



**RESPONSE OF CABLE BAHAMAS LTD AND
CARIBBEAN CROSSINGS LTD**

TO

***URCA'S DRAFT THREE YEAR STRATEGY &
ANNUAL PLAN FOR 2011
(ECS26/2010)***

January 24, 2010

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1. INTRODUCTION

Cable Bahamas Ltd. (“CBL”) and Caribbean Crossings Ltd. (collectively, “the Companies”) hereby submit their comments on the draft Three Year Strategy and Annual Plan for 2011 (the “Draft Plan”), which was published by URCA for consultation on December 10, 2010.

As a general comment, the Companies wish to reaffirm their strong support for URCA in its role as an independent regulator. Independence brings with it a heavy responsibility. The statutory framework gives URCA unusually broad discretion in the setting of its own budget. In order to ensure that independence and accountability go hand in hand, it is incumbent upon URCA to ensure that its operations and programmes are efficiently managed and justified as a matter of need, priority and timing. The Companies are pleased to see that efficient and effective regulation remain amongst URCA’s core guiding principles.¹

Enhancing the efficiency of the electronic communications sector is the first policy objective listed in section 4(a) of the Communications Act. URCA itself is an important component of the sector and, as such, its own operations should be as efficient as possible. This efficiency objective is also inherent in subsections 5(b)(ii) & (c) of the Communications Act, which require URCA to have due regard to the costs and implications of regulatory measures on affected parties and to ensure that its regulatory measures are efficient. It goes without saying that such measures include (though they certainly are not limited to) the fees that URCA assesses to cover the cost of its own operations, programmes and activities.

Efficient administration should be a core focus of URCA’s vision, mission statement and values, and should feature prominently as an element of URCA’s strategic policies and self-evaluation process (*i.e.* evaluating efficiency as well as effectiveness). The Companies note that URCA’s proposed mission statement includes the goal of managing URCA’s resources efficiently so as to minimise the cost of regulation on industry. That is a good start, but the efficiency objective needs to be integrated into all aspects of URCA’s priorities and functions.

¹ Draft Plan at p. 9.

In setting its agenda, URCA should give due consideration to the cost burden on those industry participants that are responsible for URCA's funding. This is particularly important in 2011 as the sector continues to cope with the severe effects that the global recession has had on The Bahamas, as URCA has acknowledged in the Draft Plan.²

2. SPECIFIC COMMENTS ON URCA'S DRAFT PLAN

In addition to the overarching concerns identified above, the Companies wish to draw URCA's attention to the following specific points.

A. Finance, Budget, Performance and Organisational Matters

(1) *Assessment of URCA's 2010 Performance.* In URCA's 2010 draft strategy and plan,³ URCA listed a number of Key Performance Indicators ("KPIs"). The 2011 Draft Plan, however, does not contain a self-assessment of URCA's 2010 performance against a final set of KPIs. With regard to URCA's KPIs, the Companies recommend that:

- (a) URCA should assess in the final plan for 2011 its 2010 performance against the KPIs that were established for 2010.
- (b) URCA should include the approved KPIs for 2011 against which it proposes to measure its performance at the end of the year, along the lines proposed in Table 6 of the Draft Plan. However, the Statutory/Regulatory KPIs should include a list of the specific regulatory achievements or actions that URCA *plans to complete before the end of 2011* as a matter of priority. It is the quality and not the quantity of the public consultations that are completed by URCA, and not simply the number of consultations that are started.
- (c) Next year's draft plan should specifically measure performance against the priority Statutory/Regulatory KPIs. This is an

² Draft Plan at p. 3.

³ ECS 17/2010 at p.18.

important mechanism not only for URCA's own self-assessment but also for obtaining feedback from industry and the general public on URCA's performance.

In addition, URCA should adopt the suggestion made by the Bahamas Telecommunications Company Ltd. ("BTC") for conducting an annual industry evaluation of URCA's performance.⁴ The Companies believe that industry should have an opportunity to provide an appraisal of its general interaction with URCA outside of the cut and thrust of the day-to-day regulatory process.

- (2) *Timing of Licence Fee Payments.* International experience confirms that regulatory reform and the removal of barriers to entry have served to improve sector performance through the expansion of network coverage and services, higher investment, improved service quality, greater innovation and cost-reflective pricing. The Companies are pleased that URCA has reduced the fees associated with individual operating licences, although they note that the overall level of these reduced fees continues to be very high. However, particularly in light of the challenging economic times, as a more reasonable alternative to the up-front annual payment requirement, URCA should revisit the current licence obligation requiring licensees to pay an entire year's fees in advance in full (which URCA has interpreted to allow for quarterly payments but with interest). An annual up-front payment is not consistent with the Communications Act's objectives. Quarterly payments *without interest* would be a more commercially reasonable practice and is fully consistent with the approach followed in other jurisdictions in which the payment of a substantial annual licence fee is required. It is arguable that there is a legal basis for URCA to insist on collecting interest on quarterly payments as long as the total amount of the fee for any given year is paid up before the beginning of the fiscal year to which it applies. URCA should specifically permit a quarterly payment programme (without interest)⁵.

