

The Bahamas Telecommunications Company Ltd.

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December 30, 2011

Mrs. Kathleen Riviere - Smith
Director of Policy and Regulation
Utilities Regulation and Competition Authority
UBS Annex Building
East Bay Street
Nassau, The Bahamas

Dear Mrs. Riviere - Smith,

Re: Submission of the Bahamas Telecommunications Company Limited (BTC)
Response to URCA's Public Consultation Document: Content Regulation

BTC herein submits its response to the Public Consultation Document, Content Regulation: Code of Practice for the Regulation of Content Services and Audiovisual Media Services (ECS 19/2011).

BTC looks forward in due course to URCA's determinations.

Sincerely yours,

The Bahamas Telecommunications Company Limited (BTC)

A handwritten signature in black ink, appearing to be 'FLJ', is written over a circular stamp or seal. The signature is fluid and cursive.

Felicity L. Johnson
Senior Vice President of Legal, Regulatory & Carrier Services
& Company Secretary

FLJ/acs

Enclosure: (1)



The Bahamas Telecommunications Company Limited:

Response To

Content Regulation: Code of Practice for the Regulation of
Content Services and Audiovisual Media Services

Consultation Document
ECS 19/2011

Legal, Regulatory and
Carrier Services Division
30 December, 2011

Executive Summary

The Bahamas Telecommunications Company Limited (BTC) welcomes the opportunity to respond to this Public Consultation on Content Regulation: Code of Practice for the Regulation of Content Services and Audiovisual Media Services.

It is the view of BTC that URCA has not attached sufficient weight to the role of consumer education/awareness in developing this Draft Code of Practice. There is utility in using consumers to monitor the level of compliance with the Code of Practice for Content Regulation and given the relatively immature stage of development of consumer awareness in communications media (medium) in general, a consistent programme of education by URCA would be appropriate and would reap long term beneficial results.

In this response, BTC takes the position that there should be distinct differences in the treatment of traditional broadcasting (i.e. radio and television) compared to on demand content, where users exercise more control over the content services. This is consistent with practices seen elsewhere in more advanced markets. Further, BTC notes and supports the notion that the Code of Practice should not apply to content which is delivered solely via the Internet and which is available by any person situated within or outside The Bahamas via the Internet. BTC notes and has no significant objections to Part 10 of the draft Code of Practice regarding the positive complaints handling process, compliance monitoring, the reporting of complaints and Code administration.

The European Union in its regulation of content has made the distinction between two (2) types of content: television ('linear') and television-like; on demand content ('non linear').¹ In the case of the European Union, anything which looks or feels like the traditional programs which the consumer would ordinarily view on television falls into the first category (i.e. 'linear') and the user generated content that the consumer would watch on media such as YouTube and Google Video falls into the second category (i.e. 'non linear'). URCA in its Public Consultation Paper should have made the distinction between these two (2) broad types of content services. BTC takes the position that on

¹ European Content Regulation and the Audiovisual Media Service Directive, Patricia Moll, European Policy Manager, pp 1.

demand² content should not be regulated in the same way as traditional broadcasting because the two are quite distinct. Users can better control the on line content they demand, compared to the content which is broadcast at large on television.

In reviewing content regulation across various countries, it is important to note that there are country specific laws which impact the approach to audiovisual content regulation. In examining comparisons across various countries on the treatment of content regulation, one would find that there are constitutional limits on content regulation and laws promoting national identity. In The Bahamas, the absence of such legislation, suggests that URCA would not have the overarching framework that is present in a number of countries, particularly European Union member states, in the design of its content regulation Code of Practice. This further suggests the need for greater involvement of the public (users of the various services) and broadcasters in developing the codes of practices for content regulation in The Bahamas.

BTC is of the view, that it is important that content regulation is treated within a broader context of legislation which addresses related issues such as Data Protection and Privacy. There is no reference in the Public Consultation Paper to these broader issues (i.e. Data Protection and Privacy issues). A paper prepared by the Australian Communications and Media Authority which examined international approaches to audio visual content regulation, found that in each jurisdiction surveyed, content regulation was addressed as part of a wider Data Protection and Privacy legislative framework.

