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The purpose of this paper will be to explore the mandate of administrative bodies, such as the Office of Utilities Regulation in the Jamaican jurisdiction within the context of the administrative law principles regarding natural justice and procedural fairness. This mandate and duty to act and proceed fairly will also be examined in light of the utility regulator's ambit under its empowering statute, sector specific legislation and subsidiary regulatory instruments.

The Office of Utilities Regulation ("the OUR") was established by virtue of the Office of Utilities Regulation Act 1995 and commenced operations in January, 1997. The OUR has the legislative mandate to regulate the Telecommunications, Power, Water and Transport sectors, handling issues that concern external stakeholders and operators in these industries as well as the customers they serve. In promulgating the Office's Rules of Practice and Procedure, which govern the Office's decision making processes as well as its day to day operations, the regulator is mindful of the principles of natural justice, which are described as follows by Wade & Forsyth, noted jurists and authors in this field:

> "…the Rules of Natural Justice…operate as implied mandatory requirements, non observance of which invalidates the exercise of power…"[1]

P.G Osborn also elucidates these principles, stating as follows that administrative bodies have the duty :

> **"…To act fairly, in good faith, without bias and in a judicial temper;**
> **To give each party the opportunity of adequately stating his case and correcting or contradicting any relevant statement prejudicial to his case;**
> **Not to hear one side behind the back of the other;**

[1] Administrative Law- Ninth Edition H.W.R. Wade & C.F. Forsyth[1]

That a man should not be judge in his own cause;
That a man must have notice of what he is accused; and
Relevant documents which are looked at by a tribunal should be disclosed to the parties interested…"[2]

These principles act as legal and moral touchstones that serve to fetter the discretion of administrative bodies such as utility regulators, whose powers are granted by Parliament for the purpose of creating a level playing field within the industries and relevant marketplaces that they regulate. Without such guidelines as creatures of statute, the legislative and procedural anarchy (not to mention the ambit for corruption and impropriety) that would ensue, would serve to limit the efficacy and viability of the regulated industries and may even stultify further development and investment in these areas.

It may be said that the principles governing natural justice and procedural fairness serve to govern the regulator, in that, just as the regulator, via the statutory machinery under which it acts, governs the actions of the industry players in their respective marketplaces, these principles serve as checks and balances with regards to the regulator's performance of its duties and use of its discretion.

It is acknowledged that no principle can in and of itself, provide administrative bodies with a methodology by which to automatically come to any "cookie cutter" decisions that are designed to serve as panaceas for all relevant regulatory ills. These principles do however serve to inform the legislative draftsman in his quest to, via statute, voice the legislative will of Parliament, thereby giving form and function to the principles of natural justice and procedural fairness that must inform any and all decisions taken by the regulator, especially those that affect the regulated industries and the customers and consumers they serve.

In considering what natural justice stands for, it can be said that it is fundamentally about the concept of procedural fairness as encapsulated in the old maxim: "justice should be done *and* be seen to be done". In terms of procedure, administrative decision makers should not only act in good faith or "bona fides" and without bias but also provide the opportunity to be

[2] A Concise Law Dictionary-P.G. Osborn, LL.B. (London) Fifth Edition

heard and make comments to any person or entity whose interests will be affected by the promulgation and exercise of a decision before such decision is made.

What fundamentally are the rules of natural justice?

Any administrative body or regulator who decides on any matter without hearing submissions from the affected parties, though that decision may be deemed to be correct and meritorious, has not acted transparently and has not done justice to the affected parties.
There are **two primary maxims**[3] underlying and informing the concept of natural justice: The first is the maxim of (1) "**audi alteram partem**" which loosely translates from the Latin to state: "hear the other side". This maxim basically states that a person whose rights, interests or legitimate expectations will be affected by any decision should be given an opportunity to be heard during the process before a decision is made.
The second is the maxim of (2). "**Nemo debet esse judex in propria sua causa"** which means that "no one shall be judged in his own case". This postulates that the decision making administrative body must be unbiased. If a decision maker has preconceived opinions , notions, or vested interests in any matter up for consideration with a view to a final decision, they should not attempt to consider and decide on that matter. These two maxims are also commonly referred to as the "hearing rule" and the "rule against bias" respectively.

