



The Bahamas Telecommunications Company Limited:

Response To

The Utilities Regulation and Competition Authority's
Public Consultation on
Content Regulation: Process for Developing Codes of
Practice

Consultation Document
ECS 02/210

Legal, Regulatory and
Interconnection Division
12 March 2010

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Executive Summary

Pursuant to Section 52 of the Communications Act, 2009, URCA by way of determination may issue regulatory and other measures to regulate content services intended for reception by subscribers of carriage services or by broadcasting in The Bahamas. Further, by way of Sections 53 (1) and 53 (2) of the Act, URCA has the power to issue codes of practice that are to be observed by licensees providing audio visual media services in The Bahamas and to issue standards relative to the codes of practice as per Section 53 (1).

URCA has not attached sufficient weight to the role of consumer education/awareness in looking at the alternatives of a co regulatory framework which involves intervention by the regulator compared to self regulation. There is recognition that for self regulation to be effective, there have to be vested interests or incentives by the affected parties. URCA by way of analysis may arrive at the same outcome that there is still a need for intervention by way of co regulation but there should have been the benefit of examining the role of public awareness in the choice as to whether Codes of Practice could be developed and policed by the industry and consumers or alternatively by way of some form of intervention by the regulator. There is a discussion in Table 3 which looks at the application of best practice criteria to content regulation in The Bahamas. The discussion of public awareness in this table focuses on public awareness as it relates to complaint handling procedures. Here, BTC is looking at consumer education/awareness in the context of self regulation as an alternative to intervention in the form of a co regulatory framework.

BTC notes that in the discussion on the use of a co regulatory framework, not much attention has been given to user content. The Public Consultation Paper, in putting forward the establishment of an Industry Working Group, has focused the attention on the provision of content by industry players (service providers) and has given very little attention to content created by way of users. An example of this is the content provided by users on You Tube. This suggests the need in the future to give consideration to the establishment of a Consumer Panel.

Notwithstanding the need for more discussion on the role of public awareness or education as it relates to content regulation, BTC agrees with URCA in its approach of adopting a co- regulatory

framework for content regulation. This approach, which involves a combination of statutory regulations and rules developed by a Working Group comprising members of the public and industry representatives is consistent with international best practice. The UK's Office of Communications (Ofcom) provides much by way of a body of knowledge relative to the application of co and self regulatory framework for content regulation. The Ofcom literature was reviewed by BTC in its response to this Public Consultation on Content Regulation.¹

Whilst there is general support by BTC for a co regulatory framework, there is no discussion by URCA in the Public Consultation Paper of a cost-benefit analysis of a co regulatory framework. There is a discussion in the Public Consultation Paper of the benefits of the new model of content regulation but no discussion relative to cost for the establishment of the co regulatory body. There is a general statement in the Public Consultation Paper of the requirement by URCA that where regulatory measures are introduced that they are efficient and proportionate, having regard to costs and implications for affected parties.

BTC is firmly of the view that the company should be a member of the industry Working Group. As pointed out in the Public Consultation Paper, the Working Group will need to consider the extent to which the Codes should apply to new and emerging services such as online or mobile content. As the company seeks out new opportunities created by these emerging services, it is important that the rules encourage efficiency and innovation. BTC with its suite of fixed and mobile services and its positioning to take advantage of emerging services that would be subject to content regulation, should be an industry representative of the Working Group.

The impact of convergence on content services and the business of BTC is another factor that drives the need for BTC to be a part of the industry Working Group. As a result of convergence, companies are no longer providing services across traditional markets, convergence is driving a

¹ Two papers produced by Ofcom were used as a frame of reference in responding to this Public Consultation: (i) Statement on the criteria to be applied by Ofcom for promoting effective co and self regulation and establishing co-regulatory bodies, Office of Communication.
ii. Public Consultation on Initial assessments of when to adopt self or co-regulation, Ofcom, 27 March, 2008

new pattern of demand, built around three factors: more mobility, more control and more participation in the way people use and enjoy media and communications services.²

BTC is in support of URCA's position that there ought to be a clear line of demarcation between the function of the Working Group and that of URCA as it relates to content regulation. It is essential that there are clear divisions of responsibilities between the co regulatory body and URCA. It should be clear to all relevant parties, who has responsibility for which area and the role of URCA. This clarity is needed for consumer and industry groups. It is important that the Working Group has the appropriate enabling environment to develop confidence and credibility in its decision making process. Over time, as part of its ongoing role, Key Performance Indicators will be used to measure the effectiveness of the Industry Working Group.

