CABLE BAHAMAS

CARIBBEAN CROSSINGS

RESPONSE TO URCA's POSITION PAPER ISSUED 19 MARCH 2010[1]

[1] CBL's Response Amended 16Apr10 - redacted

By E-mail & Hand

April 8, 2010

The Chief Executive Officer
Utilities Regulation & Competition Authority (URCA)
Agape House
4th Terrace Centerville
Nassau, Bahamas

Dear Mr. Symonette:

Re: Position Paper: Regarding Types of Obligations on Bahamas Telecommunications Company Ltd. and Cable Bahamas Ltd. under s. 116(3) of Communications Act, 2009 - ECS 07/2010 – issue date – 19 March 2010

Cable Bahamas Ltd. and Caribbean Crossings Ltd. (hereinafter, "CBL/CCL") hereby respond to the Position Paper issued by URCA on 19 March 2010 ("Position Paper"). The Companies' response is provided in two parts, relating to the various obligations set forth in the Position Paper that URCA proposes to apply to (1) CBL/CCL and (2) Bahamas Telecommunications Company Ltd. ("BTC").

1. PROPOSED OBLIGATIONS APPLICABLE TO CBL/CCL

URCA's Position Paper represents a considerably more realistic and proportionate approach to establishing interim SMP obligations pursuant to the transitional provisions of s. 116 of the Communications Act, 2009 ("Comms Act"). As CBL/CCL demonstrated in their submissions responding to the SMP consultation paper issued by URCA on 30 September 2009 (the "SMP Consultation Paper), URCA's preliminary views on the types of obligations that should apply to CBL/CCL seemed to be predicated on a fundamental misunderstanding of the Bahamian marketplace and the transitional requirements and objectives of s. 116.

The Position Paper proposes to eliminate some of the most costly, intrusive and impractical of the SMP obligations put forward for discussion in the SMP Consultation Paper. Nonetheless, the Position Paper continues to include several proposals that are neither required by nor justified

under the transitional provisions of s. 116. In particular, as discussed below, there is no justification for the proposed:

- SMP designation for CBL's provision of digital (premium) packages;
- SMP designation for national and international leased line services (wholesale and retail) provided by CBL/CCL; or
- the application of accounting separation requirements to CBL/CCL.

Each of these issues is addressed below. In addition, CBL requests clarification in respect of the form of price regulation to be applied to the SuperBasic package[2], resubmits its proposal in respect of untying cable television services from internet and its resale broadband offer[3].

In a separate submission to URCA, CBL/CCL will propose specific obligations under s. 116(3)(b) in respect of the accounting separation and reserves the right to submit further information on all aspects of the proposed obligation. CBL continues to believe that no other SMP designations or obligations are justified as a matter of law or policy under the Comms Act.

A. Digital (premium) packages

As CBL has previously demonstrated, there is no justification for concluding that CBL has SMP in the provision of digital (premium) packages, or for subjecting the product to the generally applicable *ex ante* obligations set forth in s. 40(4) of the Comms Act or Part G of the Individual Operating Licence. Indeed, the Position Paper acknowledges that many of the key factual assumptions underpinning URCA's preliminary views on the proposed regulatory treatment of CBL's premium digital packages were incorrect in many respects. URCA's proposed solution, in the face of this new information, has been to decline to propose any specific SMP obligations but nevertheless to retain the SMP designation.

URCA's revised proposal classifying CBL as having SMP in the provision of premium packages is legally and procedurally flawed for several reasons. First, URCA's proposal ignores the pricing constraints created by the availability of grey and black-market satellite television services. URCA is well aware that access to these services is both relatively easy and ubiquitous in The Bahamas, mainly because of the close proximity of the United States. Yet, URCA has taken no steps to investigate the extent of the provision of these services as a matter of licensing policy or for purposes of its transitional SMP assessment. URCA's failure to investigate the

[2] CBL's submission on Proposed Obligations – January 22, 2010

[3] CBL's submission of 4th March, 2010 – Additional Information further to the URCA/CBL meeting of February 22, 2010

facts is contrary to well established principles of *ex ante* SMP analysis, which must be evidence-based, and the objectives and procedures established by the provisions of the Comms Act.

The burden is not on CBL to demonstrate the existence or extent of grey and black market offerings. Rather, it is for URCA to demonstrate that CBL has a position of economic strength that allows it to price the premium packages without constraint. Moreover, URCA must rely on market forces where possible. There was never any regulation of CBL's premium digital packages prior to enactment of the Comms Act, and CBL prices have remained fairly stable since its introduction in 2005 (with only a small price increase of USD1 per month in 4 years). As CBL has explained to URCA, this pricing history is no coincidence. The fact of the matter is that CBL is constrained in its ability to increase the prices of its digital packages because of the competition it faces from grey and black market providers.