It should be noted that, in consideration of these rules and maxims, the courts emphasize the need for flexibility in their application, depending on the circumstances of each matter and its merits. In light of the varying circumstances which may apply, natural justice may require a decision-maker to:

1. inform any person or entity:
    a. whose interests and legitimate expectations are or are likely to be affected by a decision about the decision that is to be made as well as any issues that need to be addressed by said entity,

[3] Administrative Law, Fourth Edition, P.P. Craig,

b. who is the subject of an investigation of the substance of any allegations against them and/or the grounds for any proposed adverse comment in respect of them

2. provide such person, in the spirit of transparency and due process, a reasonable opportunity to make submissions on the matter and to be duly heard.
3. properly consider the submissions made and any comments that may be provided in respect of same
4. conduct investigations and/or enquiries without undue delay in order to ensure that any decision made is based upon findings and assertions of fact as well as sound technical and legal reasoning
5. proceed to act fairly and without bias in arriving at decisions.

It should be noted that, in certain cases there may be a substantial public interest in overriding natural justice requirements. These may include matters that involve risks to personal and public safety as well as national security. In such matters, it is advisable that regulators should not proceed without the requisite advice, legal and otherwise, as well as endorsement by the relevant governmental bodies that may have purview over the affected area or field.

How and when should the rules of natural justice be applied?

There is a presumption and it is indeed trite law that the rules of natural justice should be observed in exercising statutory powers that could affect the interests, rights or legitimate expectations of persons and entities. It is however good practice to observe these rules whether or not the power exercised has been conferred by statute.

It may be said that where actions being taken by public sector administrative bodies such as the OUR will not directly affect a person's rights or interests, there is no implicit obligation to inform the relevant parties of any allegations or other matters in issue. However, if the Office is using its investigative powers with a view to formulating findings, recommendations and/or a decision on the matter, the regulator should provide for natural justice to the persons concerned in the matter. Similarly, if the Office makes a decision on the basis of its investigations, it should provide natural justice, by allowing the persons

subject to the investigation to make submissions regarding the proposed decision and the possible legislative sanctions and procedural remedies that may flow as a result of said investigation.

Natural justice as reflected in Jamaican statute

In considering the powers of utility regulators such as the OUR within the context of the rules of natural justice, it is necessary to peruse relevant sector legislation and regulatory instruments. For the purposes of this paper, the legislative documents to be considered are: **(1) The Office of Utilities Regulation Act (as amended) and (2) The Telecommunications Act (2000),**

(1) The Office of Utilities Regulation Act (as amended)

Upon a close perusal of The Office of Utilities Regulation Act (as amended) (The OUR Act), it becomes clearly apparent that the aforementioned rules of natural justice and procedural fairness underpin the basic tenets upon which the regulator's enabling statute is based.

Section 4(1)(e) states:

> "…subject to section 8A, carry out, on its own initiative or at the request of any person, such investigations in relation to the provision of prescribed utility services as will enable it to determine whether the interests of consumers are adequately protected.

Section 4(2) states:

> "(2) The Office may, where it considers necessary, give directions to any licensee or specified organization with a view to ensuring that—
>
> (a) the needs of the consumers of the services provided by the licensee or specified organization are met; and
>
> (b) the prescribed utility service operates efficiently and in a manner designed to-
>
> (i) protect the health and well-being of users of the service and such elements of the public as would normally be expected to be affected by its operation; and
>
> (ii) protect and preserve the environment; and
>
> (iii) afford to its consumers economical and reliable service"

Section 4 (3) states:

"(3) In the performance of its functions under this Act the Office shall undertake such measures as it considers necessary or desirable to—

(a) encourage competition in the provision of prescribed utility services;

(b) protect the interests of consumers in relation to the supply of a prescribed utility service;

(c) encourage the development and use of indigenous resources; and

(d) promote and encourage the development of modern and efficient utility services;

(e) enquire into the nature and extent of the prescribed utility services provided by a licensee or a specified organization."