BTC notes that it is the intention of URCA to appoint the chairperson of the Group as well as having an URCA representative sit as a member of the Group. While URCA has stressed the importance of independent thinking as part of the decision making process of the Group, the appointment of a chairperson and the presence of an URCA representative can raise questions of the independent thinking of the Group. URCA by way of its influence on the appointment of the chairperson and the presence of its representative has influence on two (2) of the 8-10 positions or places in the Group.

BTC notes that over time URCA will make decisions on the ongoing role of the industry Working Group. This is important. While the likelihood exists that the Working Group may have an ongoing role, it is also likely that once the Codes of Practice have been developed and communicated to the public and there is an appreciable level of public education and awareness, policing of compliance can be delegated to consumers and members of the general public.

BTC has reviewed the application of best practice criteria to URCA's proposed industry Working Group and has found that the criteria are consistent to that of Ofcom's Public Consultation on the Initial assessments of when to adopt self or co-regulation. Also, a review of Table 3: Application of

² Excerpts taken from the Ofcom Consultation Paper, Guidelines for making an initial assessment whether to deploy co or self regulation, March, 2008

best practice criteria to content regulation in The Bahamas of URCA's Public Consultation Paper on Content Regulation, indicates that the criteria outlined is consistent with Ofcom Guidelines.

Based on the experience in the UK, a potential contentious issue going forward is who should be responsible for putting forward proposals for areas that should be subject to co-regulation. The general view is that it should be the relevant industry rather than the regulator. BTC supports the view that it should be the industry that initiates the co regulatory schemes.

In the Public Consultation, there is no discussion on the role of media literacy which is more encompassing than that of consumer education. Media literacy can over time reduce the need for regulatory intervention.

BTC's response to this Public Consultation is divided into two parts. The first part provides an overview and discussion on the main issues taken from the Paper. The second part provides the responses to the questions outlined as part of the Public Consultation.

Introduction

BTC welcomes the opportunity to respond to this Public Consultation on Content Regulation: Process for Developing Codes of Practice. BTC recognizes that this Consultation focuses on the establishment and proposed composition of the Industry Working Group.

While it is important for URCA to develop a framework for the protection and enjoyment of users of audiovisual services, it is equally important for the regulator to ensure that the regulatory framework does not stifle innovation on the part of providers of content and related services. The framework should not be so onerous that it is a disincentive to current providers and emerging entrepreneurs from pursuing niche markets. In some cases, while a particular content may be regarded as offensive for general viewers, there may be a potential within a given niche market.

Whilst BTC has lend its support to the establishment of an Industry Working Group to develop the code of practice relative to content regulation, BTC notes that there is very little by way of discussion on the use of a Consumer Panel. In the United Kingdom, a Consumer Panel is an integral part in the promotion of media literacy. In URCA's deliberation as to what should be the future role of the Industry Working Group, factored into this decision ought to be the future role of a Consumer Panel.

Although not raised in the Public Consultation Paper, there is no discussion on how URCA will deploy its existing resources to provide oversight to the work of this Industry Working Group. While URCA has responsibility for Content Regulation, this area is an additional constraint on URCA's existing resources. The problem of stretching existing resources can be further compounded if URCA appoints one of its staff members as a member of the Working Group, although URCA has the option of appointing this member from outside the Authority. BTC has previously stated its opposition to URCA appointing a member.

Do you agree with the criteria set out in Table 1 are the correct ones against which to assess suitability for a co-regulatory regime in The Bahamas? If not, why not? Should any additional criteria be added (or any removed)?

The criteria set out in Table 1 assessing the suitability for a co regulatory regime in The Bahamas are consistent to that developed by Ofcom as outlined in its Public Consultation on the Initial assessments of when to adopt self or co regulation dated March, 2008.

Following a review of the criteria outlined in Table 1 and an understanding of the local context, BTC has no objections. Further, there no suggestions for additions or removal.

Do you agree with URCA's assessment that a co-regulatory model in The Bahamas would be appropriate for content regulation? If not, why not?

While BTC generally supports the use of a co regulatory framework for content regulation, the company is of the view that over time, the use of approaches like media literacy programs as people adapt to new media technologies, can reduce the need for intervention.

Also, not to be discounted is the role of a Consumer Panel. While a representative of consumer interests is expected to be a part of the Industry Working Group, over time, the responsibilities of the Working Group may be delegated to a Consumer Panel.

