



# **ADJUDICATION**

## ***APPLICATION FOR APPROVAL OF A CHANGE IN CONTROL OF BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED***

**ECS COMP. 02/2011**

March 10, 2011

UTILITIES REGULATION & COMPETITION AUTHORITY

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**ADJUDICATION made pursuant to Section 75 of the Communications Act, 2009**

**In the matter of a request for approval of a change in control of Bahamas Telecommunications Company Limited from the Government of The Bahamas to Cable and Wireless Communications plc.**

WHEREAS the Utilities Regulation and Competition Authority (“URCA”) having received from the Bahamas Telecommunications Company Limited (as the “Licensee”) and Cable and Wireless Communications plc (as the “Acquirer”) on February 8, 2011, a Notification in which the Licensee and the Acquirer request URCA’s consent to a transaction in which the Acquirer will purchase from the Government of the Commonwealth of The Bahamas (“the Government”), fifty-one per cent (51%) of the issued share capital in the Licensee (the “Transaction”), has duly deliberated upon the information provided and matters set out in the Notification;

AND WHEREAS the Transaction is also conditional upon URCA approving the change in control pursuant to Condition 8 of the Licence of the Licensee’s Individual Operating Licence and Condition 8 of the Individual Spectrum Licence, which has been approved by URCA and this will be granted in writing upon completion of the Transaction;

AND WHEREAS URCA having given members of the public in The Bahamas reasonable opportunity to submit representations regarding the Transaction has given due consideration to all such representations received.

Pursuant to section 75(1)(a), URCA now makes the following Adjudication:

**Impact of the Transaction on Competition in the Relevant Markets**

The Acquirer is not active as a network operator or service provider in any markets in The Bahamas. The Transaction does not lead to any overlaps in the activities of the Parties. URCA has considered the situation in The Bahamas very carefully, taking into account its analysis of relevant markets. URCA finds that the change in control contemplated by the Transaction would not have either of the adverse effects set out in section 72: substantially lessening of competition; or for a change in control involving a media public interest, an effect contrary to public interest.

**URCA's Consent to a Change` in Control of Bahamas Telecommunications Company Limited**

On the basis of the findings set out in the Summary of Deliberations and Reasons (hereto attached), URCA therefore hereby grants its consent to a change in the control of the Licensee (for the purposes of section 70 of the Comms Act), Bahamas Telecommunications Company Limited, from the Government of the Commonwealth of The Bahamas to the Acquirer, Cable and Wireless Communications plc as set out in the Notification submitted to URCA by the Licensee and the Acquirer on February 8, 2011.

## Summary of Deliberations and Reasons

### 1 Introduction

- 1.1 URCA is an independent regulator, established under the Utilities Regulation and Competition Authority Act, 2009 (the “URCA Act”). URCA’s powers, functions and duties are set out in the URCA Act and the Communications Act, 2009 (the “Comms Act”).
- 1.2 URCA has wide powers to regulate electronic communications services and network operators within the legislative framework. This summary of deliberations and reasons sets out URCA’s analysis of the effect of the notified Transaction on competition in electronic communications markets in The Bahamas, pursuant to section 75(1)(b) of the Comms Act, and in accordance with section 103 of the Comms Act. In accordance with section 66 of the Comms Act, URCA has undertaken its analysis in a manner which is consistent with international best practice.
- 1.3 URCA’s powers in relation to regulation of the electronic communications services sector derive from the Comms Act, and its actions must reflect the Government’s Electronic Communications Sector Policy (the “ECS Policy”). URCA’s remit in relation to the review of the Transaction extends to a consideration of expected changes to the law and the ECS Policy which may affect the competitive landscape in The Bahamas. This is because merger control by its very essence is a forward-looking process, and seeks to determine whether a change in control can be expected to lead to a substantial lessening of competition in any markets in The Bahamas within a reasonable timescale, following the change in control of a licensee. Therefore, URCA has considered the competitive landscape in The Bahamas under the existing laws and proposed amendments to the Comms Act, as anticipated by the Communications (Amendment) Bill 2011 (the “Bill”).

## 2 Background

- 2.1 Part XI of the Comms Act sets out the competition provisions that will apply to the electronic communications sector. Under section 70 of the Comms Act no change in control of a licensee can be implemented without obtaining the prior written approval of URCA.
- 2.2 On December 1, 2010, the Government of the Commonwealth of The Bahamas (the “Government”) and Cable and Wireless Communications plc (CWC) entered into a non-binding Memorandum of Understanding setting out the key terms regarding the acquisition of a 51% shareholding in Bahamas Telecommunications Company Limited (BTC) by CWC or a CWC group company acceptable to the Government.
- 2.3 On February 8, 2011, the Government and CWC having reached agreement in respect of all of the material terms of the transfer of shares in BTC, BTC and CWC jointly submitted to URCA in compliance with the provisions of section 70(3) of the Comms Act, a notification seeking approval by URCA of the proposed acquisition by CWC Bahamas Holdings Limited (CWC BHL), an indirect wholly owned subsidiary of CWC, of a controlling shareholding (51% of the issued share capital) in BTC from the Government, acting through the Treasurer of The Commonwealth of The Bahamas (the “Notification”). The Notification was in the form of the “Full Notification Form” as required by URCA’s *“Competition Guidance: Merger Control – Procedure”* (ECS COMP. 1), and included in support thereof copies of the following documents:
  - a. Transaction Documents:
    - i. Agreement for the sale and purchase of 51% of the issued share capital in The Bahamas Telecommunications Company Limited
    - ii. Agreed Form Shareholders’ Agreement relating to The Bahamas Telecommunications Company Limited
    - iii. Agreed Form Support Services Agreement
    - iv. Agreed Form Know-How and Special Projects Agreement and Trade Mark Licence
    - v. Amended and Restated Memorandum and Articles of Association and Articles of Incorporation of BTC
  - b. Legislative and Policy Documents:
    - i. Communications (Amendment) Bill, 2011
    - ii. Draft Amendments to the Electronic Communications Sector Policy
    - iii. Utilities Regulation and Competition Authority (Amendment) Bill, 2011
    - iv. Privatisation of the Bahamas Telecommunications Company Limited Bill, 2011
  - c. Business and Restructuring Plan
  - d. CWC planned Capex investments over the next 5 years
  - e. Paper on Effect of the Transaction on Competition
  - f. CWC Annual Reports for 2008 and 2009 and Interim Report for 2010 (to second quarter)

- g. BTC Annual Reports for 2007, 2008 and 2009
- h. List of BTC's Top 5 Competitors
- i. List of CWC's top 20 customers in the Caribbean
- j. List of BTC's top 5 customers in each of its market

The Notification and most of the supporting documents were submitted to URCA on a confidential basis by the parties. URCA has reviewed all of the relevant information submitted, but has ensured that none of the parties' confidential information is included or disclosed in this document.