Section 4 (6) states especially that:

"**(6) The Office shall—**

(a) before making an order under subsection (5), notify each licensee or specified organization for the time being concerned or which, in the opinion of the Office, is likely to be affected by the order and afford each licensee or organization, as the case may be, an opportunity to be heard; and

(b) ensure that the order, if made, is consistent with the licence or the enabling instrument applicable to the licensee or specified organization, referred to in paragraph (a).

(7) The Office shall give reasons for any decision taken by it pursuant to subsection (4) (a) or (5), to any person affected or likely to be affected by that decision."

Section 4B, concerned with Applications for licences, states:

At 4B(4) : the Office shall have regard to—

"(a) whether the manner of operation is designed to protect the health and well-being of users of the service and such elements of the public as would normally be expected to be affected by its operation;

(b) the need to protect and preserve the environment;

(c) whether the consumers will be afforded an economical and reliable service;

(d) whether the service will be provided on terms which will allow to the applicant and to any other persons financing the operation of the utility service, a reasonable return on capital invested in providing the service; And

(e) such other factors as the Office considers relevant."

At 4B (5):

"(5) Where an application for a licence to provide utility services is refused, the responsible Minister-

(a) shall direct the Office to notify the applicant accordingly and shall afford to the applicant an opportunity to show cause why the licence should be granted; and

(b) may, having regard to the cause shown, grant the application subject to such terms and conditions as he thinks necessary."

These rules concerning natural justice also extend to the obligation for secrecy by which all officers and staff of the OUR are bound:

"5. Secrecy.

5. (1) Except in so far as may be necessary for the due performance of its functions under this Act, every officer and employee of the Office shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any licensee or specified organization or of any customer of any such licensee or specified organization, that may come to his knowledge in the course of his duties.

(2) Any officer or employee who—

(a) communicates any matter referred to in subsection (1) to any person other than the Office or an officer of the Office authorized in that behalf by the Registrar; or

(b) allows any unauthorized person to have access to any books, papers or other records relating to any licensee or specified organization, or to any customer of any such licensee or specified organization,

shall be guilty of an offence and shall be liable on conviction thereof to a fine not exceeding five hundred thousand dollars or to imprisonment with or without hard labour for a term not exceeding three years."

Section 8A states also:

"8A. Discretion to under take or continue investigation.

8A. (1) The Office may, determine whether to undertake or continue an investigation under this Act and in particular, but without prejudice to the generality of the foregoing, may refuse to undertake or continue any investigation if it is of the opinion that—

(a) the subject-matter of the complaint is trivial;

(b) the complaint is frivolous or vexatious or not made in good faith;

(c) the complainant has deferred for too long the making of his complaint to the Office;

(d) the complainant does not have a sufficient interest in the subject-matter of the complaint; or

(e) having regard to all the circumstances of the case, no investigation or further investigation is necessary.

(2) Where the Office decides not to undertake or continue the investigation of a complaint, it shall inform the complainant of its decision and give reasons therefore…"

(2) The Telecommunications Act (2000)

The Telecommunications Act (2000) (The Telecoms Act) is the sector specific legislation promulgated by Parliament to govern the telecommunications industry in the Jamaican jurisdiction. As is evident in the OUR Act, this statute, whilst setting out the duties of the OUR in its remit to regulate the telecommunications industry is also imbued with the principles of natural justice and procedural fairness.

Sections 4(2) to (4) of the Telecoms Act state:

"4(2) **In making a decision in the exercise of its functions under this Act the Office shall observe reasonable standards of procedural fairness, act in a timely fashion and observe the rules of natural justice,** and without prejudice to the generality of the foregoing, the Office shall -

(a) consult in good faith with persons who are or are likely to be affected by the decision;

(b) give to such persons an opportunity to make submissions to and to be heard by the Office;

(c) have regard to the evidence adduced at any such hearing and to the matters contained in any such submissions;

(d) give reasons in writing for each decision;

(e) give notice of each decision in the prescribed manner.

