

# **MINISTERIAL POLICY DIRECTIVES: THE CASE FOR AN APPROPRIATE FRAMEWORK**

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*The views expressed in the paper are those of the author and should  
not be ascribed to the organization for which he works.*

# Significance of Paper

Reviews two recent court cases in the Bahamas and Jamaica:-

- Caribbean Crossings Ltd. vs Public Utilities Commission, and
- Office of Utilities Regulation vs Minister of Commerce Science and Technology

Contends that both cases highlight the need for changes to existing statutory provisions governing ministerial policy directives in OOCUR countries.

# Legislative Framework

- Legislature passes primary statutes.
- Ministers have the power to make regulations.
- Specific power on key issues such as licensing, dominance in relevant markets (Barbados)
- Appointment of key personnel in regulatory agencies
- In the case of Jamaica it is the Minister who appoints members of the Appeals Tribunal, JTAC.
- Approval of budgets, etc.

# Cont'd

- Policy Directives:-
  - Power of ministers to issue policy directives is enshrined in legislation (e.g. Jamaica, Barbados, OECS, Trinidad & Tobago, Bahamas, Cayman Islands)
  - A tradition in Commonwealth jurisdictions
  - General and or specific policy directives
  - Consultation with regulatory bodies and stakeholders not mandated (Bahamas & Cayman Islands the exception).

# Cont'd

- Consultation is therefore at the sole discretion of the minister (*may or may not consult*).
- Publication of policy directive not mandatory (Bahamas & Cayman Islands the exception).
- Policy directive may come at any time (e.g. at the end of a period of consultation by regulator (Cayman Islands the exception))
- Policy directive subject to public interest test

# The Bahamas Case

- In 2003 Caribbean Crossings Ltd. applied to the PUC for modification to licence to allow it to transmit voice traffic to any operator.
- The application was rejected by the PUC.
- The PUC's decision was appealed and the judge ruled that based on the TSP (October 2002) the PUC was correct in rejecting the application.
- Furthermore, the PUC must implement the TSP  
- It has no discretion in the matter.

# Cont'd

- Caribbean Crossings was unaware of the new TSP (October 2002) and so the application was based on the July 2001 TSP.
- The TSP of October 2002 provide for BTC to retain the exclusivity on fixed line telephony until 24 months following the sale of its shares.
- Meanwhile, the July 2001 TSP provide for BTC's exclusivity on fixed telephony to end December 31, 2003.

# Cont'd

- BTC is still a government owned company.
- Note that the October 2002 TSP was not subject to public consultation unlike the July 2001 TSP.
- However, in keeping with law, consultation was done with the PUC and the new TSP was published
- But because consultation was confined to the PUC other parties of interest could not have known of the new TSP.



# The Jamaican Case

- Legal requirements less stringent than those in the Bahamas and Cayman Islands
  - Consultation with OUR not mandatory
  - Publication of directive also not mandatory.
- Minister issued a policy directive advising the OUR not to intervene in the mobile market by:  
*“setting rates, tariffs or price caps on the interconnection or retail charges made by any mobile competitor.”*

# Cont'd

OUR is to:-

*“facilitate competition and investment for the new mobile carriers in Jamaica.”*

- OUR viewed directive as not in the public interest and in conflict with its statutory authority.
- The Minister viewed the directive as being in the public interest.

# Cont'd

- **Public interest - vague, ambiguous which lends itself to varied interpretations.**
- **OUR disregarded directive and issued a determination on termination charges.**
- **Legal proceedings initiated by interested parties:-**
  - **Mobile entrants sought a declaration from the court to compel OUR to give effect to directive.**
  - **OUR sought a declaration from the courts as to the legality of the directive**

# Cont'd

- Solicitor General argued that it was:-
  - the minister's prerogative to issue policy and for the OUR to give effect to such policies
  - OUR has no discretion even if it feels that the policy directive would be injurious to the public.

# Cont'd

- Similar observation was made by the judge in the Bahamas case. Similar rulings likely to be made by judges in other OOCUR jurisdictions.
- Court agreed with the SG and issued a partial oral judgment upholding the Minister's directive
- After one year written judgment still outstanding and full judgment still outstanding

# Cont'd

- Directive was issued:-
  - at the end of the public consultation without any indication during the process that the government had such a policy on mobile telephony.
  - determination would have required one operator to make a substantial reduction in fixed to mobile termination charges
- Policy was not communicated – some major industry players were unaware of the directive. One entrant told the our about the Directive even before it was issued by the Minister.

# Proposed Legislative Changes

- Prop. 1. That directives should be issued only in instances in which the issue at hand relates to national security, relations with foreign governments/institutions (UN, WTO, etc) or where a clear policy does not exist.
- Prop. 2. That consultation with stakeholders in the public and private sector (in an open and transparent manner) should be mandatory
- need to avoid secret deals
  - undue influence.

# Cont'd

- Prop. 3. That policy directive should be appropriately communicated – separation of ministerial actions from regulator, avoid delays in the implementation of policy, legal challenges.
- Prop. 4. That once a process of public consultation has commenced then policy directives should not be issued.



# Reasons for Proposed Change

- Define role of elected officials vis-a-vis regulatory agencies
- Regulatory effectiveness
- Independence of regulatory agencies
- Speedy implementation of regulatory decisions
- Regulatory certainty
- Guard against abuse and misapplication

# Conclusion

- Regulatory institutions are not independent
- Elected officials exercise enormous influence over these agencies.
- Power to issue policy directive lacks accountability
- Courts have not made the distinction between these so-called “independent” bodies and the traditional departments of government.
- Hence, legislative change is the only way to remedy the current shortcomings.