



**RESPONSE OF CABLE BAHAMAS LTD AND
CARIBBEAN CROSSINGS LTD**

TO

***URCA'S DRAFT THREE YEAR STRATEGY &
ANNUAL PLAN FOR 2009-2010
(ECS25/2009)***

February 15, 2010

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1. INTRODUCTION

Cable Bahamas Ltd. ("CBL") and Caribbean Crossings Ltd. (collectively, "the Companies") hereby respond to the draft Three Year Strategy and Annual Plan for 2009-2010 (the "Draft") that was published by URCA for consultation on December 30, 2010. The Companies welcome the opportunity to comment on the Draft.

As a preliminary matter, the Companies wish to reaffirm their strong support for the establishment of an independent regulator that is administered by an experienced team of executives and staff, subject to Board supervision following the policies set by the Government. However, independence brings with it a special responsibility on URCA's part to ensure that its operations are efficient and its programmes properly prioritised and timed (where subject to URCA's discretion), with due consideration being given to the cost burden on those industry participants that are responsible for URCA's funding. This is particularly important at a time of deep global economic recession and severe financial challenges for The Bahamas and the electronic communications sector.

Because of the unusually broad degree of discretion that the URCA Act bestows on the Authority in relation to the setting of its budget, it is incumbent upon URCA to ensure that its operations and programmes are justified as a matter of need and priority in the relevant planning period. Thus, for example, measures that have already been identified by the Government as implementation priorities – such as fixed number portability – should be at the top of URCA's list rather than relegated (as proposed) to further consultation beginning at the end of 2010.

URCA also should ensure that its activities are carried out as efficiently as possible. Moreover, URCA's proposed plan, budget and annual reports should be sufficiently detailed to enable interested third parties to carry out a meaningful evaluation.

The Companies recognise that this is URCA's first-ever proposed plan and budget, and that URCA has formally been in operation for only little over half a year. Nevertheless, the dramatic increase in URCA's projected budget (more than 75 percent over that of its predecessor's) is cause for serious concern, as the funding of this expanded budget will represent a substantial cost burden for the Companies and other URCA fee-payers. We hope that the comments below will help contribute to

URCA's effectiveness as a regulator while at the same time prompting a commitment from URCA to reduce the size of its proposed budget (and the consequent fee burden on industry) so as to better reflect the size and circumstances of The Bahamas and the prevailing economic conditions affecting the sector.

2. URCA'S PROPOSED PLAN

2.1 *URCA's priorities should reflect the main objectives established by the Communications Act and the Government Policy.*

Section 4 of the Draft sets out URCA's proposed priorities and annual plan for 2009/10. URCA's strategic priorities are identified and listed as follows:

1. Implementing Regulatory Safeguards
2. Promoting Competition
3. Consumer Protection
4. Public Interest
5. Institutional Capacity Building.

URCA's proposed list raises several concerns. One is the order in which URCA has chosen to list its strategic priorities (*i.e.* Regulation before all else). Another concern is the omission of two key priorities which are listed first amongst the "main objectives" set forth in section 4(a) of the Communications Act, 2009 ("Comms Act"): *i.e.* (i) enhancing the efficiency of the sector (including that of the regulatory authority), and (ii) promoting investment and innovation in the sector. The statutory objective of "optimising the use of radio spectrum" (Comms Act, s. 4(a)(iv)) is also missing from URCA's list of priorities and is instead subsumed as an activity under "Promoting Competition."

The Companies recognise that the order in which the strategic priorities are listed in the Draft may not necessarily reflect their level of importance. Nonetheless, URCA's first Annual Plan and Budget should send out the right signals without any ambiguity. The Companies believe that URCA's first priority should be the promotion of efficiency and investment in the sector for the benefit of consumers. Development of

a clear plan for the release and liberalisation of available spectrum should be a top priority in this area, as should the resolution of Universal Service requirements and funding issues. URCA also should focus on finding ways to foster investment in new technologies, platforms and infrastructure that will expand the substantial inter-modal competition that already exists in The Bahamas. These objectives and associated activities should feature at the top of URCA's list.¹

URCA has chosen to make "Implementing Regulatory Safeguards" a strategic priority and, as already noted, has placed it at the top of the list. However, regulation for regulation's sake is not an objective set by the Communications Act or the Government's Policy for the sector. In the Companies' view, regulation should not be one of URCA's strategic priorities but, rather, a power that URCA can exercise where necessary to achieve those priorities.