### **3 The Parties**

#### **The Licensee – Bahamas Telecommunications Company Limited**

- 3.1 Bahamas Telecommunications Company Limited (the “Licensee”) is a private limited liability company incorporated in The Bahamas.
- 3.2 The Licensee is 100% owned by the Government acting through the Treasurer which is the legal owner of 254,664,999 of its shares, whilst the remaining one share is owned by a trustee for and on behalf of the Treasurer.
- 3.3 The Licensee, having assumed the operations of the Bahamas Telecommunications Corporation (BATELCO) on January 1, 2002, had vested in it on September 4, 2002 by the Telecommunications Act, 1999 (Tel Act) certain assets of BATELCO. It currently provides a wide range of electronic communications services (but does not provide broadcasting or content services) in The Bahamas.
- 3.4 The Licensee was licensed by the Public Utilities Commission under the Tel Act. On September 1, 2009 the Tel Act was substantially repealed by the Comms Act. In accordance with the procedures set out in section 113 of the Comms Act, the Licensee applied for the appropriate licences under the new regulatory regime, and URCA issued to the Licensee an Individual Operating Licence and an Individual Spectrum Licence for the exclusive use of specified spectrum throughout The Bahamas. The Licensee thereby became a licensee under the Comms Act, subject to the merger control provisions in Part XI of the Comms Act.
- 3.5 By virtue of section 114 of the Comms Act and paragraph 17 of the ECS Policy, the Licensee is the exclusive operator of mobile communications networks and provider of mobile communications services in The Bahamas. The Licensee has no interest in any other Comms Act licensee.

#### **The Acquirer – Cable and Wireless Communications plc**

- 3.6 CWC BHL is a limited liability company incorporated in The Bahamas, and is (indirectly) wholly owned by CWC. CWC BHL has not conducted business operations since incorporation. CWC BHL does not hold an interest in any other licensee under the Comms Act.
- 3.7 The group structure, of which CWC BHL is a part, is of particular note. CWC BHL is 100% owned by Cable and Wireless (West Indies) Limited, which is itself a wholly owned subsidiary of Sable Holdings Limited, which in turn is a wholly owned subsidiary of Cable and Wireless Limited, itself wholly owned by CWC. CWC is therefore the ultimate parent company of CWC BHL. URCA notes that although CWC BHL will be the actual purchaser of the Licensee’s shares, the material effect of the Transaction is that the Licensee will become a part of the CWC group in that it will be

operated by CWC as part of its business in the Caribbean region. The parties advise that CWC will exercise direct control of CWC BHL's shareholding in the Licensee through its appointment and control of directors in all of the companies in the ownership chain between CWC and the Licensee. Accordingly, control of the Licensee will be exercised by CWC. Therefore, (except where the context requires otherwise) CWC will be treated as the acquirer for the purposes of the relevant sections of the Comms Act and will hereinafter be referred to as the "Acquirer".

- 3.8 The Acquirer is a publicly-owned company, incorporated in the United Kingdom whose shares are listed on the London Stock Exchange (share code CWC). The Acquirer was formerly a standalone business unit within Cable and Wireless plc. On March 26, 2010 the Acquirer demerged from Cable and Wireless Worldwide plc to form a separate company.
- 3.9 The Acquirer has provided electronic communications services to consumers, businesses and other entities around the world for more than 140 years. The Caribbean represents one of the Acquirer's four regional business units (the others being Panama, Macau and Monaco & Islands). The Acquirer's Caribbean business trades as "LIME" (which stands for Landline, Internet, Mobile and Entertainment) and provides services to the communities of 13 Caribbean countries or territories - Anguilla, Antigua & Barbuda, Barbados, The British Virgin Islands, The Cayman Islands, Dominica, Grenada, Jamaica, Montserrat, St Kitts & Nevis, St Lucia, St Vincent and the Grenadines, and the Turks and Caicos Islands. During the first six months of its 2010/2011 financial year (April to September 2010), the Acquirer had global revenues of US\$1,159 million, of which US\$401 million is generated in the Caribbean region. Full year revenues for 2009/2010 were US\$2,346 million, of which US\$873 million was generated in the Caribbean region.
- 3.10 The Acquirer and Licensee state in the Notification that *"LIME provides a high-quality service to its customers and is entirely focussed on serving the communities of the Caribbean. The Transaction offers CWC an opportunity to provide these services through BTC to domestic and business customers in The Bahamas, where CWC does not currently have a presence. The Bahamas is a dynamic economy with excellent potential for growth and BTC's operations will be highly complementary to CWC's existing Caribbean business."*
- 3.11 Services provided by the Acquirer in those markets in which the Acquirer currently operates (which do not include The Bahamas) include:
- a. Mobile;
  - b. Fixed Line;
  - c. Broadband;
  - d. Pay TV (including IPTV, Cable TV and Mobile TV);
  - e. Data Centre Hosting; and,
  - f. Managed services.
- 3.12 The Acquirer and the Licensee collectively are herein referred to as the "parties".



## 4 The Transaction

- 4.1 The Transaction will take the form of a sale by the Government and purchase by the Acquirer (acting through CWC BHL) of fifty-one per cent (51%) of the issued share capital of the Licensee, effected by way of a Share Purchase Agreement signed on February 8, 2011, a shareholders' agreement, a support services agreement and a know-how and special services, and trademark licence agreement which will be executed upon completion of the Share Purchase Agreement.
- 4.2 Key terms and conditions of the Transaction include:
- a. CWC BHL will acquire fifty-one per cent (51%) of the entire issued share capital of the Licensee.
  - b. The Transaction as notified to URCA is conditional upon:
    - i. Approval by the House of Assembly;
    - ii. Approval by the Central Bank of The Bahamas;
    - iii. Approval by the National Economic Council of The Bahamas;
    - iv. Enactment of amendments to the Comms Act and publication of a revised Electronic Communications Sector Policy, to reflect the extended period of the Licensee's cellular exclusivity as agreed between the parties;
    - v. The issuance of a permit to CWC BHL by The Bahamas Investment Authority under the International Persons Landholding Act; and,
    - vi. Approval of the Transaction by URCA under the Comms Act and the changes of control conditions in the Licensee's licences.
  - c. CWC BHL will pay cash consideration upon completion, subject to price adjustments in respect of net cash and net working capital of the Licensee.
  - d. The Government will take steps to effect changes to the Licensee's cellular communications exclusivity period such that:
    - i. To the extent within its control, it will not launch any process in respect of the granting of a second cellular licence prior to the third anniversary of the completion of the Transaction;
    - ii. A third cellular licence shall not be issued prior to the fifth anniversary of completion of the Transaction.

- e. Immediately following the Transaction, a new Board of Directors of the Licensee will be appointed comprising seven directors; four appointed by CWC BHL and three appointed by the Government.
- f. For as long as the Government owns at least 15% of the Licensee's issued share capital, the Licensee shall not take action or make decisions in respect of certain reserved matters without the prior consent of the Government.
- g. No CWC Group member will compete with the Licensee in The Bahamas from the completion of the Transaction until two years after CWC BHL or any CWC company ceases to hold shares in the Licensee.
- h. Government has agreed to fund a trust for the maintenance of "defined benefit" pension plans for current employees of the Licensee.
- i. The Government has the right to list specific numbers of its shares in the Licensee (up to 9% of the issued share capital within the first three years, and up to 25% thereafter) on The Bahamas International Securities Exchange.

