



**PRIVILEGED & CONFIDENTIAL**

**By E-mail & Hand**

January 22, 2010

The Chief Executive Officer  
Utilities Regulation and Competition Authority (URCA)  
Agape House  
4<sup>th</sup> Terrace Centreville  
Nassau, Bahamas

Dear Mr. Symonette:

**Re: Proposed Obligations to Satisfy the Requirements of s. 116(2) of the Comms Act**

In accordance with s. 116(3)(b) of the Communications Act, 2009 (“Comms Act”), Cable Bahamas Ltd. (“CBL”) and Caribbean Crossings Ltd. (collectively, “the Companies”) hereby submit proposed obligations to satisfy the requirements of s. 116(2) of the Act.

**1. Introduction**

In Consultation Document ECS 18/2009, URCA identified a comprehensive menu of obligations that would theoretically be available to it for imposition on CBL following the process stipulated by s. 116 of the Comms Act. Section 116(2) calls for the imposition of interim obligations on CBL that are “designed to maintain . . . the objective of encouraging, promoting and enforcing sustainable competition” in relation to each market in which it is presumed to have SMP (*i.e.*, pay TV services and high speed data services and connectivity). Assuming that the Consultation Document was intended to comply with the statutory requirement of s. 116(3)(a), CBL understands that the obligations identified in the Consultation Document reflected URCA’s preliminary views on the matter.

As discussed extensively in CBL's Response, the Consultation Document setting out URCA's preliminary views did not identify the specific market failures that the remedies under discussion were intended to address. Moreover, URCA's preliminary views failed to take into account several key change factors that will affect the level and scope of competition in the relevant product markets potentially covered by the statutory presumption, and therefore the need for *ex ante* obligations in each case. Finally, URCA's preliminary views did not assess whether there is actual demand for any of the new products proposed; nor did they include any attempt to justify or evaluate the proportionality of the identified options either individually or collectively. Accordingly, CBL has been given to understand that the preliminary views set forth in the Consultation Document are exploratory in nature, for the purpose of generating information that would help URCA develop a clearer picture of the actual market dynamics at play in the sector.

The responses to the Consultation Document establish that, in the case of CBL, there is no evidentiary basis for imposing the majority of the obligations put forward by URCA for consultation. Indeed, the responses provide clear evidence of record that, by and large, the obligations under consideration for CBL would be unjustified on the basis of proper competition analysis, or else would be completely disproportionate or outside the scope of the interim SMP process envisaged by s. 116. CBL's response, in particular, carefully examined each of the obligations identified in the Consultation Document and provided a detailed assessment of each one in terms of: the perceived market failure and the need for such an obligation based on current market conditions; expected changes in the marketplace and substantiated demand; the costs of each obligation weighed against the benefits in the specific context of The Bahamas; international best practices; and the interim nature of the remedies.

As discussed in CBL's Response, the irrebuttable nature of the presumptive SMP designation and the transitional nature of the remedies have serious implications that URCA must take into account as a matter of fairness and sound economic practice. The proposed obligations should focus only on those specific product markets which clearly fall within the intended scope of the high-level SMP "markets" identified in s. 116(1). Any such product markets for which there is no demonstrable competition issue (market failure) should be excluded from consideration for interim *ex ante* regulation.



In any cases where interim *ex ante* regulation is found to be justified, the remedy selected should be narrowly tailored and should be the least intrusive solution available to resolve the market problem identified on an interim basis, pending a full market review (which is expected to be completed in 2011). In accordance with the Government's policy, the interim remedies should be basic and capable of being implemented relatively quickly. If the development of a new product is considered necessary on that basis, there should be clear evidence of actual demand sufficient to ensure that that the cost to CBL of developing and implementing the product could be recovered. Given their transitional nature, any proposed obligations imposed pursuant to s.116 should be assessed in light of CBL's current regulatory obligations, *i.e.*, whether there is continuity between the existing obligations and any new obligations so as to "maintain" the sustainable competition objective of the Comms Act. They also should take into account the unique circumstances of The Bahamas (small-sized market, archipelago topography, low density and GDP/head) as well as regional and international best practices. Finally, the proposed obligations, individually and cumulatively, should reflect a true "light touch" approach to regulation rather than the heavy-handed (and unprecedented) approach suggested by the extensive set of obligations put forward for consultation.