Both the Communications Act and the Government's Policy call for regulation only where market forces are unlikely to achieve the objectives of the new framework. In such cases, the mandate is that light-touch regulation should be applied where possible.² The Companies respectfully submit that "Regulation" should therefore be removed as a strategic priority *per se*. Any regulatory activities listed in the Draft – which can be justified in terms of URCA's efficiency, investment and sustainable competition objectives – should be included under the appropriate strategic priorities.

The Companies believe that URCA's strategic priorities should therefore be as follows:

1. Promoting efficiency of the sector (including URCA's own) and investment, including optimised spectrum use
2. Promoting sustainable competition
3. Consumer protection
4. Public interest

¹ For a more complete discussion of the importance to the sector and consumers of promoting platform-based infrastructure competition, see Response of CBL and CCL to URCA's preliminary Determination on Types of Obligations on CBL under s.116 (3) Comms Act (ECS 19/2009) (hereinafter, "SMP Response"), at pp. 10-15.

² See Comms Act, s. 5(b); Government Policy at para. 24.

5. Institutional capacity building.

Regardless of how regulatory implementation is classified, it is important for URCA to properly articulate the methods which it aims to follow when implementing regulatory safeguards.³ The relevant issues have been discussed in detail in the Companies' submissions in the interim SMP consultation. Of particular concern with regard to the Draft is its failure to mention the foundational step in determining whether *ex ante* regulation is justified, *i.e.* whether and to what extent there is a current or expected market failure in the provision of electronic communications services *at the retail level*.⁴ Where there is clear evidence of a market failure at the retail level, then it is appropriate to assess whether there are efficient and proportionate remedies at the wholesale level that will alleviate the concern.

The Draft, however, appears to identify as a stand-alone principle the goal of "ensuring the availability of appropriate wholesale products"⁵ on the sole basis that a particular network component may be difficult to replicate. This runs counter to well established principles of competition economics. Assessment of the need for wholesale obligations is only triggered if there is clear evidence that effective competition in the downstream market(s) does not exist and will not develop in the absence of regulation at the wholesale level. This should be clarified in the final document.

Another concern raised by the Draft is the lengthy list of consultations that are proposed under the various priorities. Many of these appear to prejudge the outcome of a full market review process which, according to URCA's proposed plan, will not be completed until late 2011 (the timing of which also is cause for concern). Moreover, the breadth of URCA's work plan does not appear to have taken into account the inability of industry stakeholders to participate in all of these initiatives in a meaningful way as a result of "process overload." This burden (including both time and cost factors) and the potentially counterproductive effects of process overload should be considered when developing URCA's final plan.

³ See Draft at p. 11.

⁴ SMP Response, Annex 2 at p. 13.

⁵ See Draft at p. 11, third bullet point.

The Companies urge URCA to reconsider the timing of the full market review process, which should be a top priority and placed on a faster track than that proposed in the Draft (consultation to commence Q4 2010). Section 116(8) of the Comms Act requires URCA to conduct full market reviews "as soon as possible after the Act comes into effect." URCA should therefore proceed apace to consult on the methodology and criteria that it will apply in accordance with section 39 of the Comms Act. Moreover, URCA should prioritise those markets that require immediate review rather than attempt to cover all markets at once. This process can be conducted on a rolling basis, with review of the priority markets commencing no later than the third quarter of 2010. The identification of priority markets should be addressed as part of the consultation on the methodology and criteria for defining relevant markets and assessing market power.