## 5 Change in Control

5.1 Under section 71 of the Comms Act, a “change in control” occurs when a person, either alone or with any affiliated company:

*“(a) acquires control (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation or otherwise, to ensure that strategic decisions of the licensee are conducted in accordance with the wishes of that person;*

*(b) becomes the beneficial owner or voting controller of more than thirty percent of the voting shares in the licensee; or*

*(c) becomes the beneficial owner or voting controller of more than fifteen percent of the voting shares but not more than thirty percent of the voting shares in the licensee concerned unless that person either alone or with any affiliated company-*

*(i) is not, or does not concurrently become, the beneficial owner or voting controller of more than five percent of the voting shares in any other licensee; and*

*(ii) does not have the power (including by the holding of voting shares), or does not concurrently acquire control (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating any other licensee or any other corporation or otherwise, to ensure that the affairs of such other licensee are conducted in accordance with the wishes of that person.”*

5.2 The requirements of the share threshold test in section 71(b) are satisfied in that the Acquirer will become the beneficial owner (and voting controller) of more than thirty per cent of the voting shares in the Licensee.

5.3 As stated above, the Licensee is a holder of an Individual Operating Licence, and an Individual Spectrum Licence granted by URCA under the Comms Act. Accordingly, the Transaction is a “change in control” of a licensee which, pursuant to section 70(1) of the Comms Act, may not be implemented without having obtained the prior written approval of URCA.

5.4 Section 75 of the Comms Act provides that URCA’s decision in respect of a request for approval of a change in control of a licensee is to be given by way of adjudication. URCA has followed the procedures established for the making of adjudications under section 75, which are set out in the Competition Guidelines: Merger Control, issued by URCA (ECS COMP. 1 to ECS COMP. 3).

## 6 Questions to be determined, the Review Process and URCA's Approach

6.1 Section 72 of the Comms Act provides that URCA, on receiving a notification of a change in control of a licensee under section 70(3) shall form an opinion on whether *"a proposed change of control of a licensee -*

*(a) would have, or be likely to have, the effect of substantially lessening competition in a market in The Bahamas; and*

*(b) in the case of a change in control involving a media public interest, whether the change in control would have an effect, or would be likely to have an effect contrary to the public interest."*

6.2 Upon receiving the notification, URCA must within thirty (30) days either:

- a. Issue its adjudication; or,
- b. Inform the acquirer and the licensee that URCA is opening an in-depth investigation into the change in control.

6.3 URCA may open an in-depth investigation where it considers that there is a significant prospect that the change in control is likely to have one or both of the adverse effects set out in section 72 of the Comms Act, and the parties have not volunteered any proposals to address URCA's concerns. In the event that URCA opens an in-depth investigation, URCA must issue its adjudication within ninety (90) days.

6.4 In the event that URCA determines that a change in control of a licensee would not have the adverse effects listed in sections 72(a) and 72(b) of the Comms Act, section 75(a) provides that URCA shall issue an adjudication giving consent to the change in control.

6.5 In the event that URCA determines that a change in control of a licensee would have the adverse effects listed in sections 72(a), and with respect to a media public interest and 72(b) of the Comms Act, section 75(b) provides that URCA shall take one of the following actions –

- a. Deny its consent to the change in control;
- b. Give consent subject to an order that the acquirer or the licensee concerned takes the action that URCA considers necessary to eliminate or avoid any adverse effect; or
- c. Give consent without requiring any action to eliminate the adverse effects where URCA is satisfied that any substantiated and likely efficiencies put forward by the acquirer or the licensee are necessary and outweigh any potential harm to consumers and citizens.

- 6.6 Section 74 of the Comms Act provides that a change in control shall be deemed to involve a media public interest if at least one of the persons involved in the Transaction is an enterprise involving either or both of broadcasting and/or publishing newspapers. Neither the Licensee nor the Acquirer is involved in broadcasting and or publishing newspapers in The Bahamas. Therefore, the provisions of Section 72(b) do not apply to the Transaction.
- 6.7 Accordingly, the only question to be determined by URCA in relation to the Notification is whether the proposed change in control of the Licensee would have, or would be likely to have, the effect of substantially lessening competition in a market in The Bahamas. In order to satisfy the requirements of subsection 72(a), it is not enough to find that there might be a substantial lessening in competition; in order for an event to be “likely”, it must reasonably be expected to happen.
- 6.8 In determining whether the change in control of the Licensee would have, or be likely to have, the effect of substantially lessening competition in a market for electronic communications services in The Bahamas, URCA adopts the following approach set out in ECS COMP.2, “Competition Guidance on Merger Control – Substantive” (the “Substantive Merger Control Guidance”):
- a. Identification of the relevant markets: URCA must first identify the relevant market(s) for electronic communications services in The Bahamas to which the change in control is relevant<sup>1</sup>.
  - b. Assessment of Impact on Competition in the relevant markets: Once the relevant market(s) have been identified, URCA shall assess the impact that the change in control would have on competition in those markets, considering the horizontal, vertical and conglomerate effects, as well as any other possible effects. In that regard:
    - i. For the identified markets, URCA will consider any change to the parties’ market shares caused by the Transaction, and any change in market concentration (using the Herfindahl-Hirschmann Index (HHI) as appropriate). Significant market shares or significant increases in market concentration are indicators of possible harmful effects of the Transaction on competition, although they are not of themselves conclusive. URCA will also consider other possible “*theories of harm*”, features of the Transaction which might harm competition in the relevant market(s).
    - ii. In order to determine whether a change in control would harm competition in a relevant market, URCA will consider the “*counterfactual*”, that is, what would happen if the Transaction were not approved by URCA, as compared to the position if the Transaction were allowed to proceed. URCA’s intent in each case is to determine

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<sup>1</sup> See section 4.1 of ECS COMP. 2

whether competition would be substantially lessened if the change in control were approved.

- iii. URCA will assess the presence or absence of barriers to entry in the relevant market(s). This will assist URCA in assessing whether any short term impact on competition will or is likely to have lasting effects.
  - iv. URCA may also look at the countervailing buying power of customers in the relevant market(s), if this is considered relevant. A finding that customers are able to significantly influence the terms on which they acquire services from the parties to the Transaction reduces the likelihood of a substantial lessening of competition.
- c. Efficiencies brought on by the Change in Control: In the event that URCA identifies that the change in control would result in a substantial lessening of competition in a market for electronic communications services in The Bahamas, URCA will then consider whether any substantiated or likely efficiencies have been identified by the parties which would outweigh the potential harm to consumers and citizens, as contemplated by section 75(2)(iii) of the Comms Act.
- d. Possible Steps to Mitigate Harm: Where URCA considers that a substantial lessening of competition is or would be likely, which is not outweighed by substantiated or likely efficiencies identified by the parties, URCA will consider any proposals put forward by the parties setting out actions that they could take which would satisfactorily address URCA's concerns, as contemplated by section 75(2)(ii) of the Comms Act.

