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CONTENT REGULATION:

CODE OF PRACTICE FOR THE REGULATION OF CONTENT SERVICES AND AUDIOVISUAL MEDIA SERVICES - ECS 19/2011

**Submitted to the
Utilities Regulation and Competition Authority**

December 30, 2011

**submitted by
Cable Bahamas Ltd.**

Cable Bahamas Ltd., Caribbean Crossings Ltd. and its affiliates (hereinafter, "CBL") hereby respond to the public consultation document Content Regulation: Code of Practice for the Regulation of Content Services and Audiovisual Media Services: ECS 19/2011 issued by URCA on 9th November 2011.

I. EXECUTIVE SUMMARY

The Code is a useful tool which seeks to set standards and manages expectation for the provision of broadcasting in The Bahamas. The Code can only be applicable to audiovisual media services at this time since the necessary regulatory steps have not been taken to make it applicable to all content services. Furthermore, the Code in its present form contains numerous parts which may place providers of content services at a disadvantage and may result in unequal treatment between local providers of content services. The specific content related objectives identified as important to the development of a broadcasting sector must be pragmatic, economical and achievable by a Licensee. URCA in preparing the Code should pay careful attention to section 53 of the Communications Act ("the Comms Act") to ensure it is not extending its ambit beyond what is prescribed therein or in the Comms Act.

II. INTRODUCTION

The Comms Act affirms that electronic communications perform an essential role in promoting the economic and social welfare of The Bahamas¹. The Comms Act requires, when implementing the electronic communications policy objectives, that the guidelines should inter alia have due regard to the costs and implications of the regulatory measure and other measures on affected parties and that the regulatory and other measures shall be efficient and proportionate to their purpose². The Code is a useful tool as it seeks to set standards and manages expectations in the performance of this essential role. It is also important that standards and expectations are formulated pragmatically and measurably. It is important to appreciate the current economic, commercial and technological environment and introduce changes that are gradual and achievable. It is also important for all parties (Licensee and Regulator) to comply with the Act. CBL welcomed the opportunity to be a part of the industry working group. CBL is committed to the improvement of media/broadcasting services in The Bahamas and continuing its contribution to Bahamian society and culture.

Since 1994 CBL has provided programming that satisfies the Bahamian demand for varied and entertaining television programmes. CBL has provided local content and content from overseas not only from North America and the Caribbean, but from the United Kingdom, Europe and China. CBL provides more than 40% of its airtime on Cable 12 for free local community programming. This includes both video content and static community notices. CBL has made available to the Bahamian public free airtime on Cable 12, to broadcast sundry matters, including (to name a few) original programmes produced by CBL (Portraits),

¹ Section 4

² Section 5



programmes produced by local Bahamian entrepreneurs (ControversyTV), local educational programmes (Bahamas Learning Channel) and community announcements of events and other matters of public interest. CBL's production team has contributed to the production of more than 1500 hours of historic, educational and cultural video content. CBL has presented free live sports content for several sports association and disciplines including swimming, soccer, baseball, bowling and high school basketball. CBL has been the forerunner of coverage of family island cultural festivals including live events. Many of the ideals and objectives contained in the Code, CBL's policy already embraces. CBL accepts that there is always room for improvement and development.

III. RESERVATIONS AND EXCEPTIONS

URCA has indicated that it is minded to regulate the content provided on all content services³ (i.e. free to air broadcast and cable television). URCA has indicated the Code of Practice for the Regulation of Content Services seeks to achieve those aims as well as others⁴. CBL is concerned about the proposed application of the Code to foreign produced channels delivered by pay television providers ("overseas content"). If URCA is minded to regulate overseas content on cable television, it must apply the same to overseas content delivered by any licensed satellite operator. URCA's regulation should not put an individual licensee at an unfair disadvantage in respect of class licensee. The Code should not put a Licensee at a competitive disadvantage to non-licensees illegally operating in the Bahamas.