(3) In exercise of its functions under this Act, the Office may have regard to the following matters

(a) the needs of the customers of the specified services;

(b) whether the specified services are provided efficiently and in a manner designed to -

(i) protect the health and well-being of users of the service and such members of the public as would normally be affected by its operation;

(ii) protect and preserve the environment;

(iii) afford economical and reliable service to its customers.

(c) whether the specified services are likely to promote or inhibit competition.

(4) Where the Office has reasonable grounds for so doing, it may for the purpose of its functions under this Act, require a licensee to furnish, at such intervals as it may determine, such information or documents as it may specify in relation to that licensee's operations and the licensee shall be given a reasonable time within which to furnish the information."

Section 7 of the Telecoms Act mirrors Section 5 of the OUR Act to a certain degree with regards to secrecy but expands the Office's mandate somewhat by adding provisions concerning confidential information and its treatment.

7. Obligation for secrecy.

7. (1) Every person having any official duty or being employed in the administration of this Act shall regard and deal with as secret and confidential all confidential information relating to applicants and applications for licences, and the management and operation of licensees and shall, upon assuming such duty or employment make and subscribe a declaration to that effect before a Justice of the Peace.

(2) Subject to subsection (3), a person who, by reason of his capacity or office has by any means access to the confidential information referred to in subsection (1) shall not, while his employment in or, as the case may be, his professional relationship with the Office continues or after the termination thereof, communicate any confidential information to any person.

(3) Subsection (2) shall not apply where -

(a) the confidential information is disclosed -

(i) with the consent in writing of a licensee or an applicant for a licence;

(ii) on the written directions of the Minister to the police who require such disclosure for the purpose of the investigation of a criminal offence:

(iii) to the Minister, an agent of the office or the Fair Trading Commission; or

(iv) subject to paragraph (b), to any person who is authorized by the Office to receive it;

(b) in the opinion of the Office or the Minister, disclosure is necessary in the public interest, so, however, that before such disclosure is made, the Office or the Minister shall give not less than fourteen days' notice of the proposed disclosure to the applicant or licensee concerned who shall, upon receipt of that notice, be entitled to apply to a Judge in Chambers for an order prohibiting the disclosure on the ground that it would be harmful to the interest of the applicant or licensee;

(c) subject to subsection (4), pursuant to a court order.

(4) Where an application is made to a court for disclosure of confidential information, the party claiming confidentiality has a right to require that the information be first disclosed only to the Judge for the purpose of determining the extent of and the necessity for the disclosure.

(5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

(6) In this section "confidential information" means any information classified as such and includes information that a reasonable person would regard as confidential having regard to the nature of the information."

Section 10 (d), concerning applications for telecoms licenses, states that the Office shall:

"(d) afford members of the public **a reasonable opportunity to comment on any matter regarding such applications within such period as the Office may determine, being not less than thirty days** after the publication of the notice pursuant to paragraph (c)."

The right of a party to be heard is implicit throughout the Act but is especially elucidated in Sections such as that concerning the revocation of a telecoms operator's licence:

> **14. Suspension or revocation of licence.**
>
> 14. (1) Where the Office has reason to believe that a licensee has contravened the conditions of the licence or, as the case may be, has failed to pay any amount required under section 16, the Office shall give to that licensee notice in writing -
>
> (a) specifying particulars of such contravention; and
>
> (b) requiring the licensee to justify its actions to the Office or otherwise to take such remedial action as may be specified in the notice.
>
> (2) Where the Office gives any notice under subsection (1), the Office shall send a copy thereof to the Minister for his information.
>
> (3) Where a licensee fails to justify its actions to the satisfaction of the Office or fails or refuses to take any remedial action specified in the notice issued under subsection (1), the Office shall notify the Minister in writing of the fact of such failure or refusal.
>
> (4) Where a licensee fails to comply with any requirements of a notice under subsection (1), the Office may –
>
> (a) on the first occasion of such failure, recommend to the Minister that the licence be suspended for a period not exceeding three months; or
>
> (b) if the failure occurs on any second or subsequent occasion, recommend to the Minister that the licence be suspended for such period as the Office considers appropriate or be revoked.
>
> **(5) Before suspending or revoking a licence, the Minister shall direct the Office to notify the licensee accordingly and shall afford the licensee an opportunity to show cause why the licence should not be suspended or revoked.**
>
> (6) Subject to subsection (7), the Office may recommend to the Minister that a licence be suspended or revoked, as the case may be, if, on its own initiative or on representations made by any other person, the Office is satisfied that the licensee has –
>
> (a) knowingly made any false statement in an application for a licence or in any statement made to the Office;
>
> (b) knowingly failed to provide information or evidence that would have resulted in a refusal to grant a licence;