## **7 Representations from Interested Parties and URCA's relevant response**

- 7.1 URCA is required by section 75(2) of the Comms Act, in determining whether or not to give its consent to the change in control, to give the Acquirer, the Licensee and any interested persons a reasonable opportunity to make representations; and to consider the representations made. Detailed representations were made by the Acquirer and the Licensee in the Notification.
- 7.2 URCA published a notice of the proposed Transaction on its website on February 9, 2011 and in the national newspapers on February 10, 2011, giving a description of the Transaction and inviting representations from interested persons, which representations were to be submitted to URCA on or before February 24, 2011.
- 7.3 URCA received comments from four persons, all opposed to the Transaction, on or before the deadline, and together with a petition submitted by the Committee to Save BTC for Bahamians. URCA received comments on March 8, 2011 (two days before the expiry of the thirty (30) days statutory deadline for initial consideration of the change in control), from one other person. In light of the very tight requirements that apply to a consideration by URCA of a change in control, it is not possible for URCA to take into account comments received so close to the deadline for issuing the Adjudication and so much after the deadline for comments, February 24, 2011, has passed. URCA could not therefore take into consideration those March 8, 2011 comments.
- 7.4 URCA has considered the comments in detail within the appropriate sections of this document. It is not within URCA's statutory powers to consider the petition by the Committee to Save BTC for Bahamians as this does not address either of the questions in section 75 of the Comms Act, which are the only issues that URCA has powers to consider. URCA provides its position on those comments received where relevant within the remainder of this document. The comments are summarised for convenience below.

### Allegations of Conflicts of Interest

- 7.5 Three of the respondents raised the issue that URCA's CEO and a Human Resources Advisor are former Cable & Wireless executives and question URCA's ability to adjudicate on this change in control, without a conflict of interest.
- 7.6 The relevant facts and URCA's response to the concerns expressed regarding alleged conflicts of interest have been set out in two press releases issued by URCA dated February 24, 2011, and February 28, 2011. Upon careful review of the facts, URCA has established that no actual or perceived conflicts of interest arise in relation to the matters raised in the responses. Further, URCA is satisfied that no conflict of interest arises in respect of any person who has been in any

way involved in URCA's consideration of the parties' request for approval of the change in control of the Licensee.

#### Lack of potential efficiencies and consumer benefits

- 7.7 One respondent is concerned that there are no new services or other benefits arising from the Transaction which the Licensee was currently unable to offer. Another respondent asserts that there is no evidence to show that the Transaction will result in greater benefits for consumers, and that the reputation of the Acquirer suggests the contrary. Further the respondent asserts that the Transaction will not result in a decrease in prices for consumers, but will mean the opposite.
- 7.8 URCA notes the comments made on claims by the Acquirer of the potential efficiencies and consumer benefits as a result of the Transaction. As mentioned in paragraph 6.8.c above, URCA will consider the efficiencies and benefits claimed by the merging parties when there is a likelihood of a substantial lessening of competition in a market. The Acquirer is not active in any markets in The Bahamas and, for the reasons explained in this adjudication, the Transaction does not have, nor is likely to have, the effect of substantially lessening competition in a market in The Bahamas.

#### Commercial aspects of the Transaction

- 7.9 Two respondents have expressed concern that the amount being paid by the Acquirer under the Transaction is below the value of the shares in the Licensee. Those persons refer to the profits generated by, and sums received by the Government from, the Licensee in recent years. Another respondent expressed concern on the level of management fees that the Licensee will to the Acquirer, and argues that if URCA is minded to approve the Transaction it should impose a condition which restricts the Licensee's ability to pass the management fee on to its customers.
- 7.10 URCA notes that the commercial terms of the Government's decision to sell a 51% share in the Licensee to the Acquirer are a fiscal and policy matter and, therefore, entirely outside of URCA's jurisdiction under the Comms Act. URCA's jurisdiction is limited to, and its decision is based only on, the competition impact of the Transaction on the delivery of electronic communications services in The Bahamas under the terms of the Comms Act.

#### Constitutional issues

- 7.11 One respondent asserts that the proposed exclusivity of the Licensee is *ultra vires* the Constitution of The Bahamas. The respondent states that URCA cannot be party to an unconstitutional result and should require the applicants to address the question as to whether or not the exclusivity arrangement offends the Constitution.



7.12 URCA is aware of discussion of this issue by the Judicial Committee of the Privy Council in the *Marpin Case*<sup>2</sup>, a Dominican case in which the Judicial Committee held that a monopoly to control a means of communications can amount to a hindrance of freedom of expression, provided that it is proven that the restriction exceeds that which is reasonably justifiable in a democratic society. URCA notes that the Committee in that case did not make any conclusive finding, but referred the issue back to the Dominican courts for a consideration of the particular facts in the context of the above test. In any event, constitutional issues, such as this, are highly complex and would properly involve significant judicial scrutiny of the facts surrounding the challenged decision. URCA is not the appropriate forum to consider matters of constitutionality of legislation in The Bahamas, and is therefore not competent to determine this point.

#### Leave to Appeal

7.13 One respondent notes the grant of leave to appeal the decision of Mr Justice Neville Adderley in the Supreme Court on February 14, 2011; the appeal was filed on February 21, 2011. The respondent advises that the suit challenges the right of the Government to dispose of the assets of the Licensee in the manner contemplated by the Transaction.

7.14 URCA notes the appeal to Mr Justice Neville Adderley's decision. This issue is entirely outside of URCA's jurisdiction under the Comms Act. URCA's jurisdiction is limited to, and its decision is based only on, the competition impact of the Transaction on the delivery of electronic communications services in The Bahamas under the terms of the Comms Act.

#### Oral debate and opening an in-depth investigation

7.15 One respondent has requested a public oral hearing on the Transaction and also argues that there is at least the need for URCA to open an in-depth investigation into the Transaction pursuant to section 78 of the Comms Act.

7.16 The Comms Act contains detailed provisions on public consultation, both generally (section 11) and specifically in relation to merger control (section 75(2) of the Comms Act). In accordance with its statutory duty, on February 9, 2011, URCA published a request for comments from interested parties; URCA has reviewed and commented upon all representations that were submitted prior to the deadline set out in the Notice of Proposed Change in Control of the Licensee. URCA considers that all interested persons have had a fair opportunity to provide representations. Consequently, there is no need for an oral hearing. Furthermore, URCA is mindful that section 78 of the Comms Act explicitly indicates that the only circumstance under which URCA may open an in-depth investigation, is where there is a significant prospect that the

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<sup>2</sup> Cable and Wireless (Dominica) Limited v. Marpin Telecoms and Broadcasting Company Limited, Privy Council Appeal No. 15 of 2000. See also Retrofit (PVT) Ltd. V Posts and Telecommunications Corporation 1996 (1) SA 847.

change in control is likely to have the adverse effects set out in sections 72 (a) or 72 (b) (and the parties have not volunteered any proposals to eliminate URCA's concerns).

#### Extension of the exclusivity period for mobile services

7.17 Two respondents raise the issue of the exclusivity period for mobile services. They state that completion of the Transaction will lead to an extension of the exclusivity period for mobile services relative to the situation where the Transaction does not complete. They state that this alleged extension will delay the promotion of sustainable competition, will have an adverse effect on new entrants and will preclude the resale of the Licensee's mobile services by competitors during the exclusivity period. URCA considers this point in detail in Section 11.