The Comms Act requires URCA to issue regulatory and other measures to regulate content services⁵. The Comms Act also includes a requirement to consult with a person whose rights or interests may be materially adversely affected or prejudiced by the proposed regulatory and other measure⁶. It also requires that the regulatory and other measure is published (subject to confidentiality)⁷. URCA's intention to have the Codes apply to content services is of public significance in that it would have a significant impact on CBL⁸. We are not aware of any consultation being conducted regarding the appropriateness of the Code to content services. It is our understanding that the working group's discussion on the Code related to its application to audiovisual media.

It does not appear that discussions in the working group have taken place along the line as to how the Code should be applied to overseas services. During the consultation on the process for developing Codes of Practice⁹, URCA made this statement:

³ Code of Practice for the Regulation of Content Services and Audiovisual Media Services: ECS 19/2011 page 15.

⁴ Code of Practice for the Regulation of Content Services and Audiovisual Media Services: ECS 19/2011 page 15

⁵ Section 52

⁶ Section 11(1)(b)

⁷ Section 12

⁸ Section 13

⁹ Content Regulation: Process for Developing Codes of Practice – ECS 02/2010 issued 3 February, 2010



While URCA envisages that new Codes would focus primarily on Bahamian-operated radio and TV services, ***the Working Group would need to consider how they should apply to overseas services (e.g. US television channels) that are available in the Bahamas (emphasis mine)***. The Group would need to be pragmatic about this, given that there is generally no practical means for Bahamian operators (such as Cable Bahamas) to impose any form of editorial control over programmes on overseas channels, or to be able to review programmes on those channels ahead of transmission to monitor compliance.

It would be operationally unworkable, cost prohibitive and impossible for a Licensee to apply many of the provisions of the Code to overseas content. Further the application would have to be universal and include not only cable operators but satellite operators. At the town meeting in Nassau, it was mentioned by one of the presenters, that the Code would require the Licensee to post advisories and warnings on certain overseas channels to alert viewers on certain matters. CBL displays hundreds of programmes at any given time and it is not practical for us to review programmes on these channels to see if an advisory is warranted, in fact it is not possible to view most programs in advance. Furthermore, we broadcast channels from different time zones. Additionally, we broadcast channels in English, Spanish, French, German, Chinese, Italian and Greek. Some channels carry ratings others do not. The specific content related objectives identified as important to the development of a broadcasting sector must be pragmatic and achievable by a licensee. The process in accordance with the Act needs to be adhered to in order to make the determination under section 52.

URCA further suggested that the key themes that emerges from review of content Codes around the world, ... namely that pay-TV services – such as the bundled packages offered in the Bahamas that include overseas television channels – are generally subject to lighter rules than free-to-air services, and typically make use of ratings and parental control mechanisms.¹⁰

The opportunity to explore solutions may have been jeopardized by URCA's pronouncement to regulate all content services by way of the Code. As a quasi-judicial body, URCA is expected to give parties an opportunity to be heard before it makes decision affecting the rights of a Licensee. URCA has definitively asserted that it *"intends to regulate the content provided on **all** content services"* and to achieve the aim through the Code. CBL has a legitimate expectation based on the Comms Act and the principles of natural justice, that it would have an opportunity to be heard before this decision was made. Furthermore, CBL is concerned that it may not receive a fair hearing since URCA has pronounced publicly on this matter.

¹⁰ Content Regulation: Process for Developing Codes of Practice – ECS 02/2010 p.20



For the avoidance of doubt, we agree that Cable 12 operated by CBL should be subject to the Code. However, we do not agree that the Code, as presented, can or should apply to content services.

IV. COMMENTS ON THE CODE

CBL's comments on the Code should be read in the context of its application to audiovisual services only. Our comments should not be interpreted as applying to content services. Our reservation and exceptions have been stated in Section III.

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

Answer: Section 53 of the Comms Act relates to audiovisual media services and 53(2) sets out the standards which may be included in the Code. We interpret the section as exhaustive and the restrictions on advertising in Part 6 may be outside of URCA's statutory authority.

We disagree with part 1.2(b) of the Code. We refer to Section III above. We believe the remainder of the Part is reasonable.