Do you agree that the criteria set out in Tables 2 and 3 are appropriate to ensure a fit for the purpose Working Group in The Bahamas that adheres to best practice? If not, why not?

BTC has reviewed and has no objections to the criteria outlined in Tables 2 and 3 of the Public Consultation Paper. The criteria outlined in the tables are consistent with Ofcom's Guidelines on Content Regulation and adheres to international best practice.

BTC notes the use of Key Performance Indicators (KPIs) to assess the extent to which the objectives of the co regulatory body are being met as indicated in Table 2. This is important in assessing the ongoing role of the Industry Working Group.

Do you agree with URCA's assessment of how its proposals for content regulation in The Bahamas, including the establishment of an industry Working Group, addresses these criteria? If not, why not?

As outlined in the Public Consultation Paper, it is URCA's intention to appoint the chairperson of the industry Working Group as well as having a representative of URCA as part of the Group. BTC is of the view that URCA's influence relative to these two (2) positions impacts the line of demarcation between the role and responsibilities of URCA and that of the Working Group and has the potential to compromise decisions taken by the Industry Working Group.

Further, three (3) of the five (5) criteria: adequate resource commitments, audit of members and scheme, and regular review of objectives and aims according to URCA are expected to be addressed at some future date if there is an ongoing role of the Working Group. BTC is of the view that the three (3) criteria outlined above ought to be given consideration at the initial stages. It may be useful to start with the assumption that there will be an ongoing role for the Working Group and develop a framework with this assumption in mind. Notwithstanding that periodically there will be a need to assess the Group's ongoing role.

Do you agree with URCA's proposals regarding the initial terms of reference for the Working Group, with a specific focus on the development of New Codes of Practice? If not, why not? Should any other tasks be included (or removed)?

In reviewing URCA's proposed initial terms of reference, it is important that the regulatory framework is not so onerous that it stifles innovation on the part of content providers.

BTC has no objection to the initial terms of reference. The areas that will be the focus as part of the initial terms of reference are consistent with those areas listed in Section 53 (2) of the Communications Act.

Do you agree with URCA's proposal that the Working Group should be given the opportunity to establish itself, and to form its own view as to its future responsibilities, before URCA makes decisions regarding the Working Group's ongoing role? If not, why not?

BTC agrees with the position that the Group should first be allowed to establish itself before a decision is made relative to its ongoing role. This decision on the ongoing role should be guided by input from the public and consumers as well as from the Group as suggested by URCA.

Do you agree with the proposed composition of the Working Group? If not, why not? Are there any other people, sectors or organizations that you believe should be represented? Are there any people, sectors or organizations proposed by URCA that you do not think need to be represented on the Working Group?

As discussed previously, BTC is firmly of the view that the company should be part of the Working Group. As outlined in the Consultation Paper, content regulation would not only apply to traditional audio media services but also the non traditional services such as mobile content services. Also, with convergence, it is expected that BTC will be providing services outside of its non traditional services. The inclusion of BTC as part of the Working Group provides a perspective not provided by the other representatives.

Noticeably absent from the list of representatives is a representative of the hearing impaired community. In the United Kingdom, there are public consultations on offering Basic Sign Language as part of programming content. BTC notes that in the Consultation Paper, there is provision for a representative of minority views/interests. While BTC accepts URCA's position that perhaps more than one representative is needed given the contrasting views among minority groups, it is important that the hearing impaired as a constituent is represented.

Consideration should be given over time to reexamining the composition of the Working Group. While the involvement of independent members and more specifically members representing consumers is mentioned in Table 2 which examines the application of best practice criteria, there is no mention of consumer groups in the discussion on the proposed composition of the Industry Working Group.

BTC has indicated that it is of the view that there should be a line of demarcation between URCA and that of the Industry Working Group. While the work of the Group has to be consistent with the relevant provisions within the Communications Act, the intent is to have views that are representative of a broad cross section within the community including industry. The representation

of views is achieved not just by numbers and composition but also by way of the ability of members to influence the process through a collective effort. BTC notes that it is URCA's intent to appoint the chairperson as well as having a representative as part of the Group. URCA has not cited by way of reference a precedent for having a representative and BTC therefore is not satisfied that URCA should have a representative on the Committee.