#### Suitability of CWC as the Acquirer

7.18 Comments were made by two of the respondents which allege that the Acquirer has a negative reputation for customer services in the Caribbean region and that therefore URCA should reject the Transaction. Representations were also made objecting to a foreign-owned company acquiring shares in the Licensee.

7.19 URCA does not have the power under the Comms Act to consider the issue of foreign ownership as it falls outside of URCA's purview and is properly a matter of policy for consideration by the Government and Parliament. As detailed in paragraph 4.2, the Transaction is subject to approval by the House of Assembly. As noted earlier, URCA has wide powers to regulate the electronic communications sector and would be able to address the issue of customer service under the terms and conditions of the Licensee's IOL.

#### Lessening of Competition

7.20 One respondent raises the following concerns:

- i. The Transaction results in a substantial lessening of competition in several markets as it precludes the Acquirer, which is a major global and regional provider of electronic communications services with a stated objective of expanding in the Caribbean region, from entering as a competitor to the Licensee, which is currently the dominant provider in most telephony markets in The Bahamas and has a legal monopoly in the mobile services market.
- ii. The Transaction will cause a lessening of competition in the fixed markets as it extends the Licensee's ability to leverage its mobile monopoly to impede the growth of competition in the fixed voice, broadband, domestic long distance and international long distance markets.
- iii. The Transaction will cause a lessening of competition in the international services markets because the Acquirer will have an incentive and the ability to favour the

Licensee over other operators licensed to provide international services to customers in The Bahamas. The respondent states that the Acquirer's affiliates have significant market power in their home markets and could provide call termination service to the Licensee on prices terms and conditions which discriminate against other international services providers in The Bahamas. The respondent argues that the end result will be a substantial lessening of competition on some international routes.

- iv. If the Transaction is approved, the Acquirer as part of its "One Caribbean" operating model would be in a position to cross-subsidise the Licensee by providing various operational, administrative and management services to the Licensee at low prices, thereby enabling the Licensee to engage in anti-competitive cost shifting. These practices may not be addressed by, or be detectible under, URCA's current cost accounting and accounting separation rules.
- v. Further the respondent argues that URCA should not approve the Transaction but that if it is minded to consent to the Transaction, it should adopt strong and effective conditions that, to the greatest extent possible, will mitigate the anti-competitive effects of the Transaction. The respondent has also proposed conditions to URCA that it considers appropriate.

7.21 URCA has wide powers to intervene and regulate activities of licensees with significant market power or licensees acting in an anticompetitive manner. The Licensee is presumed to have significant market power in the provision of fixed voice services and has a monopoly over the provision of mobile voice and mobile data services. Under section 40 of the Comms Act, URCA may impose a wide range of conditions on SMP licensees and under section 116 URCA has already imposed appropriate regulatory obligations (see for example ECS 11/2010, *Final Decision - Obligations imposed on Operators with Significant Market Power (SMP)*). URCA considers the point relating to the loss of a potential competitor (point (i) above) in Section 9 below.

## 8 Identification of Markets

### Process for identifying Markets

- 8.1 The Comms Act restricts transactions which would have or be likely to have the effect of lessening competition in a market for electronic communications services in The Bahamas. It would be only in highly unusual circumstances that a merger between a company which does not operate at all in The Bahamas and a company which operates in The Bahamas will be found to *have the effect of lessening competition in a market for electronic communications services* in The Bahamas. This could be the case, for example, if it could be proved that, in the absence of a change in control, the company with no operations in The Bahamas nevertheless had clear defined plans to enter The Bahamas within a reasonable timescale as an independent competitor.
- 8.2 Having said that, URCA's starting point is to identify those markets for electronic communications services in The Bahamas in which the Licensee currently operates, and then to consider the effects of the change in control on these markets. As set out in the Substantive Merger Control Guidance, a relevant market will normally have two dimensions: a relevant product market and a relevant geographic market.<sup>3</sup>
- 8.3 A relevant product market comprises those products which are sufficiently substitutable for each other. As set out in ECS COMP.5 (the Market Definition guidelines), it may be sufficient to identify several possible 'markets' without settling on a final market definition, if the substantive competition assessment would be the same whichever of the possible descriptions of the market is adopted.

### The parties' submission on the Relevant Markets

- 8.4 The parties have identified the following retail products provided by the Licensee in electronic communications sector in The Bahamas:
- a. Public payphones
  - b. Residential and Business Fixed access (and ancillary services)
  - c. Fixed local calling (residential and business)
  - d. Fixed domestic long distance calling (DLD)
  - e. Fixed international long distance (ILD) calling
  - f. National leased lines
  - g. Fixed to mobile calling
  - h. Card calling services

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<sup>3</sup> Ibid, see also, section 2 of URCA's Competition Guidance – Market Definitions (ECS COMP 5)

- i. PABX rental
- j. Directory publication
- k. Operator assisted calling
- l. Mobile access (and ancillary services)
- m. Mobile local calling
- n. Mobile domestic long distance (DLD) calling
- o. Mobile international long distance (ILD) calling
- p. Incoming international calls to mobile customers
- q. Mobile data
- r. GSM post-paid
- s. Blackberry corporate plans
- t. Voice over internet
- u. Broadband internet access
- v. DSL internet access
- w. Fax machine
- x. International leased lines

8.5 The parties have listed the following wholesale products provided by the Licensee in the electronic communications sector in The Bahamas:

- a. Fixed line
- b. Origination of calls to free-phone numbers
- c. Call origination to calling card services
- d. National transit call conveyance
- e. Call termination to geographic numbers
- f. Call termination to non-geographic numbers
- g. Call termination to automated assistance numbers
- h. Call termination to directory enquiries
- i. Call termination to premium rate numbers
- j. Entry to directory number inclusion service
- k. Call termination to operator assistance service
- l. Call termination to emergency service
- m. Joining service
- n. Tower sharing
- o. Fixed transmission
- p. Equipment hosting
- q. Number allocation
- r. Cellular mobile
- s. Mobile termination
- t. Broadband access
- u. Access to transmission network
- v. International transit

- 8.6 The parties have notified URCA that the Acquirer provides the same electronic communications services (among others) in other jurisdictions throughout the Caribbean and worldwide, but does not provide any of those services (or any other electronic communications service) in The Bahamas.

URCA's identification of Product Markets

- 8.7 URCA must conduct its assessment of the effects on competition of a proposed change in control, including analysis of third parties' comments, within the relevant context. Market definition provides this context as it assists in the identification of competitive constraints and enables URCA to consider how those constraints would change pursuant to the change in control.
- 8.8 When a change in control occurs between two parties, only one of which is active in a specific market, in the absence of unusual circumstances (see paragraph 8.1), a detailed market definition and market analysis exercise of those markets in which only one party operates would serve no purpose. URCA has carried out a detailed review of the markets in which BTC operates in ECS 07/2010 (*Position Paper regarding types of obligations on BTC and Cable Bahamas Limited under s.116(3) of the Comms Act*) and the proposed change in control will not change that assessment. Therefore for the purposes of this adjudication, the context is provided by a broad high-level reference to markets, generally consistent with the areas within which the Licensee's business in The Bahamas is currently conducted.
- 8.9 Therefore, for the purpose of this adjudication, URCA has identified the following high level markets as the appropriate reference point to enable URCA to conduct the competition analysis required to determine whether the Transaction will have the effects on competition relevant to URCA's consideration of a change in control:
- a. Fixed voice services
  - b. Fixed data services
  - c. Mobile services
  - d. International services
- 8.10 URCA notes that even if the markets were defined more narrowly than these high level markets, it would not need to conduct its analysis in more detail than that conducted on the basis of the above definitions as there would be no change to the outcome of the analysis in this particular case.