URCA has chosen to disregard the results of a 2005 survey relevant to this issue for reasons that are highly dubious. URCA has evidently made no effort to investigate for itself what the actual situation is on the ground with respect to the grey and black markets, even though it is the only organisation in a position to do so. Nearly six months have passed since URCA issued its preliminary views on the subject, and CBL considers that this should have been more than sufficient time for URCA to conduct its own investigation. That URCA has chosen not to do so raises serious legal and procedural impediments to URCA's proposal to designate CBL as having SMP in this product market.

URCA's approach with respect to CBL's premium digital package is also problematic because it is internally inconsistent with other aspects of its proposal. URCA has decided – properly so – not to designate HDTV and pay-per-view packages as being characterised by SMP. URCA has done so on the basis of a checklist comparing the television services provided by Satellite Bahamas, which URCA concluded constitute an adequate substitute. URCA should have used the same checklist (see page 89 & 94 of the SMP Consultation Paper)[4] when it considered CBL's premium digital packages, including the impact of grey and black market providers. Had it followed this approach, URCA would have to excluded the premium packages from the SMP designation as well.

The fundamental concerns inherent in URCA's proposed approach to this market are highlighted by URCA's mischaracterisation of its proposed SMP designation as a "Do Nothing" option (at page 74). In fact, the proposed SMP designation carries with it significant general obligations under S. 40(4) of the Comms Act and Part G of the Individual Operating Licence. It also gives rise to a proposed accounting separation obligation, which is one of the most onerous and costly SMP obligations that can be imposed. URCA's "Do Nothing" characterisation therefore is

[4] Preliminary Determination Types of Obligations on Cable Bahamas Company Ltd. under s. 116(3) of the Communications Act, 2009 issue date 30 September 2009.

evidence of a failure to grasp how serious and disproportionate an SMP designation is under the circumstances, even if no specific pricing regulations are imposed. The "Do Nothing" Option that URCA should adopt for this product is to maintain the status quo, *i.e.*, no SMP designation and no regulation of any kind.

Nowhere does the Position Paper discuss what an SMP designation would mean in this context and, more specifically, how the general requirements of s. 40(4) of the Comms Act or the licence would apply to premium digital services. CBL submits that none of these general obligations is relevant to CBL's premium services and, as such, they are totally unsuitable. URCA has ample powers under the Comms Act to take action against CBL for any abuse of a dominant position that URCA may wish to remedy in this market. Moreover, URCA has the authority to open up a full market review with respect to this market at any time.

In sum, there is no basis upon which URCA can reasonably or lawfully designate CBL as having SMP in the provision of premium digital packages under the transitional provisions of s. 116. Moreover, application of the s. 40(4) obligations and SMP licence conditions to CBL for this purpose would be inappropriate, counterproductive and disproportionate. URCA's final SMP decision should therefore treat CBL's premium digital packages the same as CBL's HDTV and pay-per-view packages by declining to subject any of them to an SMP designation.

B. National/International Leased Lines and Backhaul/Transmission Access

For similar reasons, URCA should decline to designate CBL/CCL as having SMP in the provision of national/international leased lines (retail or wholesale markets). There is no evidentiary basis upon which URCA can reasonably conclude that there is ineffective competition in, or insufficient capacity to supply, these markets. Indeed, URCA's own analysis demonstrates that evidence of capacity or pricing problems is inconclusive.

URCA's approach to analysing these markets is flawed, principally because the competitive assessment has been conducted in silos, with a finding of individual SMP in the same market for each of BTC and CBL/CCL. From a competition standpoint, designating two operations as having SMP in the very same market is an impossible outcome absent a finding of joint or collective dominance. URCA has not even suggested that joint dominance may be an issue, nor has it attempted to evaluate whether such a condition exists in accordance with well established principles of competition law and economics. The Companies are confident that no such finding could reasonably be made on the basis of the evidence at hand.

Comparisons of the competitive situation that prevails in The Bahamas in respect of these markets demonstrates that for an archipelago, the country benefits from a surprisingly high amount of leased line capacity, redundancy and independence amongst the three network

operators serving the islands. URCA has produced no evidence or studies that would demonstrate any real or material competition concerns, and the issues it has identified as potential "market failures" in this regard are purely speculative, without any focused analysis.

Finally, as is the case with CBL's premium digital packages, URCA appears to believe that an SMP designation is a "Do Nothing" option so long as no specific SMP obligations are imposed, apart from accounting separation. Again, this suggests that URCA has failed to conduct a proper cost-benefit analysis. An SMP designation is a serious matter with significant cost and other implications. An SMP designation cannot lawfully be adopted without clear evidence of market dominance, unless otherwise stipulated by law. Nothing whatsoever in s. 116 of the Comms Act compels a presumption of SMP in these markets.