The Companies also request URCA to clarify what is meant by the proposed consultation on "access and infrastructure sharing," which is scheduled to commence in the third quarter of 2010.⁶ If this is meant to promote the sharing of antennae and sites for base stations or the coordination of civil works, the consultation may be useful if the existing procedures are inadequate. However, it would be completely unreasonable and an unnecessary diversion of URCA's resources to conduct a consultation on issues like unbundled local loop or similarly complex wholesale access obligations prior to completing a full market review.

Of far greater importance to promoting competition and eliminating entry barriers, as well as ensuring customer choice, is the implementation of number portability for fixed services. The Companies believe that progress on this critical issue is achievable in the near term and should be one of URCA's top priorities. Considerable work has already been accomplished in this area over the past year. A consultation paper issued by the BTC Privatisation Committee on behalf of the Government at the end of 2008 proposed to introduce ~~number portability~~ for fixed communications "as soon as practicably possible."⁷ In the consultation response that was issued in March 2009, the following position on number portability was confirmed:

⁶ Draft at p. 13, sixth bullet point, and p. 14, third item under "Description of Output."

⁷ Consultation Paper on the Issues and Options for Reform of the Regulatory Framework for the Communications Sector, at p. 10 (Dec. 5, 2008).

*"The Government is pleased that there is broad acceptance for the implementation of number portability. URCA will be holding a separate consultation and operator workshops on number portability which will address the issues raised by the stakeholders in the Framework Consultation. The Government will introduce number portability for fixed line communications as a matter of priority."*⁸

In light of the priority status that the Government has accorded number portability implementation and the relatively limited set of issues that remain to be addressed, it is disappointing that the Draft proposes to delay further consultation on this important issue until the fourth quarter of 2010.⁹ The Companies urge URCA to revisit the proposed timetable with the goal of having a permanent or interim solution in place no later than the end of the third quarter of 2010.

Finally, the Companies strongly urge URCA to include as a major initiative within its monitoring, enforcement and investigation activities the detection and control of electronic communications services that are being provided in The Bahamas unlawfully without a proper licence. Voice, video and satellite services can and should be provided lawfully on a licensed basis under the new regulatory framework that is now in place. Appropriate compliance measures should therefore be taken to protect consumers in the marketplace and ensure a level playing field for existing licensed providers and potential entrants.

2.2 *URCA should make efficient operation a strategic priority and should measure its performance in achieving this objective.*

As noted above, enhancing the efficiency of the electronic communications sector is the first policy objective listed in section 4(a) of the Comms Act. URCA is an important part of the sector and, as such, its own operations should be as efficient as possible. This efficiency objective is also inherent in subsections 5(b)(ii) & (c) of the Comms Act, which require URCA to have due regard to the costs and implications of regulatory measures on affected parties and to ensure that its regulatory measures are

⁸ Framework Consultation Response, at para. 57 (Mar. 19, 2009).

⁹ See Draft at p. 14.

efficient. It goes without saying that such measures include (though they certainly are not limited to) the fees that URCA assesses to cover the cost of its own operations, programmes and activities.

Accordingly, the Companies believe that efficient administration should be a core focus of URCA's vision, mission statement and values, and should feature prominently as an element of URCA's strategic policies and self-evaluation process (*i.e.* evaluating efficiency as well as effectiveness). The Companies note that URCA's proposed mission statement includes the goal of managing URCA's resources efficiently so as to minimise the cost of regulation on industry. That is a good start, but the efficiency objective needs to be integrated into all aspects of URCA's priorities and functions.

This is not a hypothetical concern. As noted above, URCA's proposed budget represents a 75 percent increase over that of its predecessor. However, no consideration appears to have been given to evaluating whether any cost savings could be found in the PUC's baseline budget. Furthermore, the substantial increase that is being proposed over and above the PUC's budget is nowhere explained in any detail, let alone justified. To make matters worse, the budget shows an overall increase of nearly 2% (comparing the 12 month to the 16 month totals), which suggests a continuous upward trend.

