COMMENTS OF CABLE BAHAMAS LTD AND CARIBBEAN LTD CROSSINGS

ON

RESPONSES TO

URCA'S PRELIMINARY DETERMINATION, DRAFT ORDER AND CONSULTATION DOCUMENT ON TYPES OF OBLIGATIONS ON CABLE BAHAMAS LTD. UNDER S. 116(3) COMMUNICATIONS ACT, 2009 (ECS 19/2009)

URCA'S DRAFT GUIDELINES ON ACCOUNTING SEPARATION AND COST ACCOUNTING ISSUED TO CABLE BAHAMAS LTD. (ECS 21/2009)

URCA'S DRAFT GUIDELINES ON ACCESS AND INTERCONNECTION (ECS 22/2009)

January 22, 2010

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1. INTRODUCTION

Cable Bahamas Ltd. ("CBL") and Caribbean Crossings Ltd. (collectively, "the Companies") hereby submit the following comments on the responses to URCA's Consultation Document on the types of obligations on CBL under s. 116(3) Communications Act, 2009 ("Consultation Document").[1] Responses to the Consultation Document were filed by the Companies ("CBL Response"), The Bahamas Telecommunications Company Ltd ("BTC"), Systems Resource Group Limited ("SRG") and Digicel. In a separate filing, the Companies have submitted to URCA the proposed *ex ante* regulatory obligations which in their view satisfy the requirements of s. 116(2) of the Communications Act, 2009 ("Comms Act") , in accordance with the procedure set forth in s. 116(3)(b).

In its Response, CBL provided extensive evidence of existing and growing competition in those relevant product markets that may reasonably be deemed to fall within the presumptive SMP categories applicable to the Companies pursuant to s. 116.

In respect of the pay TV market, CBL's Response demonstrated the imminent prospect of entry into the market by BTC and potential entry by other licensees. In particular, BTC has announced plans to provide IPTV over its next generation network ("NGN"), which BTC is now rolling out and has announced it will complete within the next ten months. The success of incumbent PSTN operators in the US, Canada, France, the Netherlands, Portugal, and Sweden (to name a few) in commercialising IPTV in a relatively short timeframe demonstrates that IPTV represents a strong competitive threat to cable TV.

With regard to "high speed data and connectivity", CBL's Response demonstrated that there is substantial inter-modal competition in the provision of broadband services, and there is clear evidence that competition will intensify in the near term with the roll-out of BTC's NGN. The broadband market has never been regulated in The Bahamas, a position that is fully consistent with international best practices. Indeed, the evolution of Internet access services in this country demonstrates the vibrancy of market forces in this segment. Ten years ago, BTC had a market share of approximately 80% of the Internet access market, and CBL was not in the market. Since that time, CBL has been able to enter the market, develop and implement high-quality broadband products, and surpass BTC's share of the internet market. This demonstrates the existence of real competition at work between two infrastructure-based operators – competition that is likely to intensify as these two players enter one another's core markets.

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[1] The Companies are submitting these comments in accordance with the revised timetable set forth in URCA's Public Notice of November 3, 2009.

URCA's policies in this area should therefore focus on ensuring that competition between these two competitors is robust, rather than attempting to stimulate artificial competition from hypothetical new entrants or simple resellers with unclear business strategies and unproven access to financial resources.[2] A credible business case for "pure-play" Internet Service Providers is unlikely to exist even in the best of economic times,[3] and is all the more unlikely in the current, highly challenging economic environment, which is not expected to improve anytime soon.

CBL's Response also demonstrated that:

(1) The methodology utilised by URCA in developing its preliminary views on the proposed SMP objectives is fundamentally flawed and has produced a set of proposals for the *ex ante* regulation of a cable television company that are for the most part unjustified as a matter of sound competition economics, highly intrusive, and economically and technically unfeasible;[4]

(2) With few exceptions, the obligations proposed by URCA are incompatible with the letter and spirit of s. 116, not least because they are anything but basic, transitional remedies susceptible of relatively quick implementation; and

(3) The proposed obligations, individually and collectively, represent anything but light-touch regulation and are either unprecedented globally, or have been imposed by regulators in other countries only in very rare and unusual circumstances that are entirely irrelevant to a country with the characteristics of The Bahamas (small-sized market, archipelago topography, low population density and GDP/head).