An SMP determination in respect of leased lines would in any event be counterproductive for several reasons. An SMP designation automatically triggers a non-discrimination obligation. In a competitive market, such a restraint can work to the detriment of consumers and competition by creating a chilling effect on innovation and product development. Moreover, a non-discrimination obligation and the other general SMP requirements can have unintended consequences that URCA should fully consider and address before such a serious regulatory step is taken.

Furthermore, as previously explained by CBL in its submissions to URCA, there could be repercussions for CBL from a US regulatory standpoint if an SMP designation is made in respect of CBL's Bahamian operations. Yet URCA appears not to have grasped the international implications of its proposed designations. At a minimum, URCA should advise CBL/CCL of the details of its findings in response to the significant issues that have been raised by the Companies in this regard.

URCA has failed to provide the necessary evidence to support an SMP designation for these markets, and it also has failed to conduct a proper cost-benefit analysis of the regulatory implications of its proposal. Because URCA cannot reasonably or lawfully designate the Companies as having SMP in these markets pursuant to s.116 of the Act, URCA should remove these markets from the final SMP designation.

C. Accounting Separation

URCA's position paper fails to make a legally sustainable case for the imposition of detailed cost accounting rules on CBL/CCL. The Companies will not here repeat the basis for their position in this respect, which is a matter of record. Without prejudice to their position, the Companies have made clear that they are amenable to discussing the voluntary implementation of a high-level reporting approach with URCA. However, there is no basis for applying the same degree

of cost separation to a cable television operator as has traditionally been applied to PSTN operators in other countries (and as should appropriately apply to BTC, which holds an entrenched position of dominance in the fixed voice market and a legally protected monopoly in the provision of mobile services).

The Companies are confident that any reviewing body would conclude that URCA lacks an evidentiary as well as a legal basis for imposing detailed accounting separation obligations on them pursuant to s. 116 of the Comms Act. The proposed accounting separation measures are anything but "transitional" in nature in their application to a cable television operator. Moreover, as the Companies have demonstrated, imposing accounting separation obligations on stand-alone cable television operators is virtually unprecedented worldwide. Such obligations are amongst the most burdensome and intrusive remedies that can be imposed on the basis of an SMP finding, and they are by no means routinely adopted, as URCA appears to believe. In light of the revised conclusions with respect to CBL/CCL that are set forth in the Position Paper, an accounting separation requirement would be completely disproportionate under the circumstances.

D. "Rules-based price regulation" for CBL's SuperBasic package

The Position Paper concludes that, in light of current market conditions, it would be appropriate to apply a form of price regulation to CBL's SuperBasic package. CBL does not oppose this proposal in principle. However, URCA should make clear in its final decision that the type of price regulation and the procedures relating to same will be purpose-built for the particular services at issue, and that they will not simply be subjected to telco-style price regulation.

CBL has proposed a procedural framework for this purpose, which URCA has not addressed. We therefore attach it once again to this submission as Annex A. We request that URCA explicitly address the need for a purpose-built solution for price regulation of CBL's SuperBasic package in accordance with the objectives and requirements of the Comms Act, and that it adopt the procedures set forth in Annex A.

E. Conclusion

Following the letter and the spirit of s. 116 of the Comms Act, URCA should conclude that there is no basis for making an interim SMP designation in respect of CBL's provision of premium digital programming packages or the Companies' provision of national/international leased lines (wholesale or retail). Moreover, URCA's final decision should make clear that there is no basis for imposing telco-style accounting separation rules on a cable television company. As an adjunct to the submissions and proposed obligations, CBL is concern about the ambiguity in terms of what constitutes compliance. CBL will be grateful to obtain URCA's views in relations to same.

2. OBLIGATIONS APPLICABLE TO BTC

CBL is of the view that it will be necessary for URCA to revisit many of the decisions set out in, and numerous issues left unaddressed by the Position Paper in respect of BTC's SMP obligations.

We look forward to developing a good working relationship with BTC as an interconnected carrier and as a potential supplier of wholesale access and ancillary services as we prepare to enter the fixed voice market. However, until CBL is actually allowed to compete with BTC in the provision of fixed voice services, it is difficult to assess whether any additional SMP concerns will manifest themselves. CBL reserves the right to request URCA, as a matter of urgency, to initiate targeted market reviews or abuse of dominance adjudications relating to BTC's provision of wholesale access and interconnection in respect of voice services as and when actual experience in the market demonstrates that there is a market failure. In such cases, CBL anticipates that URCA will use all of the regulatory tools available to it in order to achieve a swift and effective solution to the problem.