CBL respectfully submits that in any of the identified product markets where there is clear evidence of transitional market problems, the requirements of s. 116 may be satisfied by relying on the baseline SMP obligations set forth in s. 40(4) of the Comms Act. Nothing in s. 116 requires URCA to impose any additional SMP obligations on CBL's provision of services in such markets during the interim period. In any markets where there is a possibility of market failure that cannot be proven on the basis of existing evidence, URCA can give notice that it will monitor the developments and institute full market reviews targeted to address any issues that may arise in actual practice or exercise its *ex post* powers under Part XI of the Comms Act. Indeed, URCA may only impose additional remedies if there is convincing evidence that doing so is necessary to maintain the sustainable competition objective of the Comms Act.

On the basis of the foregoing, CBL remains of the view that no *ex ante* regulation of its products and services is in fact necessary to ensure competitive pay TV and Internet broadband/data services. CBL nonetheless acknowledges that as a matter of continuity, in relation to issues that were identified and/or addressed under the prior regulatory regime and which may continue to

raise concerns during the transitional period, the imposition of *ex ante* regulations may be acceptable in two specific areas provided that the implementation measures are reasonable and proportionate. These are discussed in turn below.

## **2. Retail price regulation of CBL's SuperBasic Pay TV package**

CBL has traditionally provided its basic TV package (SuperBasic) under a form of price regulation that was stipulated in its initial 15-year licence, which has now expired. This regulation took the form of a price control which led to a charge for the basic package that has not changed since the inception of CBL's pay TV service in 1994. Price regulation of the basic package was essentially the *quid pro quo* for the exclusivity right that was granted to CBL under its previous licence to enable the development of a sustainable cable TV business in The Bahamas under the economic and technical conditions prevailing at the time.

The *de jure* exclusivity granted to CBL under its initial licence has now been terminated, and it is expected that other forms of subscription television – in addition to existing legal, grey and black market satellite television services – will develop over time. In particular, BTC and IPSI have both announced plans to offer IPTV (and are in possession of the necessary licences), and other operators may also now be licensed to offer subscription television services by wireless means (satellite or terrestrial).

Although CBL believes that this prospective competition should be sufficient to justify the removal of price regulation from CBL's basic package, this may be an issue that is more appropriately addressed in a full market review. In the interim, CBL would not oppose the continued application of reasonable and proportionate retail price regulation to its basic package. CBL proposes a price control mechanism that would reflect international best practices tailored to meet the specific circumstances of The Bahamas. This would require CBL to take into account the costs for delivering the service (in particular, programming costs, associated network, IT, marketing and SG&A costs). In addition, the appropriate scope of the basic package should be assessed following international models and taking into account the evolution of the Bahamian marketplace.



CBL proposes a tariff review process for this interim period that would involve an annual or semi-annual review by URCA, upon CBL's request. CBL would agree not to alter the price or content of its basic package without URCA's prior approval, based on a minimum notice period of 30 days. CBL's specific proposal in this regard is attached as **Annex A**. Compliance with this obligation for purposes of s. 116(4) would be confirmed by CBL's acceptance of the specific procedural and substantive retail price obligations for its basic package.

This proposed obligation would fully satisfy the requirements of s. 116 in respect of the sole product market in the category of "pay TV services" where CBL may reasonably be found likely to retain some degree of market power during the transitional period. CBL believes that its proposal is a reasonable and proportionate interim remedy. Furthermore, because any proposed pricing modifications would be based on product-specific cost data provided by CBL, there would be no need for a full-blown regulatory cost accounting or accounting separation obligation. As CBL has demonstrated in its Response, there is no justification for a cost accounting obligation, which would be unduly burdensome and wholly disproportionate in the case of a stand-alone cable television provider (*i.e.*, one not affiliated with the incumbent PSTN operator).