(c) wilfully failed to comply with the terms of its licence;

(d) wilfully contravened any provision of this Act or any rules or regulations made hereunder;

(e) violated or failed to comply with a cease and desist order issued under section 63;

(f) provided services not authorized by its licence;

(g) operated a facility without a carrier licence;

(h) failed to make payments in a timely manner in connection with the universal service obligation levy or in respect of the regulatory fee imposed pursuant to section 16.

(7) Before taking action under subsection (1), the Office shall carry out such investigations as may be necessary and afford the licensee concerned an opportunity to be heard.

(**8) For the purpose of this section, the Office may**

(a) summon and examine witnesses;

(b) call for and examine documents;

(c) require that any document submitted be verified by affidavit,

(d) adjourn any investigation from time to time.

(9) If a person fails or refuses without reasonable cause, to furnish information to the Office when required to do so, the Office may apply to the Court for an order to compel the person to furnish the information to the Office.

The "hearing rule" is seen further in Section 28 of the Telecoms Act, speaking to the determination of dominance in the Telecoms industry:

28. Determination of dominance.

28. (1) Subject to subsection (2), the Office shall determine which public voice carriers are to be classified as dominant public voice carriers for the purposes of this Act.

(2) Before making a determination under subsection (1), the Office shall -

(a) invite submissions from members of the public on the matter; and

(b) consult with the Fair Trading Commission and take account of any recommendations made by that Commission.

(3) A dominant public voice carried may at any time apply to the Office to be classified as non dominant and the Office shall not make a determination in respect of that application unless it has invited submissions from members of that public on the matter and has taken account of any such submissions.

Section 60(4), concerning the appeal of Office decisions, states:

"**60(4)** A person who is aggrieved by a decision of the Office may, within fourteen days of receipt of that decision, apply to the Office in the prescribed manner for a reconsideration of the matter.

(5) An application under subsection (4) shall be heard only if the applicant-

(a) relies upon new facts or changed circumstances that could not, with ordinary diligence have become known to the applicant while the matter was being considered by the Office; or

(b) alleges that the decision was based upon material errors of fact or law.

(6) The Office may, in relation to an application under subsection (4), confirm, modify or reverse the decision or any part thereof.

(7) Where a decision is confirmed, the confirmation shall be deemed to take effect from the date on which the decision was made…"

Section 63, which deals with enforcement and the power of the Office to issue cease and desist orders, states:

63. Power to issue cease and desist orders.

63. (1) The Office may, where it is satisfied that there are reasonable grounds for believing that any conduct specified in subsection (2) is being carried out by any person, on its own initiative or on the application of any person, issue to the person concerned, a cease and desist order in accordance with section 64…

…(4) Before issuing a cease and desist order, the Office shall cause to be served on the person concerned, a notice –

(a) containing a statement of the facts referred to in subsection (3)(a); and

(**b) specifying the period within which and a place at which a hearing will be held to afford to the person concerned an opportunity to show cause why the order should not be made.**

As can be seen from the legislative examples given above, the principles of natural justice and procedural fairness, pervade the machinery of the Telecoms Act as well as the OUR Act, as it relates to the legislative mandate of the OUR to act fairly and transparently in its day to day dealings with the telecommunications industry, external stakeholders as well as the end users of the telecommunications products and services. Upon perusing the two statutes referred to above, it is apparent that apart from natural justice principles, there are certain common duties and regulatory guidelines that are implicit in the documents, especially in Section 4(2) of the OUR Act. These guidelines are central to the machinery governing regulators across the globe and include the mandate to:

- to prevent abuses of dominance and monopoly power by incumbent operators;
- to prevent anti-competitive behaviour within regulated industries and to facilitate and allow for the growth of competition;
- to protect consumer interests and legitimate expectation;
- to protect environmental interests;
- to facilitate a "level playing field" that allows utility service providers to finance their commercial activities and realize a reasonable return on investment;
- to promote efficiency on the part of utility service providers
- to enforce licence conditions when breaches are occasioned by the activities of licencees.