### URCA's identification of Geographic Markets

- 8.11 The geographic scope of a market is the area in which the firms under examination are involved in the supply and demand matrix of the relevant products and services. The Licensee has been granted national operating and spectrum licences, and (with few exceptions) offers its products and services throughout the populated parts of The Bahamas. Given that the Acquirer is not active as a network operator or service provider in The Bahamas, the competition assessment will not change if the parties consider a more narrow geographic definition. For the purposes of this case, it is not necessary to consider whether there is a more narrow geographic scope as it would not affect the final conclusion. Therefore, the geographic scope of each of the relevant markets is no wider than The Bahamas.
- 8.12 The second stage of review as set out in the Substantive Merger Control Guidance, and recounted in section 6 of this document is a review of the state of competition within the markets.
- 8.13 In reviewing markets, the central fact to be emphasised again in the instant case is that there are no markets for electronic communications services in The Bahamas in which both the Acquirer and the Licensee offer products and/or services. As such, the change in control is neither a horizontal nor vertical merger which would have negative effects on competition in any of the markets. Further, as the Acquirer does not operate in any closely related market for electronic communications services in The Bahamas, there are no conglomerate effects of the change in control which URCA must consider under its merger control provisions. Having said that, URCA provides below its detailed assessment in relation to each of: fixed voice services; fixed data services; mobile services; and international services.

## 9 Fixed Voice Services

### *Market overview*

- 9.1 The Licensee is the largest provider of fixed voice services in The Bahamas, and currently provides services to approximately 98%<sup>4</sup> of subscribers in the markets for these services, though it is noted that the Licensee's market share does not take account of calls made using voice over internet products<sup>5</sup>, or Domestic Long Distance (DLD) and International Long Distance (ILD) calls using calling cards. The Licensee has been presumed by section 116 of the Comms Act to have Significant Market Power in the provision of fixed voice services.
- 9.2 As a result of its market position in the provision of fixed voice services the Licensee is the primary provider of interconnection services to other licensed operators.
- 9.3 The only other operator in this segment of the market is Systems Resource Group Limited (SRG) which URCA currently estimates serves approximately 2% of the market via its "IndiGO" branded offering. It is noteworthy that URCA has recently approved a transaction under which SRG will be acquired by and become a wholly owned subsidiary of Cable Bahamas Ltd. (CBL). In addition, CBL has recently satisfied its SMP obligations pursuant to section 116 of the Comms Act, thereby enabling CBL, should it wish to do so, to enter the market for Fixed Voice Services.
- 9.4 URCA also notes that there are a number of persons who hold Individual Operating Licences granted by URCA and who, by virtue of those licences, are authorised to enter the Fixed Voice Services market should they wish to do so.

### *Effect on competition*

- 9.5 Neither the Acquirer nor any affiliate of the Acquirer currently offers any electronic communications services in the market for Fixed Voice Services in The Bahamas. Therefore, the change in control of the Licensee will not result in a change in the level of competition in this market in that neither the market shares of the existing participants in the market nor the market concentration (measured by the HHI) will change as a direct result of the Transaction.
- 9.6 The parties have identified a number of efficiencies to which the Licensee's offering in this market will have access as a result of the Licensee becoming a part of the Acquirer's regional

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<sup>4</sup> See URCA's draft 3 year Strategy and Annual Plan 2011 (ECS 26/2010)

<sup>5</sup> For a discussion on VoI services, see URCA's Preliminary Determination on Types of Obligations on Bahamas Telecommunications Company Ltd. under section 116(3) of the Comms Act 2009 (ECS 18/2009)



business. The parties have also identified significant business changes and investments that are proposed for the Licensee's operations following the change in control.

- 9.7 A respondent has indicated that in its view, the change in control results in a substantial lessening of competition generally, as it would mean that the Acquirer, which is a major global and regional provider of electronic communications services with the stated objective of expanding in the Caribbean region, will not enter the market as a third competitor to BTC and CBL. The respondent argues that the Acquirer could be a strong new entrant market participant, which would create a competitive constraint on the Licensee. The respondent further argues that even if the Acquirer did not enter, in the absence of the Transaction the possibility that the Acquirer *could enter* the (fixed) services markets creates a significant competitive constraint on the Licensee's ability and incentive to act in an anti-competitive manner. The respondent argues that the approval of the Transaction will lessen competition by removing the threat of entry by the Licensee's most likely potential competitor in the region.
- 9.8 URCA does not agree with the scenario proposed by the respondent (namely that in the absence of the Transaction, the Acquirer would be a likely potential entrant). URCA notes that for potential competition to be treated as a competitive constraint, it is necessary that the new firm (in this case the Acquirer) be one of the most likely entrants or be genuinely perceived as such by those already in the market. For example, the European Commission notes in its Horizontal Merger Guidelines that *"For a merger with a potential competitor to have significant anticompetitive effects, two basic conditions must be fulfilled. First, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a conclusion. Second, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger."*<sup>6</sup>
- 9.9 URCA does not believe that the necessary conditions are met in this case for the following reasons:
- a. The fixed voice (and data) services market in The Bahamas has been open to competition since 2009 and during that period, the Acquirer has made no move to obtain a licence to enter any market in The Bahamas. The respondent has provided no evidence that substantiates any intention by the Acquirer to enter the fixed voice (or data) services market in The Bahamas. The Acquirer's position as a full services provider in virtually all of the other countries in the Caribbean where it currently operates is derived from its historic position as the incumbent provider of fixed services in those countries or the purchase of such incumbent providers. In fact, because of this URCA considers that the Acquirer's acquisition of the Licensee (which is the historic incumbent fixed services provider in The

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<sup>6</sup> Commission guidelines, para 6.001, n.4 at para 60.

Bahamas) is considerably more consistent with its strategy, than entry to the market as a competitor to the existing operators in The Bahamas. URCA believes that the high cost of entry and long time to roll-out in the fixed services markets (particularly those in which the Licensee has significant market power) substantially decreases the likelihood of the Acquirer entering the market, save by way of acquisition of existing licensed operators.

b. URCA has seen no evidence that establishes or suggests the Acquirer currently exerts a significant constraining influence on the Licensee.

9.10 URCA notes that the acquisition by CBL, which has Significant Market Power in the provision of high speed data services, of SRG (which is an operator of Fixed Voice Services) has recently been cleared by URCA, and that CBL can now enter new markets having complied with its SMP obligations under section 116 of the Comms Act.

9.11 URCA therefore considers that, in the absence of any evidence that the Acquirer intended to enter the Bahamian market independently of the change in control under consideration, the respondent's proposed scenario is highly speculative and cannot form the basis for a finding of any harmful effect on competition.