### **3. Decoupling of CBL's Broadband Internet Offers from the Pay TV Package**

Unlike the cable television market, which has legally been opened to competition for only a few months, broadband and data services have been open to competition for nearly ten years. In respect of the presumptive high-level market for high speed data service and connectivity, the evidence demonstrates that there is in fact substantial competition in the retail broadband market, as detailed in CBL's Response. Moreover, there is clear evidence that competition will intensify over the coming year. The broadband market has never been regulated in The Bahamas, a position that is fully consistent with regional and international best practices.

There is, however, one aspect of CBL's existing arrangements that URCA proposes to modify by regulation that CBL concedes could increase competition in the broadband market if a proportionate solution can be found. This involves decoupling the SuperBasic pay TV package from the provision of Internet broadband services. Under the previous regulatory framework, CBL discussed with URCA's predecessor the technical and commercial challenges posed by the

then-available options. In particular, CBL's current network architecture makes it difficult to develop a cost-effective, comprehensive solution that would at the same time preserve the security and integrity of CBL's pay TV network and business. As a result, these options were ruled out as a workable system-wide solution.

A comprehensive solution allowing for the cost-effective decoupling of broadband from CBL's pay TV services, while at the same time ensuring the security and integrity of CBL's pay TV network and business, would require CBL to undertake a major network upgrade. CBL will consider such an option in light of the obligation proposed by URCA in the Consultation Document. Any solution based on a comprehensive network upgrade would be very costly and would likely require at least two years to complete, which would be beyond the scope of the transitional remedies envisaged by s. 116 of the Comms Act.

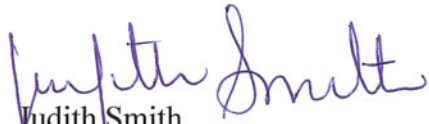
However, as a transitional measure, CBL is prepared to commit to the immediate decoupling of its Internet broadband services from its pay TV services for any new installation in which a customer orders Internet broadband only, commencing no later than two months following URCA's decision accepting this proposed obligation. It should be noted that to comply with this obligation, CBL will be forced to resort to an interim technical solution (until a comprehensive network upgrade could be completed) that may put at risk CBL's network and business integrity. Compliance with this obligation for purposes of s. 116(4) would be the publication of an Internet broadband-only offer available for new installations on CBL's website.

CBL proposes to work with URCA to agree the technical details and cost recovery mechanisms that are pertinent to this proposed interim decoupling solution.

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CBL believes that its proposals are reasonable and proportionate based on proper competition analysis and fully satisfy the requirements of s.116(2) of the Comms Act. They are in line with international best practices adjusted to reflect the specific circumstances of The Bahamas. They are also in keeping with the transitional nature of the s. 116 process. We look forward to discussing the implementation details of our proposals with URCA over the coming weeks.

Sincerely yours,

  
Judith Smith  
Legal Counsel  
/jms



## Annex A

### Tariff Regulation Applicable to Basic Cable Television Packages

The following terms shall apply to proposed price increases and reductions that are proposed by CBL for its basic cable TV package. CBL shall not change the tariff or price of its basic package without the prior written approval of URCA.

CBL shall submit to URCA an application for a tariff or price change, as appropriate, at least 30 days before the proposed effective date of the change. Such application shall include:

- A description of the scope of the basic TV package for which the price change is being requested;
- Proposed effective date for the price change;
- Current tariffs/prices;
- Proposed tariffs/prices;
- Any proposed changes to the applicable terms and conditions that will result from the price change;
- Commercial rationale for making the proposed change;
- Cost data relevant to the proposed change, including the following:
  - actual programming costs, network, marketing and SG&A costs allocated on a reasonable basis, and
  - other relevant information to support the proposed price change including a benchmark study of prices in comparable jurisdictions, along with supporting information.



Based on the information provided to it, URCA may state that it has no objections to the proposed tariff/price changes or may reject them and propose suitable amendments to any tariff/price change for a Price Regulated Service. URCA shall review an application for a tariff/price change as follows:

- a. Within 30 days of receipt of a completed application (all information is provided in accordance with the requirements of this Section), URCA may issue a decision rejecting the application, which must contain detailed justification and may propose suitable amendments.
- b. If URCA takes no action within 30 days of receipt of a completed application, the application shall be deemed to be granted.