BTC has noted from a review of an Ofcom Publication, Criteria for delegating Ofcom's functions to a co regulatory body, Ofcom is adamant that there ought to be clear division of responsibilities between the regulator and the Working Group. Ofcom's role according to the publication is one of an enabler and evaluator but not with the power to second guess decisions of the co regulatory body.³

It is important in the context of group dynamics for individual members to be involved with the appointment of the chairperson as ultimately the members of the Group will have to work with the person appointed as chairperson. While BTC can appreciate that the work of the Group has to be consistent with the provisions in the Communications Act relative to Content Regulation, URCA's role relative to the Group should be in an advisory capacity and not as a member.

Do you have any suggestions for how best to ensure that the full range of interests of the Bahamian public – including people on different islands, those who belong to minority groups, and young people – are properly represented on the Working Group (or any sub groups that are formed)?

Public awareness and education of the role of the Working Group are important in ensuring that the Group represents the range of interests of the various constituents. This campaign of awareness and education on the role of the Industry Working Group should be targeted towards the various groupings/constituents whose interests should be represented. URCA should give consideration to campaigns in the Family Islands, particularly the southern islands. Targeting high schools and the College of The Bahamas is one way of ensuring the involvement of young people in the process. The involvement of organizations that provide support services to persons with disabilities such as persons with hearing impairment is one way to get minority representation.

³ <http://www.ofcom.org.uk/consult/condocs/co-reg/criteria>

To ensure the varying views/interests are represented, there has to be involvement by the various constituents. To get real involvement, there is a need for an educational/awareness campaign.

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?

BTC is of the view that there should have been more discussion or evaluation of the former rules relative to content regulation. To the extent that there was more discussion with respect to the former rules, it would allow for a better assessment as to what is practical going forward. Clearly from the discussion on the previous framework, in cases where there were rules, there was the lack of enforcement. BTC also noted the absence of a complaints handling procedure under the previous rules.

The issue of user content should have been explored more in this Consultation Paper. While the intent was to focus the discussion on the establishment of an Industry Working Group, increasingly content is provided by way of users and not the traditional content service providers. The discussion on user content would have permitted more discussion on the use of a Consumer Panel as an alternative or to some extent to complement the work of the Industry Working Group.

BTC is of the view that while the Consultation Paper referenced consumer groups and independent members of the Industry Working Group, there was little by way of discussion on the representation of persons with disabilities, i.e. hearing impaired and those persons with visual impairments. In the United Kingdom, Ofcom is required to ensure that its policies take into account this constituent. The inclusion of representation from a minority group is rather generic which may or may not include representation from the disabled community.

BTC noted that there was no discussion by way of how the Industry Working Group will be remunerated and funded. If individuals are to be remunerated, will URCA provide the funding from its existing budget? If funding is provided from its existing budget then it places a significant proportion of the burden on licensees like BTC.

Conclusion

BTC has noted from its review of the Public Consultation Paper that what is being proposed by way of a co regulatory body in the form of the Industry Working Group to develop the appropriate Code of Practice for Content Regulation is consistent with international best practices as evident by reference to the Ofcom Guidelines on Content Regulation. BTC also recognizes that while it is important to follow a framework with well established precedents and principles, it is also important to appreciate that The Bahamas is still in the embryonic stage relative to the regulatory practices found in more developed economies.

URCA in the establishment of a co regulatory framework has to strike a delicate balance relative to consumer rights to privacy, the need for flexibility on the part of industry participants to encourage innovation, and the need for regulatory intervention in cases where there is market failure. This requires a constant review of the regulatory environment and the assessment of intervention against Key Performance Indicators (KPIs). The involvement of consumers and industry players are important in shaping the rules going forward. Effective input from key stakeholders is contingent on a campaign of education and awareness of the role, function and expected outcomes with the establishment of the Industry Working Group.

BTC was particularly pleased to see that URCA proposes that over time the work and future role of the Working Group will be assessed and hopefully the appropriate actions will be taken to achieve the desired outcomes consistent with the provisions of the Communications Act. BTC also agrees with URCA's position that the Group should not be over burdened with responsibilities until it has demonstrated its effectiveness and gained credibility with the public.

BTC affirms its position that the company should be a member of the proposed Industry Working Group. There are content services provided by telecommunications service providers outside of the traditional services provided by broadcasters and other content providers. There is a strong case to be made for the inclusion of a representative of BTC as a member of the Industry Working Group.

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 reserves all its rights.

Legal, Regulatory and Interconnection Division
The Bahamas Telecommunications Company Limited (BTC)
March 12, 2010