⁴ ECS 16/2010 p.28 Issue 5: URCA's Performance (28)

⁵ ECS 16/2010 p. 13 Issue 9: Other Budget concerns – this was the unanimous comments of all licensees.

- (3) *Impact of Fund Transfer to the Government.* The URCA Act was amended in 2010 to allow a surplus of \$5,910,000 to be transferred from URCA’s account to the Consolidated Fund of the Government of The Bahamas. There was no discussion with stakeholders about the basis for, or the expected impact of, this transfer. URCA’s final plan should contain a detailed accounting of its finances, including the source and disposition of any funds that have been transferred from URCA to the Government – in particular, the justification for the transfer and how it will affect URCA’s activities and the level of the operating licence fees going forward.
- (4) *Level of URCA’s Budget.* The Companies have reviewed the Draft Plan and note that the budget continues to be an area of concern. In reviewing 2010 Annual Operating Plan (“AOP”) all of the respondents remarked on this matter. URCA indicated in its 2010 AOP that it allocated \$1 million for the relocation of offices. It is further noted that in the July–September 2010 Quarterly Report, the Board approved an additional \$214,440.13 for this purpose. The Board appears to indicate that there were savings on the capital expenditure for spectrum equipment, but the 2011 AOP does not reflect any such savings.⁶
- (5) *Appointment of Chair of URCA’s Audit Committee.* The activities of URCA’s Board should be made more transparent to stakeholders. In light of the unusual degree of financial independence that URCA enjoys (as discussed in point (1) above), the procedures and activities of the Board are of keen interest to industry and the general public. The functioning of the Audit Committee is of particular concern and importance. CBL understands that the process for appointing the Chair of that Committee has commenced but it is unclear whether a Chair has in fact been selected, which candidates were considered and according to what criteria, timetable and process. Board matters of importance to stakeholders should be made more transparent as they occur and should also be summarised in URCA’s published plans.

⁶ Draft Plan at p.18.

B. Regulatory Matters

Generally, the number of consultations slated for Q1 will pose an onerous regulatory burden on the Companies. Our recommendation is that the Public Consultation on Audit and publications Requirement for Separated Accounts and Infrastructure Sharing be moved to Q3.

- (6) *Number Portability.* The Companies are pleased that URCA has scheduled a long-overdue consultation on number portability for Q1 2011, and that it seems to have reduced the number of consultations that will be needed before a system is finally approved and implemented. Establishing an effective and efficient Number Portability system and process is as important to competition in the fixed voice market as finalising negotiations with BTC pursuant to a reasonable Reference Access and Interconnection Offer (“RAIO”). The Government of The Bahamas has clearly recognised the importance of the prompt implementation of Number Portability for fixed services, which is crucial to promoting competition, eliminating entry barriers and ensuring customer choice.⁷ The Companies believe that progress on this critical issue has stalled and must be given URCA’s full attention in 2011. There is no need to reinvent the wheel as the relevant models are well understood, tested and tried. ***URCA’s goal should be to have a fully functioning number portability system and process up and running in The Bahamas by the end of 2011.*** This should be a top priority for URCA and for the industry.
- (7) *Infrastructure Sharing Consultation.* URCA’s Draft Plan should be more specific about what is meant by “infrastructure sharing” in the context of the planned consultation for the first quarter of 2011, and URCA should clarify why it views this as being a matter of apparently greater importance than

⁷ We note that a consultation paper issued more than two years ago by the BTC Privatisation Committee on behalf of the Government proposed to introduce number portability for fixed communications “as soon as practicably possible.”⁷ In the consultation response published in March 2009, the Committee reconfirmed the importance of implementing number portability and confirmed that URCA would be holding “a *separate consultation and operator workshops on number portability. . . [and that the Government would] introduce number portability for fixed line communications as a matter of priority.*” Framework Consultation Response, at para. 57 (Mar. 19, 2009).

Number Portability.⁸ The Companies also request URCA to clarify what it means by “infrastructure sharing,” since the term has several very different meanings. If this is meant to promote the sharing of antennae and sites for base stations or the coordination of civil works, the consultation may be useful if the existing procedures are inadequate. However, it would be completely unreasonable and an unnecessary diversion of URCA’s resources, not to mention contrary to the framework established by the Communications Act, if URCA were to conduct a consultation on issues like unbundled local loop or similarly complex wholesale access obligations prior to completing the first round of full market reviews.