We agree with URCA's proposal in Part 1.4(3) refraining from regulating content on the internet. As an aside, the same logic that it is practically impossible to regulate content on the internet should also apply to the Code's approach to rebroadcast of overseas content. The logic is the same since the same overseas content on television is available on the internet. The Code's approach to overseas content should be the same whatever the means of delivery (network neutrality).

Question 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 provision be included in this Part of the Code or any removed?

Answer: CBL disagrees with URCA's proposal under part 2.4(6) requiring retention of a recording for three months if legal proceedings are contemplated. It is our submission that the retention period in this situation should be the same as in part 2.4(2). It is our contention that a complainant should be encouraged to act expeditiously to address matters and allowing three months to decide whether to proceed with litigation conveys a contrary intention. The longer retention period impacts storage capacity and increases the risk that material will be inadvertently destroyed.

CBL disagrees with URCA's proposal under part 2.4(7) permitting URCA to require a Licensee to deliver to URCA recordings it considers have sufficient historic importance for safekeeping. The provision appears to be confiscatory and contrary to intellectual property rights. We do not



believe that URCA has the statutory authority and in the event URCA considers it has the statutory authority, we contend that the taking should be subject to reasonable compensation.

Question 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?

Answer: The underlying principles for broadcasting in the Bahamas appear reasonable.

Question 4: Do you agree with URCA’s proposals in Part 4 of the draft Code of Practice regarding Law and Order, Harmful and offensive content and religious programming? If not, why not? Should any other provisions be included in this Part of the Code or any removed?

Answer: CBL refers to part 4.17. It is our submission that the Licensee should be required to provide clearly readable or audible information that there is a cost for the call or there is a cost of the text message. CBL does not believe that the requirement should be to indicate the actual costs, since in light of liberalization, the cost may vary depending on the tariff structure and network of the consumer/subscriber.

Question 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?

Answer: Subject to our response in question 1 about the ambit of section 53(2), CBL has further concerns in regards to the URCA’s proposal in part 5.7. The part makes the Licensee responsible for obtaining parental consent of a participant under the age 18 who appears in an advertisement. CBL believes that the provision is onerous on the Licensee, the advertisement may include numerous children (choir or school for example) and not an individual child. The provision is unfair because the advertisement may not be within the control of the Licensee for example the advertisement may be from abroad. It is CBL’s proposal that the onus should be placed on the person producing the advertisement. If that advertisement is being produced by the Licensee, then we concede that it is logical that the necessary consents are obtained. We further submit that the consent required should be of a minor that is featured prominently in the advertisement as opposed to in the background.

CBL has concerns regarding part 5.10(1) and submits that this is only possible for audiovisual media.

CBL submits that live broadcast should be exempt from carrying classifications as stated in part 5.10. Alternatively live sporting events should be exempt from carrying classifications.

Question 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?

Answer: CBL believes that the proposed rules under Part 6 are a vast improvement over the current Interim Code of Practice for Political Broadcast – ECS 01/2010.

CBL agrees that factual information should be clearly distinguishable from opinion or advocacy. CBL further supports the concept of accuracy, accountability and veracity in reporting. However, in achieving these goals, it is important to recognize the limitation of audience's attention and the need for the presentation to be engaging. In respect of the requirements outlined in part 6.9(2) we believe to present this information aurally during a broadcast is too much. We suggest that the Licensee's obligation (where they are the producer of the broadcast rather than only the broadcaster or re-broadcaster) is to indicate to the listeners where a copy of the survey is available (i.e. website or office location)¹¹. It is our contention that it is not necessary to prescribe that the host or participant have the survey with them during the broadcast. If the host or participant is unable to answer questions posed on the survey during the broadcast, the listener will be able to draw the appropriate conclusion.

Question 7: Do you agree with URCA's proposals in Part 7 of the draft Code of Practice regarding advertising, sponsorship and non-programming material? If not, why not? Should any other provisions be included in this Part of the Code or any removed?