The British Department of Trade and Industry stated in their green paper on modernizing utility regulation that:

> "Effective regulation should therefore ensure that the consumer comes first. It should do this by providing proper incentives to innovate and improve efficiency; driving competition to promote choice and value for money wherever possible; protecting consumers where competition is an insufficiently effective discipline; and ensuring that these industries contribute to a better environment and quality of life…".[4]

[4] A Fair Deal for Consumers: Modernising the framework for utility regulation. The response to consultation, Department of Trade and Industry, July 1998

It is submitted that the framework and objectives for "effective regulation", as referred to in the said paper, speak to the need to put the consumer first, and it is the consumer's needs that are central to the need for natural justice in utility regulation. Whether or not that consumer or "customer" depending on which tier of the food chain one falls in, is treated fairly will depend on the quality and efficacy of the regulatory machinery to which that consumer is subject. For our purposes here, a "customer" could be a stakeholder such as a utility service provider that has, by virtue of an interconnection agreement or other such arrangement, a fiduciary relationship with another provider, for the provision of services that in turn, enable it to conduct its own commercial activities. The term "customer" could also refer to the ultimate end user, such as your average "man on the street" consumer of utility products and services.

The acts that create and/or govern regulators such as the OUR, give such regulators duties based on the aforementioned principles. These duties are expressed as either being mandatory or discretionary and one may tell the difference by looking at the words used by the parliamentary draftsman in the structuring of the relevant act. The mandatory duties are shown by the use of the legislative words 'shall', 'will' or 'must', although there is often considerable debate as to whether the discretionary word 'may' really falls into the mandatory category. This is because, at times (especially in certain cases that this writer has been involved in) the interpretation of the word 'may' when deciding how to enforce certain provisions, really effectively turns it into 'shall'. It can be said that, without such liberal construction of the law at times, the very statute that we are seeking to apply may be rendered moribund and the enforcement powers of the legislator, in its quest for fairness, rendered emasculated.

Discretionary duties are often elucidated by the use of words such as 'consider', 'take into account' and 'have regard to'. These phrases usually refer to duties of the regulator that are necessary but are not as strictly demarcated as others, giving the regulator a bit of "wriggle room" in the manner in which it arrives at decisions. It should be noted however that all regulatory powers, whether mandatory under statute or discretionary, should be exercised in the spirit of transparency. Such transparency is necessary in light of the view that regulators, if left with certain powers affecting the regulated industries' interests without being fettered by statutory duties, would be free to run amok, arriving at decisions in any manner deemed

suitable to them without proper adherence to due process. The regulator's statutory duties ensure that their powers are used for specific, statutorily prescribed ends, reflecting procedural fairness and the policy requirements of the relevant government bodies that supervise the regulator.

The duties to consult and give reasons for decisions

When considering the powers of the Jamaican regulator, the OUR in light of the aforementioned legislation, the two paramount duties to consult and give reasons are indispensable in any vibrant and effective regulator's arsenal.