The Companies have carefully reviewed the responses submitted by BTC, SRG and Digicel. Nothing in their submissions detracts from the strength of the evidence provided in CBL's Response.

As discussed in greater detail below, BTC's response identifies many of the same fundamental flaws in URCA's methodology that were exposed by CBL and its advisors. Digicel's response raises a number of procedural issues relevant to

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2 Moreover, as discussed in CBL's Response, it is important for URCA to avoid creating the type of perverse incentives that many of the proposed obligations could create by motivating existing operators *not* to invest in network upgrades and expansion. *See* CBL Response at p. 12.

3 *See, e.g.*, ScreenDigest Market Study, "Will the Internet Break? ISP Economics Assessment to 2012. http://www.telecomsmarketresearch.com/research/TMAAATCB-screendigest. Among the key findings of this study are that: "The big losers in the ARPU decline are the pure-play Internet Service Providers, which have tried to offset the squeeze [from the erosion of ARPU, which are predicted to continue to fall to 2012] by bundling additional services with broadband access. However, the effect of these value-added services has been limited. ***New entrants with another core area of profitability, such as pay-TV and mobile phone companies, have transformed broadband access itself into a low-cost bolt-on in packages***." (emphasis added)

4 The Companies also demonstrated that the procedures selected by URCA for determining the obligations deviated in material respects from those set forth in s. 116.

implementation of a reference interconnection and access offer, focusing (rightfully so) primarily on BTC. Finally, SRG, in a 7-page letter, has outlined its "wish list" of proposed obligations for CBL.[5] SRG has provided no competition analysis to support its proposals and no evidence that it is unable to replicate (through self-provision or otherwise) the products that it would like to have URCA require the Companies to develop and commercialise for it. SRG also has failed to provide any analysis or relevant benchmarks that would indicate how such products could be provided by CBL in a manner that is technically and economically feasible; nor has SRG offered any indication that it would commit to use (and pay the cost of) the long list of wholesale services that it proposes to require CBL to offer.

The Companies' comments on specific points raised by BTC, SRG and Digicel are set forth below.

2. BTC RESPONSE

2.1 *CBL agrees with many of the issues raised by BTC in respect of URCA's Methodology.*

BTC's Response (Section 2) contains a detailed discussion of the flaws in the methodology applied by URCA in developing its preliminary views on the types of obligations that should apply to BTC and to CBL. These defects include, for example, URCA's failure to:

- conduct a proper market definition analysis;
- undertake a forward-looking approach taking into account the impact of market liberalisation, privatisation, NGN deployment and other factors;
- consider prospective competition;
- consider the impact of the proposed regulations on investment incentives; or
- carry out a regulatory impact (proportionality) assessment.

CBL agrees with BTC that, for these and other reasons established in CBL's Response,[6] URCA's methodology is materially flawed. CBL's preliminary views regarding the interim remedies that should apply to BTC are set forth in the Companies' Response to URCA's consultation document (ECS 18/2009) on the types of obligations that should apply to BTC under s. 116(3). In light of the substantial and enduring bottlenecks over which BTC has control in the fixed-line network and

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5 It is highly unusual, and a testament to the untenability of SRG's position, that it has proposed more numerous and onerous obligations for the Companies than it has proposed for the incumbent PSTN operator.

6 *See* CBL Response, Annex 2.

its indefinite legal monopoly in the mobile sector, CBL believes that a proper competition analysis and proportionality assessment will ultimately justify rigorous *ex ante* regulation of BTC during the transitional period and beyond. It is nonetheless important that any such obligations be imposed based on sound evidence and proper analysis. As discussed below, however, the *outcome* of an assessment based on a proper methodology will not be the same for BTC and CBL in light of the very different circumstances applicable to the two companies.