A. Definition of "ancillary services" and "enabling products"

One of the principal areas in which competitive voice operators like CBL will require access inputs from BTC in order to be able to compete fairly and effectively is in the provision of access and interconnect products, including "ancillary services" and "enabling products." In the original SMP consultation concerning BTC's obligations, URCA's proposal in this regard was somewhat ambiguous as to whether BTC's RAIO would have to include co-location and facility or infrastructure sharing, among other components. This was pointed out in CBL/CCL's Response of 18 December 2009 to URCA's Preliminary Determination on BTC's SMP obligations (pages 8-9).

URCA's Position Paper has not resolved this ambiguity, which refers (at page 121-22) to "ancillary products" and "enabling products" and notes that the latter "include joining circuits,

points of interconnection and data management amendments." URCA's final decision on BTC's SMP obligations should clarify that the RAIO must include reasonable co-location and facility sharing arrangements, even if the details are left to further negotiation. Otherwise, BTC will be under no obligation to ensure that it maintains reasonable space in its facilities for this purpose, and the future prospects for imposing workable obligations involving access to BTC's space for co-location or other forms of facility sharing will be greatly diminished.

B. Directory Services

One issue of considerable concern to CBL relates to BTC's provision of "wholesale directory enquiry and ancillary services." In particular, it is unclear whether the services that are deemed to fall within this SMP designation and must be included in BTC's RAIO will cover the provision of directory information covering the customers of third parties like CBL. It also remains unclear to what extent CBL and other competitive operators will be able to ensure that their customers are not disadvantaged in this respect (for example, by requiring BTC to make its directory information available to third parties so that they can produce their own on-line directories or printed guides). URCA's final decision should be as specific as possible in these respects and should take into consideration the substantial information gap and asymmetry from which BTC will be able to benefit – and continue to dominate the marketplace – for years to come, in the absence of regulatory intervention.

C. Implementation of Number Portability to support competition in fixed voice markets

An additional concern is the apparent lack of urgency with which URCA is approaching the implementation of number portability (at least according the timetable set forth in URCA's draft Three-Year Strategy and Annual Plan). Efficient and effective implementation of number portability between fixed voice operators should be dealt with as a matter of urgency, and an interim solution should be identified and imposed as soon as possible to help speed up customers' ability to switch between fixed voice providers. In addition, rules relating to win-back and other commercial practices will need to be developed and enforced against BTC.

Number portability has proven to be a critical component in virtually every country for the development of effective and sustainable competition in the fixed voice market, and there are well tested models and regulatory templates from which URCA can choose. It need not reinvent the wheel. CBL recognises that Number Portability is not strictly an SMP obligation (in technical respects) because of its symmetrical application. However, a clear signal from URCA on the timing of the number portability consultation and implementation of a transitional arrangement should be provided in the final decision as a vital adjunct to the implementation of

BTC's SMP obligations. Furthermore, BTC's entry into any new lines of business should be contingent on it agreeing and implementing a workable interim approach.

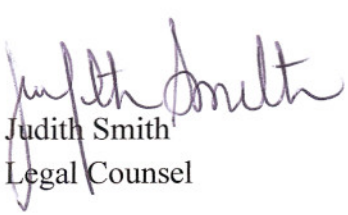
D. Wholesale Mobile Access

Finally, CBL disagrees with URCA's apparent conclusion that it would be contrary to the Government's Policy to mandate wholesale access obligations in respect of BTC's mobile voice and data services. To the contrary, CBL believes that it is quite clear that the limitations set forth in the Government's policy relate to the award of additional licences for GSM services only. This means that URCA can move forward with the development of a plan and process for the award of spectrum licences for the provision of WiMax services (fixed and mobile). It also means that URCA can impose wholesale obligations on BTC to allow other operators to become Mobile Virtual Network Operators ("MVNO") or resellers. Alternatively, URCA may opt to exercise its *ex post* competition powers by finding that BTC has abused a position of dominance if BTC declines to negotiate reasonable MVNO arrangements with its competitors in good faith.

In the absence of reasonable resale obligations applicable to BTC's mobile offerings, the overarching objectives of the Communications Act would be severely undermined, since in that circumstance, only BTC would be in a position to provide customers with the full suite of fixed and mobile services on a "one stop shop" basis or as part of an integrated package. This would be both anticompetitive but also anti-innovation and anti-consumer. At a minimum, if reasonable MVNO or reseller provisions are not imposed by URCA or voluntarily offered by BTC, URCA should explicitly adopt an SMP measure preventing BTC from offering any mobile voice or data services, including fixed-to-mobile services, as part of a package or bundle involving any of its other services, pending full liberalisation of the mobile market.

We remain at your disposal to answer any questions that URCA may have covering this response.

Sincerely yours,



Judith Smith
Legal Counsel

/jms

Attachments

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.