Section 4(7) of the OUR Act states:

> "**(7) The Office shall give reasons for any decision taken by it pursuant to subsection (4) (a) or (5), to any person affected or likely to be affected by that decision."**

Section 4(2) (a) of the Telecoms Act states that, regarding consultation, the Office shall -

> **"(a) consult in good faith with persons who are or are likely to be affected by the decision…"**

Noted legal author Bennion also states:

> " *Duty to consult* Where an enactment conferring power to make delegated legislation requires the delegate to consult interested persons before excercising the power, this duty is mandatory rather than discretionary. It requires (a) the communication of a genuine invitation to give advice and (b) a genuine consideration of that advice when given."[5]

The regulatory field worldwide has adopted the use of the consultative process as well as giving reasons for administrative decisions, (most often in documentary form). One need only use any internet search engine, the most popular of which is "Google" in order to view the plethora of consultative documents that exist regarding various decisions affecting regulated industries. One such example is our own website, www.our.org.jm which contains

[5] F. Bennion, Statutory Interpretation, 4th ed (Butterworths, 2002) p.209

a cornucopia of consultative documents, mainly dealing with telecommunications matters. Whilst many regulators across the globe have adopted the consultative process without legislative prompting and machinery in place, the Jamaican jurisdiction has codified the duty to consult, an example of which was referred to above. The OUR has taken the baton so to speak, issuing numerous consultative documents and ensuring their publication on the world wide web in as expeditious a manner as possible. This is not only in the spirit of regulatory efficiency, but also in the spirit of transparency and natural justice, wherein all utility service providers, consumers and other interested parties affected may view the said documents and make comments within the time frame specified by the Office.

Whilst it is recognized that it is not perhaps best practice to codify the manner in which a regulatory body should incorporate the comments received through consultative process into its decision making process, the rules of natural justice do demand that the regulator conduct consultations within the affected industries before making a decision. Upon arriving at said decision, there is the duty to give reasons for that decision in order for justice to not only be done, but **seen** to be done. This duty to give reasons has also been codified in Jamaica, as shown in the example above, in order to augment the consultative as well as investigative processes of the OUR and other regulatory bodies. Whilst the consultative process provides a transparent view into the machinations of the regulatory process during the developmental period of a decision, the publication of a decision and the reasons therefore allows the parties affected to understand the Office's conclusions and the factors affecting them.

Judicial review of regulatory decisions

The decisions of utility regulators are open to judicial review in the same manner as those of most administrative bodies the world over, as per the principles of administrative law. In the Jamaican jurisdiction, it is no different. Whereas in most jurisdictions, an applicant with *locus standi* or, the right to bring an action, usually applies to a high or supreme court for judicial review of the regulator's decision, in Jamaica, such actions are brought before an Appeals Tribunal. The right to resort to the Supreme Court is only exercisable in certain regulatory matters after the Tribunal has heard the matter and there still appears to be an imbroglio without a plausible solution.

Section 62 of the Telecoms Act sets out the workings of the said Appeals tribunal as follows:

> "**62. Appeal to Tribunal.**
> 62. (1) A person who is aggrieved by a decision of the Office may appeal against the decision to the Appeal Tribunal –
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> (a) if the person is a party, within twenty-one days after receipt of the decision; or
>
> (b) in any other case, within thirty days from the date of notification of that decision.
>
> (2) On hearing an appeal under this section the Appeal Tribunal may, subject to subsection (3)-
>
> (a) confirm, modify or reverse the decision of the Office or any part thereof; or
>
> (b) by a direction in writing, refer the decision back to the Office for reconsideration by it, either generally or in relation to any matter specified in the direction,
>
> and the Tribunal shall state the reasons for so doing within thirty days.
> (3) The Tribunal may, on application by an appellant, order that the decision of the Office to which an appeal relates shall not have effect until the appeal is determined.
>
> (4) The Appeal Tribunal may dismiss an appeal it is of the opinion that-
>
> (a) the appeal is frivolous or vexatious or not made in good faith; or
>
> (b) the appellant does not have a sufficient interest in the subject matter of the appeal.
>
> (5) Where the Appeal Tribunal dismisses an appeal, it shall in writing inform the appellant and the Office, stating the reasons therefor.
>
> **(6) In making a decision the Appeal Tribunal shall observe reasonable standards of procedural fairness and the rules of natural justice and act in a timely fashion."**

It can be seen at Section 62 (6) that the constant thread that runs through the legislation regarding natural justice and procedural fairness is still apparent here.