- (8) *Consultation of Methodology for Market Reviews.* The Companies note that URCA proposes to launch a consultation on a methodology for market reviews in the first quarter of 2011, presumably in accordance with Section 39(2) of the Communications Act. The Companies welcome the opportunity to provide their input on the issues of market definition and the assessment of market power, which will differ considerably from the unique process which was mandated by statute for the transitional market reviews that URCA completed last year. This is an important predicate for the full market review process.
- (9) *Full Market Reviews.* The Companies are surprised to see that URCA has listed the identification of operators with significant market power (“SMP”) in call termination as a priority for 2011, with a consultation to be launched in the second quarter of the year. The Companies submit that this is a matter that requires no immediate attention. It need only be addressed if and when problems arise in respect of the pricing of fixed termination by operators other than BTC. For the time being, the relatively small shares of BTC’s competitors, their consequently higher unit costs, and BTC’s considerable degree of countervailing buyer power make the need for a market review in this area a matter of third-order importance, which can be revisited in 2012 if any issues develop. In any event, it is not appropriate to launch the proposed review before establishing the methodology for full market reviews, as set

⁸ Draft at p. 18,

forth in point (9) above. The first round of market reviews should – following an approved methodology – focus on whether the markets in which Cable Bahamas has been deemed to have SMP as a transitional matter were properly defined and assessed in line with the approved methodology. In particular, the full market reviews should consider whether, if SMP is found to exist or persist, there is a need for the onerous obligations that have been imposed on Cable Bahamas (especially the broadband resale obligation and full-scale accounting separation). Furthermore, consistent with the licensing of Satellite Bahamas Ltd, the market for PayTV should promptly be revisited.

- (10) *Study on BTC's Efficiency.* The Companies strongly endorse URCA's proposal to initiate a study of BTC's efficiency in the second quarter of 2011. The Companies believe that the charges that BTC is attempting to justify on the basis of its costs in the RAIO negotiations actually reflect a high degree of inefficiency. The costs that form the basis of any pricing of BTC's SMP services going forward should be the costs of a reasonably efficient operator.
- (11) *Enforcement of the Licensing Obligation of the Communications Act.* The Companies strongly urge URCA to include as a major initiative in 2011 the monitoring, enforcement and investigation of the unlawful provision of electronic communications services in The Bahamas without a proper licence. Voice, video and satellite services can and should be provided lawfully on a licensed basis under the new regulatory framework that is now in place. Appropriate compliance measures should therefore be taken to protect consumers in the marketplace from unlicensed operators and ensure a level playing field for existing licensed providers and potential entrants, including with respect to their fee contributions to cover URCA's budget.
- (12) *BTC's RAIO.* The Companies commend URCA for its work in connection with BTC's RAIO. URCA's review of BTC's proposal was thorough and forward-looking and will provide a good platform for the Companies' negotiations with BTC. However, we are concerned about the process going forward and how URCA will deal with any delays caused by differences of view over how URCA's final decision should be interpreted at the level of detail required for actual implementation. URCA should make clear that it

will remain involved in overseeing the steps necessary to achieve operational implementation of the RAIIO and that this will be a top priority for 2011.

- (13) *Mobile Exclusivity Period.* There are indications that the proposed purchase of 51 percent of the Government’s shares in BTC by Cable & Wireless will be conditioned upon an extension of the exclusivity period as it relates to the cellular monopoly. The Sector Policy indicated that changes may be made “...during its term on a proposal by URCA and subject to Minister’s approval in accordance with the Communications Act in the case of unexpected changes of circumstances and/or to take account of technological advances and the evolution of liberalized markets”⁹ It is our understanding that the exclusivity period in respect of BTC’s cellular monopoly will be extended to three years. The Companies inquire: (a) whether URCA made such a proposal; and (b) was this based on competition principles or on a market review? The Companies wish to point out that The Bahamas is one of the few countries left *in the world* that retains a monopoly in the mobile cellular market. If URCA has made a recommendation to extend this monopoly, which is not in the interests of the people of The Bahamas, URCA should at least recommend that the provision of mobile services on a resale basis (*i.e.*, allowing for the licensing of mobile virtual network operators or “MVNOs”) should commence as soon as possible, so that BTC’s fixed network competitors will at least be in a position to provide triple-play packages involving mobile cellular services to the public.
- (14) *Numbering Consultation.* A statement of Results on the Numbers consultation remains outstanding. The consultation was launched on May 25, 2010. Responses were due by July 30, 2010 and were published on URCA’s website September 1, 2010 but thus far URCA has published no Statement of Results. The final plan should explain the delay in reaching a conclusion and provide a timetable for completion of the consultation process.

⁹ Draft Sector Policy published by the Government of the Commonwealth of the Bahamas – August 13, 2009

3. **CONCLUSIONS AND NEXT STEPS**

The Companies look forward to working with URCA and other industry stakeholders in this continuing process.

Respectfully submitted

A handwritten signature in blue ink that reads "Judith Smith". The signature is written in a cursive style with a large initial 'J'.

Judith Smith
Legal Counsel

January 21, 2011