Answer: URCA should consider whether parts 7.5, 7.6, 7.7, 7.9, 7.10, 7.11, 7.12, 7.13 and 7.14 are permissible under section 53 of the Comms Act. The provision seems to limit the scope of the Code. In respect of advertising the Comms Act does not invite URCA to regulate advertisements as contemplated in the distance selling and the prices and offers in advertisements (parts 7.5 and 7.6). In the event, URCA considers that it has the authority to issue Codes in respect of advertisement, CBL disagrees with URCA's proposal in part 7.6, which requires the Licensee to verify that the advertised prices are below retail prices. We suggest the removal of this part and substitute a general requirement that the Licensee keep Advertiser's name address and telephone contact on record for complaint handling purposes. We recommend that parts 7.5 and 7.6 be combined under one heading "Advertisements".

Question 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?

URCA has included in part 8.9(3) a requirement by Licensees where applicable to carry such classifications and/or advisories as are required by the Code. It is CBL's practise to insert trailers/previews in the schedule according to the rating of the film being advertised. It is

¹¹ Please see Addendum.



important to bear in mind the ratings of the trailers/previews and the movies are not under the control of the Licensee. The expectation should be that the Licensee shall make every attempt to appropriately insert trailers/previews.

Question 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?

Answer: CBL seeks clarification on part 10.1(f). It states that the purpose is to ensure that Licensees: (f) respond promptly to written complaints received by a Licensee within thirty (30) calendar days of the relevant **broadcast**.... We believe that the standard should be within thirty (30) calendar days of relevant '**complaint**'. This seems to be consistent with part 10.2.

CBL notes that URCA is seeking the Licensee's assistance in publicizing the Code. During the town meeting it was suggested that included in the requirement for on-air announcements there is also specific broadcast times. CBL believes that 360 on air announcements of the Code and the complaints procedure is excessive. We understand URCA's efforts to get the message out but what also needs to be borne in mind is that all radio and television stations will have to carry this message approximately every day conceivably for the next three years. In aggregate this is a considerable cost. We suggest that URCA produces an advertisement which is informative but engaging to publicize the Code. URCA should purchase airtime on radio and television and use available community channels to air the advertisement. URCA should also use forms of social networking (Facebook, YouTube etc..) websites of Licensees' and government ministries to publicize the Code. Alternatively, if URCA is not minded to accept our suggestion, we propose the on-air announcements should be three (3) times a week along with a requirement to post same on Licensees' website (where possible). We do not think it's appropriate for URCA to stipulate specific times of broadcast since the Licensees are bearing the cost of this advertisement and in the spirit of co-regulation. Further we suggest that included in the information on the Code and handling of complaints that references are also made to locating it on URCA's website. We also suggest that if URCA is minded to require specific times for the on-air announcements, then this should be done at URCA's expense.

CBL seeks clarification on the operation of part 10.9(13) in conjunction with part 10.2(4). Part 10.9(13) provides an option for confidentiality when a complaint is referred under the Code or by way of URCA's initiated investigation. Yet part 10.2(4) requires a complainant to disclose his/her name for it to constitute a complaint under the Code.

CBL seeks clarification of part 10.11(1) and specifically the period of retention. It is our understanding that once the complaint is satisfactorily resolved there is no longer a necessity to retain the records. However, if the complainant has utilized the complaint procedure under the Code and is not satisfied with the resolution, the Licensee is required to retain that record for 3 years from the date of its receipt. We consider that 3 years is too long and the retention period should be set in accordance with the rules of the Utilities Appeal Tribunal (UAT). In the



absence of rules by the UAT, the retention period should be three (3) months which is consistent with appeal provisions in the general law.

The Code should include in the process of referring a complaint to URCA a declaration whether or not legal action has commenced or is likely to be pursued – in which case the legal case takes precedence and that URCA will hold its duties in abeyance until the conclusion of the legal matter. If URCA is seized of the matter, and the complaint becomes the subject of legal proceedings, any party can notify URCA of this and URCA's will hold in abeyance the matter before it. A conciliation process should be included in the complaints handling procedure when a complaint is referred to URCA. It is not clear in the Code whether decisions of URCA are binding and can be used as precedents in future matters.

Question 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?