2.2 *There is no basis for the application of "symmetrical regulation" in The Bahamas.*

BTC has espoused the position that any regulatory changes applicable to it should also apply to CBL, and that asymmetrical regulation of CBL would be inconsistent with a technology-neutral approach.[7] BTC's assessment is misguided. As CBL has demonstrated in its response, it is well settled that the principle of "technology neutrality" does not dictate uniform remedies for all market participants.[8] The facts and circumstances applicable to each participant in the market must be evaluated on the basis of; whether one or more of them has market power in the relevant market; the identified market failure(s) and the need to impose remedies *ex ante*; and a proportionality assessment of the potential remedies, taking into account the facts and circumstances applicable to each player (including differences in network architecture, superior access to finance, etc.). To sustain a conclusion that two players should be subject to identical *ex ante* remedies in the same relevant market, it would first be necessary for URCA to make a finding of joint dominance. However, there is absolutely no evidence of joint dominance in any of the relevant markets under consideration. Any such assessment would require a detailed analysis of the potential for tacit coordination, which involves far more than a mere finding that the market is concentrated.[9] Even if such a finding could be justified, however, the outcomes could be very different based on a proportionality assessment applied to each individual operator.

CBL disagrees entirely with BTC's position – which is completely unsupported – that technological convergence dictates that the "differential treatment of cable operators . . . is no longer relevant or appropriate."[10] BTC points to the US market as a purported example. However, BTC has conveniently neglected to point out that, by contrast with the situation in The Bahamas: (1) no US telecommunications operator has ever been government-controlled; (2) no US telecommunications operator enjoys a legal monopoly over any of the services it provides; and (3) the US market has been

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7 *See* BTC Response at pp. 22-23, 38-39.

8 CBL Response at pp. 12-14.

9 *See* "Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services", section 3.1.2 (Collective dominance) and Article 82 of the EC Treaty.

10 BTC Response at p. 38 & fn. 49.

open to competition for at least three decades and was only recently deregulated by the US Federal Communications Commission.

2.3 ***BTC should be required to provide wholesale access where there are clear market failures and there is a proportionate remedy.***

BTC correctly points out that URCA has artificially bifurcated the competitive assessment of several relevant product markets, including broadband, national and international leased lines and backhaul.[11] CBL concurs with BTC that there is effective competition between CBL and BTC at the retail level in the broadband and leased line markets, and that there is no basis for retail regulation in those markets.

With regard to wholesale bitstream access and backhaul, there is copious evidence based on experience in other countries, large and small, that a wholesale bitstream obligation is generally reasonable and proportionate for DSL providers with SMP. Indeed, this solution has become the mainstream remedy in most countries apart from the United States, which has effectively opted for total deregulation under circumstances that (as noted above) are very different from those in The Bahamas. This is in stark contrast to the regulatory treatment of cable television companies, for which a bitstream solution has not yet been proven to be (1) necessary, (2) economically feasible, *and* (3) of sufficient interest to potential access seekers.

In the case of national and international leased lines, new entrants will in all probability be able to access excess capacity on CBL's and BTC's networks at competitive prices. Moreover, as discussed below, they will also be able to lease international capacity on a third cable system (ARCOS-1) operated by Columbus Communications, which has agreed to sell its interest in CBL and will no longer have control over CBL's operations. If for any reason competition issues arise, URCA can use its *ex post* process to address them or institute a focussed market review on an expedited basis.

In summary, the evidence of record demonstrates that there is no basis for *ex ante* regulation of retail broadband, or of retail or wholesale international leased lines (or backhaul). If a competition case could be made for the imposition of an *ex ante* obligation to provide bitstream access (which in CBL's view is open to serious doubt in the circumstances existing in The Bahamas today), the obligation should apply exclusively to BTC. The bitstream solution was tailor-made for DSL. By contrast, there is no economically feasible way for CBL to comply with such an obligation. Furthermore, even if CBL could do so, it is highly unlikely that access seekers would find a cable bitstream solution to be of any commercial interest.

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[11] *See* BTC Response at p. 39.

As the European Commission recently observed when considering a unique set of circumstances involving the imposition of a cable-based wholesale broadband access obligation on the incumbent PSTN/cable operator in Denmark (TDC):

> ["*The national regulator should ensure the economic feasibility of a wholesale broadband access via cable and particularly analyze the investment that TDC would have to incur to be able to provide a wholesale cable access product and the impact that those investment costs would have on the price for wholesale broadband access over cable. In this respect, [the national regulator] should also verify whether the recovery of TDC's investment via the regulated wholesale access price on the basis of FAHC would lead to prices for the wholesale cable access product viable for access seekers.*"][12]

The Consultation Document failed to examine any of these factors; however, the evidence presented in CBL's Response demonstrates that a cable bitstream offer in a market the size of The Bahamas would fail on all of these counts.