In looking at cases in the past, it is apparent that actions for judicial review of regulatory decisions are usually based on one or more of the following precepts or assertions that:

a) the regulator acted *ultra vires,* or outside the scope of its powers as conferred by statute;
b) the regulator erred in a matter of fact or of law in arriving at a decision.
c) the regulator neglected the rules and procedures governing it, as stated by statute or other enabling instrument, such as subsidiary legislation and licences.
d) the regulator breached the rules natural justice and procedural fairness and/or acted in a manner that was not transparent

In the event that a matter does go before the Tribunal and, in certain cases, eventually to the Court for hearing, the matter will be reviewed on the manner in which the decision was arrived at and not according to the content of the substantive decision itself. In the Jamaican jurisdiction, the Tribunal can as per Section 62(2) of the Telecoms Act, upon hearing an appeal:

> **"(a) confirm, modify or reverse the decision of the Office or any part thereof; or**
>
> **(b) by a direction in writing, refer the decision back to the Office for reconsideration by it, either generally or in relation to any matter specified in the direction…"**

It is important to note that, judicial review can only happen after a decision has been made by a regulator and parties affected have mounted their objections against it. Unfortunately for the parties involved, the process is usually rather lengthy, taking several months, in the Jamaican jurisdiction and, in certain cases, several years, during which time, the activities of utility service providers and indeed the very regulator may be hamstrung with regards to certain important regulatory decisions affecting matters such as enforcement orders, tariff decisions, rate setting decisions, the applicability of interconnection agreements, and even the payment of certain industry specific levies. In light of this, it is of paramount importance that regulators such as the OUR and other utility regulators around the world act fairly and transparently, according to the rules of natural justice. This is important not only with regard to the regulated industries, stakeholders, customers and consumers, but also with regard to the very viability of the regulatory process and the confidence of the industries and the

public at large in the decisions of the regulator and the manner in which those decisions are concretized.

Conclusion

A regulator such as the OUR in Jamaica, as well as regulators elsewhere, in making decisions affecting regulated industries will have to endeavor to consider with equanimity the interests of policy makers, industry stakeholders and consumers with discretion and transparency. Discretion and careful consideration of all salient issues is of paramount importance but, in arriving at a decision regulators must not be draconian in their application of their powers, but neither must they be overly lax. As eastern philosophies such as Buddhism state, "The Middle Way is part of the path to enlightenment". This "middle way" is equally applicable in the area of utility regulation and balancing interests of all parties affected, whilst maintaining fairness and procedural transparency. In concluding, it is perhaps useful to consider, in short, the benefits to be garnered by the use of natural justice in regulatory action.

Benefits for parties affected by regulatory decisions:

Natural justice allows parties affected by decisions the opportunity:

a) to put postulate arguments and make submissions supporting their position in a given matter.
b) to make submissions regarding views as to why a proposed regulatory action should not be undertaken
c) to deny submissions and assertions made by other parties or the regulator itself.
d) to introduce evidence in support of their own assertions and claims as well as any mitigating circumstances in a given matter.
e) enjoy due process.

Benefits for regulatory bodies making decisions:

While natural justice is , as a legal principle, designed as a safeguard applying to parties whose rights, interests or legitimate expectations are being affected, a regulator should not regard such principles as onerous as they are integral to the decision making process, as stated in a fulsome manner before. Natural justice serves a regulator in the following ways:

a) it is an invaluable methodology by which the veracity of facts and submissions may be ventilated

b) it may shed light on any argument that may be postulated criticizing or attacking a regulatory decision before said decision is communicated or published thereby serving to keep the regulator's credibility intact

c) any comments obtained in the consultative/investigative process may expose any weaknesses in a decision-making process, investigation, submissions or information and documents upon which a regulatory decision is to be based,

A regulator with no credibility, no transparency, no due process, no perceived fairness, is not a regulator in whom affected parties place confidence. Such a regulator will not be trusted to promote and foster competition nor to strive to maintain the economic viability of its stakeholders. It will not be a regulator in the spirit in which administrative bodies are given powers and duties the world over, such spirit being that of credibility and impartiality. It will not be a regulator of markets, service providers, industries and consumers. Outside of the theoretical realm of the statutes that empower it on paper, it will be a regulator of shadows, dust and straw.