The Consultation indicates that the Interim Codes will remain in force until new Codes of Practice are published by URCA¹². CBL believes overall the Codes are an improvement over the interim codes and understands that there is considerable benefit to the consumer and the Licensee to have these implemented as soon as possible. However, CBL suggests that the Codes should have a transition period to allow Licensees to adapt their operations to the various requirements (i.e. complaint handling procedure, classifications, watershed periods, on-air announcements of code, reporting requirements etc.) The transition period should be six (6) to twelve (12) months. We recognize that the suggested transition period would mean that the provisions in the Code applicable to Political Broadcasts and Political Advertisements would not be available for the 2012 elections. In that particular instance, we would suggest that this particular provision could be brought into effect immediately. Alternatively, CBL suggests that if the Codes are brought into force immediately, then the penal aspects not be applicable for six (6) to twelve (12) months. During this period, Licensee's would be expected to adhere to the Code with forbearance on breaches or omissions during the transition period.

The Consultation does not address the application of the Code to programmes produced prior to the Code. It is CBL's suggestion that these programmes should be exempt from the Code, save and except for the watershed period. For example programmes, such as Portraits, Legends or Students of Substance, produced prior to publication of the Code should not be required to have ratings or have obtained parental consent for participants. Licensees can still be expected to broadcast such programmes in the appropriate time period.

Respectfully submitted



Judith Smith
Legal Counsel

¹² Part 1.2(6)



ADDENDUM

Cable Bahamas conducted a non-scientific study on the application of the criteria listed in part 6.9 (2) of the Code. The criteria were gauge against a story appearing in the Tribune Business Section. The article was about an Economic Crime Survey conducted by the Bahamas Chamber of Commerce and Employers Confederation¹³. A checklist was made of all the criteria listed in part 6.9(2). The article was reviewed and a marked was made against the criteria in the checklist that were satisfied. Of the 16 criteria, only 3 were satisfied.

We recognize that URCA is not proposing to regulate the print media and that the article was not about an election opinion survey. However, we think from a practical perspective and by way of analogy it makes a point which supports our contention that the criteria are too much to be part of a broadcast. If one considers that the reader of an article has a much longer attention span than a listener to a broadcast and yet most of the criteria were omitted or, if one considers that the newspaper has more space to allocate to these details than broadcast media does, but yet the criteria were omitted, it suggests these detail encumber the flow of the story making it uninteresting or convoluted.

For broadcasting to strike the balance of accuracy and validity while maintaining the attention of the audience and utilizing efficiently limited time, the survey can be posted on a website or made available at an office or on request.

¹³ \$45- \$90,000 ANNUAL LOSS FROM FRAUD by Neil Hartnell – Tribune Business Section; 22nd December, 2011.
http://www.tribune242.com/searchresults/12222011_Crime_business_Page1-4



*Table Comparing URCA's Requirements for Broadcasting to the Public
the Results of an Election Opinion Survey - based on recognized
statistical methods (Part 6.9(2))
to other Survey (source – The Tribune Business Section Thursday December 22,
2011)*

	URCA's requirements as per The Content Code		2011 – Economic Crime Survey
1.	Results of the survey	√	Loss of \$45,000 - \$90,000 per annum
2.	Name of the sponsor of the survey	√	Bahamas Chamber of Commerce and Employers Confederation (BCCEC)
3.	Address of the sponsor of the survey	x	—
4.	Name of the person or organization that conducted the survey	√	Kr Ys Global accounting firm
5.	Address of the person or organization that conducted the survey	x	—
6.	The date on which or the period during which the survey was being conducted	x	—
7.	Information about the method used to collect the data from which the survey results are derived; (i) The sampling method; (ii) The population from which the sample was drawn; (iii) The size of the initial sample (iv) The number of individuals who were asked to participate in the survey • Refused to participate and • Were ineligible to participate	 x x x x x	 — — — — —



	(v) The dates of the interviews (vi) Time of day of the interviews (vii) The method used to recalculate data to take into account in the survey the results of participants who expressed no opinion, were undecided or failed to respond to any or all of the survey questions, and (viii) Any weighting factors or normalization procedures used in deriving the results of the survey	X X X X X	— — — — —
8.	The wording of the survey questions	X	—
9.	(if applicable) The margins of error in respect of the data obtained	X	—