3. SRG RESPONSE

It is evident from SRG's Response that it does not understand the fundamental objectives or requirements of the new regulatory framework for electronic communications that has been adopted in The Bahamas; nor does SRG appear to be aware of the limited nature and purpose of the transitional market review required by s. 116.

SRG has proposed a wide-ranging regulatory agenda which suggests that it would prefer to be a free rider on CBL's network than a serious competitor in its own right. CBL vigorously disagrees with SRG's proposals. More fundamentally, CBL is firmly of the view that it would be contrary to the interests of Bahamian consumers and the Bahamian economy for URCA to impose a set of obligations on infrastructure-based providers for the purpose of sustaining a "new" entrant which proposes to do nothing but resell other companies' products, with little or no value added. That approach has been tried in other jurisdictions (including the United States) with disastrous consequences, leading to bankruptcies and customer disruptions in the extreme.

If SRG wishes URCA to impose onerous regulations on virtually every part of CBL's business, SRG should be required to demonstrate with clear and convincing evidence why it is unable to replicate each of the particular products in question through self-provision or otherwise. As discussed below, SRG has failed to make any such showing.

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12 Case DK/2008/0862: Wholesale broadband access in Denmark (09/03/2009), SG-Greffe (2009) D/1391, p. 7 (commenting on the "exceptional case" presented by the Danish regulator's proposal to apply a form of "wholesale cable broadband access" on the Danish incumbent PSTN operator, TDC, which also owns a cable TV network).

3.1 ***There is no basis for SRG's recommendation that broadband should be regulated at the retail level.***

For the reasons discussed above in sections 1 and 2, there is effective competition in the retail broadband market, which has never been subject to regulation in The Bahamas, in line with best international practice. SRG proposes that the retail broadband market should be subject to *ex ante* regulation,[13] but it has provided no economic or legal basis for its recommendation.

In CBL's view, there is no reasonable basis upon which to impose *ex ante* regulation on any participants in the retail broadband market – certainly not within the context of this interim review. On the contrary, there are strong policy and public interest reasons to allow market forces to work rather than to risk calcifying competition by imposing heavy-handed, unnecessary tariff review procedures. For the reasons discussed in CBL's Response,[14] it would in any event be totally disproportionate and virtually unprecedented to impose a cost orientation obligation on a stand-alone cable television operator like CBL, accompanied by onerous cost accounting and separation requirements.

3.2 ***There is no basis for SRG's recommendation that national and international leased lines should be subject to retail and wholesale regulation.***

SRG also has urged URCA to regulate national and international leased lines at the retail and wholesale levels.[15] SRG's recommendation goes even further than the preliminary list of extensive obligations set out as possible options in the Consultation Document, which did not propose to regulate national and international leased lines.

In support of its recommendation, SRG contends that URCA has overlooked the fact that CBL's network consists of two physical layers, including hybrid fibre coax ("HFC") and direct fibre hubs. This network architecture is commonplace in the cable industry, and CBL's network architecture has no relevance to resolution of the threshold issues that must be addressed, *i.e.*:

- How should the relevant market be defined?
- Is there proof of a competition problem in the relevant market that requires an *ex ante* remedy, particularly in the context of a transitional market review process.

SRG's unique approach appears to rest on the principle that if a network component can be proven to exist, it should be regulated and, indeed, must comply with the most

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13 SRG Response at pp. 4-6.

14 *See* CBL Response at pp. 20-22, Annex 2 (section 5.3) & Annex 6 (section 5).

15 SRG Response at pp. 4-8.

draconian form of regulation conceivable. That, fortunately, is not the litmus test established by the Comms Act, nor is it the policy of any democratic country in the world of which CBL is aware.