#### ***Counterfactual***

9.12 In the absence of any identified effect on competition, it is not necessary to consider the counterfactual.

#### ***Barriers To Entry***

9.13 As URCA has not found there to be any harmful effects on competition in this market, it is not necessary to consider how barriers to entry impact that finding. However, it is worth noting that the fixed voice services market has been open to competition since 2009, and that there are therefore no legal barriers to competition in this market.

#### ***Countervailing Buying Power***

9.14 In the absence of any effect on competition, it is not necessary to consider countervailing buying power.

#### ***Conclusion***

9.15 On the basis of the foregoing, URCA finds that there is no likelihood of a substantial lessening of competition for fixed voice services in The Bahamas as a result of the change in control of the Licensee.

## **10 Fixed Data Services**

### ***Market overview***

- 10.1 The Licensee currently offers fixed data services in the form of dial-up and broadband internet access, and wholesale data services such as broadband access, and access to its transmission network. The parties estimate that the Licensee currently has a 30% share of the broadband internet services market (retail and wholesale). It should be noted that for the purposes of this Adjudication, fixed data services also includes those services included in the “high speed data services and connectivity” market identified in section 116 of the Comms Act. CBL has been presumed to have significant market power in high speed data services and connectivity.

### ***Effect on competition***

- 10.2 Neither the Acquirer nor any affiliate of the Acquirer currently offers any fixed data services in The Bahamas. Therefore, the change in control of the Licensee will not result in a change in the level of competition in this market, in that neither the market shares of the existing participants in the market, nor the market concentration (measured by the HHI) will change as a direct result of the Transaction. As regards the possible argument that the Transaction may lead to a loss of a potential competitor, the same considerations apply as those which have been discussed in section 9 above,

### ***Counterfactual***

- 10.3 In the absence of any effect on competition, it is not necessary to consider the counterfactual. For the general speculative counterfactual that the Transaction removes a potential competitor in the markets for fixed services (voice and data), see the comments above (paragraph 9.9).

### ***Barriers To Entry***

- 10.4 As URCA has not found there to be any harmful effects on competition in this market, it is not necessary to consider how barriers to entry impact that finding. However, it is worth noting that the fixed data services market has been open to competition since 2009, and that there are therefore no legal barriers to competition in this market.

***Countervailing Buying Power***

- 10.5 In the absence of any effect on competition, it is not necessary to consider countervailing buying power.

***Conclusion***

- 10.6 On the basis of the foregoing URCA finds that there is no likelihood of a substantial lessening of competition on fixed data services in The Bahamas as a result of the change in control of the Licensee.

## 11 Mobile Services

### *Market overview*

- 11.1 The Licensee is currently the only operator licensed to operate networks and provide services in the markets for mobile voice and data services, by virtue of a legal monopoly, pursuant to section 114 of the Comms Act. As such, the Licensee currently has a 100% market share in all retail and wholesale services provided in this market and this will continue to be the case after completion of the Transaction.
- 11.2 The Government has agreed to seek an amendment to the period of exclusivity in mobile services granted to the Licensee, so that:
- a. The Government will not launch any process related to the grant of a second cellular communications licence prior to the third anniversary of completion of the Transaction;
  - b. Any third cellular communications licence will not be issued prior to the fifth anniversary of completion of the Transaction; and
  - c. The Government has agreed to compensate the Acquirer for losses suffered (subject to specific liability caps) if the above exclusivity period is breached.
- 11.3 The Communications (Amendment) Bill 2011 (the “Bill”), if and when passed is designed to implement the extension outlined above. This Bill has been tabled before Parliament.

### *Effect on competition*

- 11.4 Neither the Acquirer, nor any affiliate of the Acquirer, currently offers any electronic communications services in the mobile services market in The Bahamas. Therefore, the change in control of the Licensee will not result in a change in the level of competition in mobile services, in that neither the market shares of the existing participant, nor the market concentration (measured by the HHI) will change as a direct result of the Transaction.
- 11.5 A respondent has expressed concerns about the Licensee’s ability to leverage its exclusivity in mobile services to harm competition in other markets. URCA notes that these practices can be undertaken by the Licensee absent the Transaction, and therefore the practices could not reasonably be attributed to the Transaction. If such practices occur and are proven to be an abuse, URCA has powers to deal with them under competition law.
- 11.6 URCA is empowered with a wide range of powers with which it can address anti-competitive behaviour, whether *ex post* or *ex ante*. It has powers to address instances of market leverage

and anticompetitive behaviour by the Licensee, now and after the Transaction. The respondent highlighted in particular the possibility of the Licensee bundling its mobile services with services in other markets, and suggested that this would be anticompetitive. URCA notes that such conduct is covered by URCA's retail pricing rules, as well as under the competition law powers.

### ***Counterfactual***

- 11.7 The same respondent also submitted that there would be a substantial lessening of competition as a result of the Transaction, when compared with the position if the Transaction did not go ahead. That respondent compared the period of mobile exclusivity in the Bill against the period under the ECS Policy. In that ECS Policy, the Government stated its intention to amend the Comms Act so that the Licensee's exclusive right to provide mobile communications services would expire two years after privatisation.
- 11.8 URCA notes that merger control analysis implies a comparison of the expected harm created by a merger with the situation likely to arise without the merger (the so-called "counterfactual"). In the absence of identified harm, there is no need to consider the counterfactual.
- 11.9 When analysing any counterfactual, however, URCA will apply the principles in section 4.4 of the Merger Control Substantive Guidelines, which states, as far as is relevant:
- "82. ... URCA will typically consider what would happen if the parties did not merge. This prospective-looking scenario is called the counterfactual.*
- 83. When assessing a notified merger, URCA will presume that the counterfactual scenario is the status quo prior to the proposed merger (i.e. the effects of the merger will be compared to the pre-merger scenario).*
- 84. This presumption may be rebutted where it is likely that there would be a change to the market structure even if the merger did not take place ..."*
- 11.10 Accordingly, when analysing whether a merger may lead to a substantial lessening of competition, URCA compares changes to the market structure which will occur as a result of a change in control and changes to the market structure which would happen even if the change in control did not take place. In particular, if URCA is aware of legislative measures that will have an effect within the time period of its prospective review of a change in control, URCA must take account of those legislative measures in the same way in which URCA is required to take into account all circumstances likely to have the effect of substantially lessening competition.
- 11.11 In the instant case, the Bill has been tabled before Parliament but has not yet been passed. The Notification indicates that the Transaction is conditional on the Bill being passed, and the Rt.

Honourable Prime Minister has indicated that it will be tabled for debate in Parliament after URCA's approval of the Transaction is given<sup>7</sup>. Accordingly, URCA agrees with the respondent that if the Transaction were to proceed, the period of exclusivity will be amended as indicated in paragraph 11.2 above.