BTC notes that in Part 1 of the draft Code of Practice with reference to Definitions and Interpretation, and in Section 1.4(3), it is specifically stated that the Code does not apply to content which is delivered solely via the Internet, and which is available for access by any person situated within or outside The Bahamas. BTC welcomes this distinction and treatment of the Internet. BTC notes however, that in the same section, there is a proviso which states that: **'...unless that content is targeted at persons within The Bahamas by virtue of it being promoted or**

² Under Article 1(g) of the EU's Audio Visual Media Service Directive, the on-demand (i.e. linear) refers to an audiovisual demand service provided by a media service provider for the viewing of programmes at the moment chosen by the viewer at his/her request on the basis of a catalogue of programmes selected by the service provider, sourced from International approaches to audio visual regulation – A Comparative Analysis of the Regulatory Frameworks, May 2011, pp. 11

advertised within The Bahamas. It is to be considered, however, that while content may be advertised or targeted at persons within The Bahamas, Licensees providing carriage services may be limited in their ability to deny access. More discussion is needed on this Section specifically, Section 1.4 (3) of the Consultation Paper.

Further, BTC notes that in Section 1.4(2) (iii) of the Consultation Paper, provisions for penalties for the breach of the Code to be mitigated are addressed in circumstances where the Licensee can demonstrate inter alia that there was an act or failure to act beyond the Licensee's control, or an accident or some other cause beyond the Licensee's control, provided that the Licensee took reasonable precautions and exercised due diligence to avoid the act or failure to act of such person. In examining this Section of the Consultation Paper and taking into account, Section 1.4(3) in which based on the interpretation of this section, the Licensee could be held responsible for content targeted at persons within The Bahamas by virtue of it being promoted or advertised, there are some concerns for BTC. This section is particularly unsettling given that the Internet as URCA has pointed out should be excluded from the Code of Practice and the fact that there is the absence of any reference to discussions in the Consultation Paper on individual privacy.

In the European Union, there is a passionate debate relative to empowering users to make informed decisions through the use of filtering and labeling systems. It is a generally accepted principle that, through education and empowerment of users, there is less need for regulatory intervention. This ought to be a significant consideration by URCA as part of its responsibilities, of Content Regulation and long term objectives.

Response to Questions in Public Consultation Document

- 1. Do you agree with URCA's proposals in Part 1 of the draft Code of Practice regarding definitions and interpretation, purpose of the Code, the regulatory framework, compliance with the Codes and review of the Code? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: In reviewing Part 1 of the draft Code of Practice, BTC notes that audiovisual media service has the same meaning as stated in Section 2 of the Communications Act, namely a service for the provision of material under the editorial responsibility of the service provider of that service. Further, editorial responsibility is defined in this Part to include on demand audio visual media services. BTC notes from the EU framework that while video on demand (non linear service) is included as part of the definition of audio visual media services, there is the distinction in treatment of video on demand compared to traditional television ('linear') service. There are more restrictions placed on linear services, given that non linear service is provided on request and users are able to exercise the appropriate controls compared to linear services. URCA in this Section has not sought to make this important distinction in applying the rules.

BTC notes the definition of watershed in the Public Consultation Document. The Ofcom Code of Practice, provision provides in circumstances where material that is unsuitable for children is aired as part of a news cast as an example, that the audience is warned in advanced that the material may be inappropriate for children. The definition of watershed as in the case of the Ofcom Code of Practice therefore, should include this exception.

As indicated earlier, BTC notes in Section 1.4 (3) of the Definitions that the Code does not apply to content which is delivered solely via the internet, and which is accessible by any person situated within or outside The Bahamas via the internet. This is consistent with international best practices where generally content provided by way of search engines is excluded from the Code. Where BTC takes exception is in the first part of Section 1.4 (3) which acknowledges that the Licensee has no control over content provided by way of the internet, but then the second part of this section provides an exception where the **'...content is targeted at persons within The Bahamas by virtue of it being promoted or advertised within The Bahamas.'** Again, this section requires further review taking into account any overarching legislative framework governing Data Protection and Privacy. An important distinction also, is that users of the content services provided over the internet have the discretion as to what content they pull by way of the internet for consumption.

In Section 1.5, Review of the Code, BTC notes that while the intent is to review the Code after it has been in effect for three (3) years, there is provision so that URCA has the flexibility to review the Code if needed before the expiration of the three (3) years, whilst giving the public an adequate opportunity to comment on the proposed changes. In addition to the public (which can be interpreted as users of the content services), Licensees and interested parties should be included as additional entities and given the opportunity to respond to any proposed changes.

- 2. Do you agree with URCA's proposals in Part 2 of the draft Code of Practice regarding positive rules, operational and technical rules? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC has no objections to Part 2 of the draft Code of Practice.

