is filed, unless the Authority designates a different time. **exclusive of exhibits appended authorities, supporting affidavits and other documents,**
- (4) Submissions and responses must not exceed fifty (50) pages, without prior permission from the Board, and must be served on all other parties.
- (5) A party has no right to reply to a response, but may petition the Board for leave to reply. Any party seeking leave to reply must identify the new matters raised in the response and must demonstrate why those matters could not reasonably have been anticipated and why a reply is necessary. The party may attach the reply to the petition for leave to accept the reply. A reply must be filed no later than five (5) days after service of the response. The Board may extend the time upon a showing of good cause.
- (6) The Board will allow oral argument only where plainly necessary to assist the Board in making its decision.

91 Motion to reopen the record prior to entry of a final order

- (1) Any party may file a motion to reopen the record at any time after the close of the record and before the Board issues a final adjudicative decision and order. The Board also may reopen the record in a proceeding on its own motion.
- (2) The Board will only reopen the record to allow receipt of evidence that is essential to a decision and that was unavailable and not reasonably discoverable with due diligence at the time of the adjudicative proceeding or for any other good and sufficient cause.
- (3) The Board will give all parties an opportunity to respond to any evidence received during the period after the record has been reopened.

92 Final adjudicative decision and order

- (1) After the Board has made any revisions to the preliminary adjudicative decision and order that it concludes are appropriate, typically within 30 days after all submissions have been made, it will adopt a final adjudicative decision and order which will be:
 - (a) served on the parties; and
 - (b) published on the official website.
- (2) In the event that any Commissioner concurs with, or dissents from, the final adjudicative decision and order, the Authority will publish any formal statement issued by the concurring or dissenting Commissioner.
- (3) A final adjudicative decision and order will 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.
- (4) In lieu of adopting a final adjudicative decision and order, the Board may return the matter to the presiding officer for further consideration, including further hearing or other process when appropriate.

93 Reconsideration of a final adjudicative decision and order by petition

- (1) Any party to an adjudication may seek reconsideration of the adjudicative decision and order on the grounds that it is:
 - (a) inconsistent with ^{the Regulatory Authority Act 2011} 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 twenty-one (21) days of the date on which the final adjudicative decision and order is published on the 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. The petitioner must clearly identify each portion of the challenged order that it contends is erroneous or incomplete, must cite those portions of the record and

each law or Authority administrative determination that the petitioner relies on to support its petition, and must present a brief argument in support of its petition.

- (4)** A petition for reconsideration must 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)** No party may file an answer to a petition for reconsideration unless requested by the Board. If the Board requests answers to a petition for reconsideration, it will issue a notice stating the date by which answers must be filed and the date by which the board intends to enter an order resolving the petition.
- (6)** The Board will not hear oral argument on a petition for reconsideration unless the Board determines on its own motion that oral argument is required.
- (7)** Within a reasonable period of time following the close of the period for filing petitions for reconsideration, typically no more than thirty (30) days, the Board will issue an adjudicative decision and order on reconsideration that:

 - (a)** denies the petition in full;
 - (b)** grants the petition in part, and denies it in part; or
 - (c)** grants the petition in full.
- (8)** The adjudicative decision and order on reconsideration will be:

 - (a)** served on the parties; and
 - (b)** published on the official website.
- (9)** If the Board grants a petition, the Board may modify its prior order or take other appropriate action. If the Board denies the petition, no further action will be taken in the matter with respect to the final order. No party may petition for reconsideration of an adjudicative decision and order on reconsideration.
- (10)** Filing a petition for reconsideration does not automatically stay the effect of an order or serve as a request for a stay. A party may request that the Board stay the effectiveness of an adjudicative decision and order pending reconsideration by filing a petition for stay.
- (11)** Filing a petition for reconsideration is not a prerequisite for seeking judicial review of a final adjudicative decision and order.