- 11.12 URCA notes further that the counterfactual, the situation that would be most likely to prevail in the absence of the Transaction, is unclear, particularly as any changes to the Comms Act are within the purview of elected Government and Parliament.
- 11.13 The respondent indicates that, under the conditions set out in 2009 in the ECS Policy, the appropriate frame of reference for an analysis of the counterfactual should in fact be that, in the absence of the Transaction, the Comms Act will be amended so that BTC's exclusivity would end "two years from the date that Government no longer owns a majority of the shares of BTC"<sup>8</sup>. URCA notes that this is in itself an uncertain outcome.
- 11.14 Even assuming that it could be concluded that in the absence of the Transaction, Parliament would amend the Comms Act as indicated in ECS Policy, URCA notes:
- a. introduction of competition in the mobile sector is still dependent on privatisation under the scenario proposed by the respondent,;
  - b. if the Transaction did not take place, it is not clear *when* privatisation of the Licensee might be expected to occur;
  - c. successive Governments have attempted unsuccessfully to privatise the Licensee since 1998 and

it seems clear that successive Governments' considered the Licensee's mobile exclusivity core to the Licensee's value;

- d. URCA cannot speculate as to the terms that could be agreed in the context of an alternative transaction. If the Government found an alternative buyer for the shares in the Licensee, there is no guarantee that the exclusivity period will be as set out in the ECS Policy; or a similar period as envisaged in the current Transaction; or a different period altogether.
- 11.15 In light of the above uncertainties, the respondent's representation that the counterfactual would see liberalisation of the mobile communications sector sooner than envisaged under the Transaction is speculative, and dependent on Government policy and Parliamentary approval.

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<sup>7</sup> Communication by the Rt. Hon. Hubert A. Ingraham on the Sale of 51% of Bahamas Telecommunications Company to Cable & Wireless Communications, Plc. (CWC), Tribune Newspaper March 2, 2011 at page 20.

<sup>8</sup> Footnote 2 to paragraph 17 ECS Policy

11.16 In order to make a finding of an adverse effect as contemplated by section 72 of the Comms Act, URCA would have to conclude that the change in control of the Licensee would have, or be likely to have the effect of substantially lessening competition in a market in The Bahamas. In this context, URCA would have to expect a delay in competition in the mobile services market which would occur as a result of the Transaction and the delay should be of such magnitude so as to cause or be likely to cause a substantial lessening of competition. In considering whether there is a delay in competition, and the likelihood and effect of such a delay, URCA is cognisant that to make a finding of a substantial lessening of competition it would be required to draw conclusions regarding the variables identified above, which are matters for Government and Parliament.

***Barriers To Entry***

11.17 As URCA has not found there to be any harmful effects on competition in this market resulting from the change in control of the Licensee as contemplated by the Transaction, it is not necessary to consider how barriers to entry impact that finding.

***Countervailing Buying Power***

11.18 As URCA has not found there to be any harmful effects on competition in this market resulting from the change in control of the Licensee as contemplated by the Transaction, it is not necessary to consider countervailing buying power.



## ***Conclusion***

- 11.19 Accordingly, URCA does not consider that the change in control of the Licensee as contemplated by the Transaction would have or would be likely to have the effect of substantially lessening competition in mobile services in The Bahamas.
- 11.20 URCA takes this opportunity to remind the parties and the sector that it has the powers to deal with abuses of the Licensee's position of monopoly in mobile services. URCA will be carefully monitoring developments and will seek to ensure that regulatory measures are applied and enforced effectively to the benefit of the electronic communications services sector in The Bahamas.

## 12 International Services

### *Market overview*

- 12.1 The Licensee is the operator of the Bahamas II cable system that provides connectivity to Florida from New Providence and Grand Bahama, the Bahamas Domestic Submarine Network (BSDNi) cable system that connects the islands in The Bahamas and links Haiti to The Bahamas, and a Satellite Earth Station located at Soldier Road in New Providence that provides connectivity to Europe and other locations.
- 12.2 Other operators providing international services include:
- a. Caribbean Crossing Ltd., a wholly-owned subsidiary of CBL, which operates a fibre-optic submarine cable system linking four islands in The Bahamas (Grand Bahama, New Providence, Eleuthera and Abaco) to the continental United States, providing communications transmission capacity and the carriage of data and internet services for other licensees; and,
  - b. Columbus Networks Inc, whose ARCOS network provides connectivity between The Bahamas, the United States and several countries in the Caribbean.

During 2010, URCA licensed a provider of international connectivity, Global Nexus Telecommunications Limited, which proposes to operate a submarine cable with a landing in Freeport, Grand Bahama.

- 12.3 To the extent that electronic communications services are provided by the Licensee in Florida (by virtue of the connections to cables in Florida) the Acquirer also operates several submarine cable systems which terminate in Florida. However, URCA notes that such cables are not substitutes (because the Acquirer's cables do not provide connections to The Bahamas) and therefore cannot be part of the same market. Further, the relevant services are provided outside of The Bahamas.
- 12.4 URCA is not in possession of verifiable information regarding market shares in the markets for international services. The parties have indicated that the Licensee's estimated overall share of services within these markets is between 5% and 25% by revenue. For the purposes of this Adjudication, it is not necessary to consider the Licensee's share any further.

### *Effect on competition*

- 12.5 Neither the Acquirer nor any affiliate of the Acquirer currently offers any electronic communications services in the International Services market in The Bahamas. Therefore, the

change in control of the Licensee will not result in a change in the level of competition in this market.

12.6 Comments from a respondent argue that the Transaction will substantially lessen competition in this market as a result of:

a. the Licensee's ability to leverage its mobile services exclusivity by ensuring that international calls from its mobile services customers are routed along the Acquirer's networks, rather than the networks of the Acquirer's competitors.

b. the Licensee might be able to access preferential rates for foreign call termination.

URCA has the power to address any anticompetitive actions by the Licensee using its *ex post* powers, or by instituting suitable *ex ante* remedies. With regards to the second issue raised above, this relates to a service provided outside of The Bahamas, and is therefore not relevant to its adjudication. In any event, URCA does not consider that either of the activities discussed present any competition issue which would affect URCA's approval of the Transaction.

#### ***Counterfactual***

12.7 In the absence of any effect on competition, it is not necessary to consider the counterfactual.

#### ***Barriers To Entry***

12.8 As URCA has not found there to be any harmful effects on competition in this market, it is not necessary to consider how barriers to entry impact that finding. URCA notes in any event that this market is open to competition, so there is no legal barrier to a new entrant.

#### ***Countervailing Buying Power***

12.9 In the absence of any harmful effect on competition, it is not necessary to consider countervailing buying power.

#### ***Conclusion***

12.10 URCA finds that there is no likelihood of a substantial lessening of competition in the market for international voice and data services in The Bahamas as a result of the change in control of the Licensee.

## 13 **URCA's decision**

- 13.1 On the basis of the foregoing deliberations and findings, URCA has concluded that the change in control of the Licensee as set out in the Notification submitted on February 8, 2011 would not have either of the adverse effects set out in Section 72 of the Comms Act: substantially lessening of competition; or for a change in control involving a media public interest, an effect contrary to public interest. URCA therefore grants its consent in accordance with section 75(1)(a) of the Comms Act to a change in the control of the Licensee, Bahamas Telecommunications Company Limited, from the Government of the Commonwealth of The Bahamas to the Acquirer, Cable and Wireless Communications plc as set out in the Notification.