- 3. Do you agree with URCA's proposals in Part 3 of the draft Code of Practice regarding underlying principles and positive rules? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC agrees with URCA's proposals in Part 3 of the draft Code of Practice. BTC notes that under the Positive Rules, while URCA seeks to encourage Bahamian content, educational content and the promotion of programming that serves the diversity of interests within The Bahamas, in this Part of the draft Code, Licensees are provided with the necessary flexibility compared to some jurisdictions, albeit in more mature markets, where the Code goes as far as specifying the percentage of local content.

- 4. Do you agree with URCA's proposals in Part 4 of the draft Code of Practice regarding preservation of law and order, harmful and offensive content, religious programming and contests and promotions? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC has no objections to URCA's proposals in Part 4 of the draft Code of Practice.

- 5. Do you agree with URCA's proposals in Part 5 of the draft Code of Practice regarding the protection of young persons and a television programme classification system? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC agrees with URCA's proposals in Part 5 of the draft Code of Practice regarding the protection of young persons and a television programme classification system.

- 6. Do you agree with URCA's proposals in Part 6 of the draft Code of Practice regarding election broadcasts and advertising, other aspects of election broadcasts and political advertisements and operational matters in elections, referendums and political broadcasts? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC has no objections to this part of the draft Code of Practice.

- 7. Do you agree with URCA's proposals in Part 7 of the draft Code of Practice regarding advertising and sponsorships? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC is in agreement with the spirit and intent of Part 7 of the draft Code of Practice, however, the company maintains that effective policing of the provisions included in this Part of the Code should be carried out by informed consumers. Greater consumer awareness as to what to look for in advertisements and what is appropriate behavior by advertisers, will be more effective in ensuring greater compliance with the provisions in Part 7 of the draft Code of Practice.

- 8. Do you agree with URCA's proposals in Part 8 of the draft Code of Practice regarding accuracy and impartiality, fairness and privacy, national emergencies and disasters, miscellaneous news and factual material in news and factual programmes? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC is in agreement with the proposals in Part 8 of the draft Code of Practice regarding accuracy and impartiality, fairness and privacy, national emergencies and disasters, miscellaneous news and factual material in news and factual programmes.

- 9. Do you agree with URCA's proposals in Part 9 of the draft Code of Practice regarding the provision of access services by broadcasters for members of the audience who are visually and hearing impaired? If not, why not? Should any other provisions be included in this Part of the Code or any removed?**

Response: BTC is in agreement with URCA's proposals in Part 9 of the draft Code of Practice regarding the provision of access services by broadcasters for members of the audience who are visually and hearing impaired.

BTC is also of the view, however, that URCA should ensure that with any review of the Code of Practice there is representation by the visually and hearing impaired. The Company in its response to the Public Consultation on the establishment of Working Groups to develop the Code of Practice for Content Regulation had supported URCA's position to have representation from the visually and hearing impaired as part of the Working Group. Again, in developing the Code of Practice, BTC would like to stress the need to ensure that there is representation from this community as part of the consultative process in developing the Code.

- 10. Do you agree with URCA's proposals in Part 10 of the draft Code of Practice regarding the complaints handling process, monitoring compliance, reporting**

complaints and Code administration? If not, why not? Should any other provisions be included in this Part of the Code or any removed?

Response: BTC is in agreement with URCA's proposals in Part 10 of the draft Code of Practice regarding the complaints handling process and monitoring compliance save some areas which should be reviewed further.

To assist Licensees in indentifying the broadcast that is the subject of a complaint, BTC recommends that Section 10.2 (c) should include a request for the provision of the relevant channel or station in addition to the other information required in this Section in lodging a complaint with the Licensee.

BTC notes Section 10.3 – “Publicizing of the Code”, where Licensees are required to broadcast three hundred and sixty (360) on air announcements alerting the public to the Code of Practice and the complaints procedure. In the case of television broadcasting stations, where possible, this information must also be broadcast using closed captioning and where available, audio description. The challenge is that in the absence of the appropriate mechanisms in place for URCA to verify that broadcasters have complied with the three hundred and sixty (360) on air announcements, there is the potential to create an uneven playing field, where some broadcasters are likely to comply with the 360 announcements and others may not comply.

In Section 10.7 (1) of the draft Code, BTC notes that the Licensee is required to provide a final reply *‘...within forty (40) days of receiving the Code of Complaint...’* Having regard to Section 10.9 (20) of the draft Code, where URCA has indicated that it would aim to complete those cases it takes forward for investigation within sixty (60) *‘...working days...’* after receipt or referral of a Code of Complaint, Licensees should be required to provide a final reply within forty (40) *‘...business days...’* of receiving the Code of Complaint.