With regard to international leased lines, SRG has argued that although there are three separate cable systems with capacity available, they are effectively controlled by either the Bahamian Government or Columbus Communications or both. The Companies can confirm that as far as the BICS system is concerned, neither the Government of The Bahamas nor Columbus Communications exercises direct or indirect control over its operation. Although it is true that Columbus Communications previously held common ownership interests in BICS and ARCOS-1, the sale of Columbus's interest in the Companies has now been agreed. As a consequence, contrary to SRG's assertions, Columbus Communications will no longer exercise control over CBL through board arrangements, management agreements or otherwise. The Companies will provide the appropriate documentation to URCA on a confidential basis to corroborate this fact.

On the topic of leased lines, we note that SRG has quoted from a CBL power point presentation that was made to potential investors in 2008, which suggested that CBL's sub-sea fibre network is "difficult to replicate."[16]

CBL acknowledges based on experience that building a new undersea cable between The Bahamas and the US (or other international locations) would be challenging. But it would certainly be *possible* to do so, particularly if other new entrants licensed in The Bahamas, or potential operators on the foreign end, were interested in forming a cable consortium for that purpose. In any event, there is sufficient excess capacity on the three existing systems, and new entrants should therefore be in a position to negotiate competitive commercial terms for leasing international capacity.

3.3 *SRG's proposal to impose "bitstream access" and "unbundled local loop" obligations on CBL are completely without merit.*

SRG also proposes to impose both a bitstream access and an unbundled local loop ("ULL") obligation on CBL.[17] SRG chides URCA for not having mandated sufficient technical detail in the consultation document about how a cable bitstream obligation would work.[18] SRG is correct that the Consultation Document poses a highly conceptual solution. However, that is not surprising given the novelty of a cable bitstream access solution (as demonstrated in CBL's Response).[19]

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16 SRG Response at p. 7.
17 *Id.* at pp. 2-3, 7.
18 *See* CBL Response at p. 7.
19 *Id.* at pp. 22-23.

SRG apparently, has not invested any time or effort to investigate whether (and if so, how) such a solution would work on either CBL's side of the network or SRG's own. SRG also has failed to explain how it would propose to integrate DSL and cable bitstream access solutions across its network. CBL respectfully suggests, for the reasons set forth in its Response, that a cable bitstream solution is unjustified on the basis of sound economic analysis. However, even if a competition case could be made, the solution would be wholly disproportionate for imposition on a cable television operator in the circumstances of the Bahamas (as discussed in section 2.3 above) – and certainly in the context of this transitional market review process.

The preposterousness of SRG's position is demonstrated by its additional proposal to subject CBL's network to ULL. CBL is not aware of a ULL obligation *ever* having been imposed on a cable television operator anywhere in the world. As SRG has offered no support whatsoever for this proposal (apart from the fact that parts of CBL's network consist of fibre elements), URCA should reject this – along with SRG's equally unsupported bitstream proposal – as unjustified and beyond the scope of the s. 116 process.

4. DIGICEL RESPONSE

Digicel's Response focuses exclusively on the Draft Guidelines for Access and Interconnection as applied to "the incumbent." There is no precedent for the imposition of a Reference Interconnection and Access Offer on cable television providers anywhere in the world, and Digicel does not appear to suggest that there is any reason for The Bahamas to deviate from the norm in this respect.

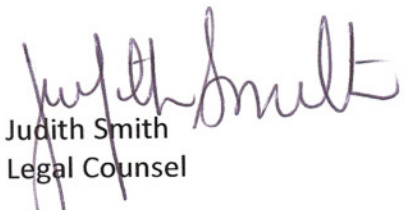
Digicel also raises issues relating to symmetric versus asymmetric mobile termination rates which, though important, are not yet ripe for consideration in The Bahamas and should therefore be the subject of a separate consultation at the appropriate time.

Digicel also proposes a number of enhancements to the dispute resolution process applicable to SMP operators, many of which CBL believes have merit but which should also be the subject of a separate consultation.

5. CONCLUSION

For all of the foregoing reasons, as well as those set forth in CBL's Response, URCA should revisit the preliminary views set out in the Consultation Document and adopt only those *ex ante* obligations that are justified on the basis of sound competition analysis, and then only if they can be implemented relatively quickly (as interim remedies) and in a way that is technically and economically feasible. CBL commits to work closely with URCA over the coming weeks to develop reasonable regulations that address any demonstrable market problems in order to satisfy the requirements of s. 116 (2) of the Comms Act.

Respectfully submitted,



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