BTC notes in Section 10.9 (13) – “Referral of Codes of Complaints to URCA”, that a

complainant may request that URCA not disclose his or her identity to the Licensee. BTC is of the view that this conflicts with Section 10.6(5) and may impede further inquiries. In the Cayman Islands' the Regulator, The Information & Communications Technology Authority (ICTA), took the position that “**...Licensees have the right to know the allegations against them and the identity of the complainant...**”³ BTC is of the view that URCA should only determine that it will not disclose a complainant’s contact details to the Licensee, upon request, if to do so would hinder URCA’s investigation into the complaint. URCA’s assessment of all relevant factors is of particular importance in light of the fact that the Licensee may be called upon to provide further representations to URCA in accordance with Section 10.9 (18), URCA is also reminded of the overarching principles of transparency, fairness and non-discrimination in the introduction of regulatory measures in sections of the Communications Act 2009. BTC maintains that disclosure of the identity of any complainant is consistent with these principles.

Pursuant to Section 10.9(20) of the draft Code of Practice, should URCA determine that it requires more than sixty (60) working days to complete its investigations, the Licensee and the complainant should be notified by URCA in writing.

Under Section 10.12(5) of the draft Code, BTC is of the view that the industry group should also consider content regulation in the wider context of laws relating to slander, copyright and trademarks, the protection of children, medical legislation, the Penal Code and data protection.

11. Do you have any further comments to make on the proposals in this consultation document that are not covered or raised by the other consultation questions?

Response: BTC notes in the Public Consultation the absence of any discussion on media literacy. OfCom has defined media literacy as ‘**...the ability to use, understand and create communications.**’⁴ As Ofcom has pointed out: ‘**A media literate person should**

³ Information & Communications Technology Authority, Cayman Islands, www.icta.ky/da_complaint_nsteps.php

⁴ OfCom: What is Media Literacy? <http://stakeholders.ofcom.org.uk>

be able to use an electronic programme guide to find the programme they want to watch. They may agree or not with the programme maker, or just enjoy the programme. They may also recognize that the programme maker is trying to influence them in some way.'

One can expect an inverse relationship between the degree of media literacy and the degree to which there is a need for regulatory intervention. Thus, while in developing the Code of Practice for Content Regulation, there is a need for the regulator to ensure that there is compliance with the Code, there is also a responsibility to educate the public so that the public can monitor the behavior of Licensees.

Conclusion

BTC takes this opportunity to once again underscore the importance of media literacy and programs initiated by the regulator aimed at educating users as a means of effectively policing broadcasters. Experience in Europe and elsewhere shows that where consumers are informed and there is a well defined process relative to the rules and complaints handling, there is less need for regulatory intervention and this should be the ultimate objective of any regulator.

BTC maintains that URCA should make the distinction in the treatment of linear content services (traditional television service) versus that of non linear content service (i.e. video on demand). In the case of the latter, users have more control over the content they wish to view and with the appropriate filtering, the need to regulate non linear content is further reduced. The proposed difference in treatment of linear and non linear content service is consistent with the practice in the European Union (EU).

BTC supports URCA's position on the treatment of content provided by way of the Internet, where such content is available to any persons within or outside The Bahamas. BTC is firmly of the view, however, that there should be no exception or qualification that places some degree of responsibility with Licensee if the content provided by way of the Internet is advertised locally.

BTC is in general support of the proposals in Part 10 of the draft Code of Practice regarding the complaints handling process. BTC notes URCA's Guidelines for developing the Licensee Consumer Complaints Handling Procedure: Consultative Document (ECS 23/2011) just issued on December 23, 2011 which sets out the minimum set of criteria to be included by each Licensee in its Complaints Procedure.

Finally, while there is universal recognition of the need to protect children and the general public with respect to content considered offensive, there is a need to take into account and balance these considerations with Privacy laws and Data Protection requirements. This should be a consideration for both the regulator and Licensees.

Reservation of Rights

BTC has addressed the issues but reserves the right to comment at any time on all issues and states categorically that the decision not to respond to any issue raised in this Consultation in whole or in part does not necessarily represent agreement in whole or in part with URCA's position, nor does any position taken by BTC in this consultation mean a waiver of any of BTC's rights in any way. BTC expressly reserve all its rights.

Prepared by:
Legal, Regulatory Department
The Bahamas Telecommunications Company Limited (BTC)
30th December, 2011