The proposed budget increase (particularly coming as it does alongside the substantial increase in licence fees payable to the Government) will impose a major burden on those industry participants that are obligated to cover URCA's costs through payment of the URCA fee.¹⁰ The failure of the proposed plan to provide any concrete justification for such a sharp increase in fees (or for the upfront payment requirement) is particularly worrying given the scant attention paid in the Draft to the need for efficient operations or any plan for reductions in budget. At a minimum, URCA should provide the industry with clear visibility into the principal reasons proposed for the budget increase and its plans for reining in costs in future years.

¹⁰ A further concern is raised by the fact that URCA has decided to require full payment of the substantially increased fees for an initial *16-month* period upfront.

Ensuring that URCA receives good value for money is an important element of the efficiency objective. URCA is apparently required to follow an "open and transparent competitive selection procedure" only in the case of appointing the executive members of the Board.¹¹ Because URCA is a public authority under section 3(1) of the URCA Act, the Companies respectfully urge URCA to implement procedures similar to those prescribed for government agencies by the Tenders Board, even if URCA is not legally obligated to do so. This is particularly important in light of the fact that URCA sets its own budget with relatively little external oversight. The final document should detail the procedures that URCA will employ and the steps it will take to ensure that it derives the best value for money when it acquires goods and services from third parties.

3. URCA'S PROPOSED BUDGET

3.1 *The Board must ensure that URCA's plan and budget are reasonable and justified.*

Under the new regulatory framework (URCA Act, s. 41) and the Government's Policy (para. 25), URCA is accountable for its own budget. This is in contrast to URCA's predecessor, whose accounts were required to be submitted to the Minister of Finance and laid before Parliament.

As noted above, URCA is in a unique position in this regard, as compared to the practice in other countries. For example, in the United Kingdom, the converged sector regulator, Ofcom, is required by statute to submit its annual report and accounts to the UK Parliament, through the responsible Secretaries of State, and is subject to inspection by the National Audit Office and the Public Accounts Committee of the Parliament. Ofcom may be required to give evidence to the Select Committees of Parliament and to the Parliamentary Audit Committee. Moreover, Ofcom must operate within an overall financial cap agreed with the Treasury.¹² Since its creation in 2004, Ofcom has reduced its budget in real terms in each consecutive year, having achieved a total reduction of 21 percent through 2008/09.¹³

¹¹ Comms Act, s. 23(2) & s. 28.

¹² See, e.g. ICT Regulation Toolkit, Case Study, Converged Regulator: Ofcom [6.1.1], www.ictregulationtoolkit.org/en/PracticeNote.2030.html

¹³ See Ofcom Annual Report 2008-09, Financial Performance: http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0809/perform/

In URCA's case, the Board is responsible for approving URCA's budget and accounts subject to limited Ministerial oversight (*i.e.* approval of the non-executive Board members' compensation, and consultation on staff salaries, which in combination make up around 40% of URCA's total budget). URCA's accounts are subject to audit by an independent auditing firm selected by the Audit Committee of the Board and approved by the Minister.¹⁴ In light of this comparatively limited degree of oversight, URCA's Board of Directors bears a heavy responsibility to ensure that URCA's plan and budget are reasonable and justified, giving due consideration to the prioritisation of URCA's activities and programmes, but also to:

- the cost impact of URCA's budget on those who are required to fund its operators,
- economic and financial forecasts for The Bahamas and the sector, and
- satisfactory implementation of efficiency measures and procedures by URCA.

The final plan should provide clear and specific information on URCA's governance structure and procedures as they relate to the planning, budgeting and audit processes.

3.2 ***URCA's proposed budget should be far more transparent.***

The Draft states that URCA's proposed budget is "substantially different" from its predecessor's and notes that, whereas the PUC's 13-month budget for the period 1 July 2008 to 31 July 2009 was just over B\$3 million, URCA's proposed budget is around B\$5.2 million for a similar 13-month period.¹⁵ The Companies recognise that URCA will have some responsibilities that the PUC did not carry out (for example, *ex post* competition enforcement and broadcasting). However, there apparently are also functions which URCA will not undertake that the PUC previously covered.¹⁶ All of these changes in responsibilities from the PUC to URCA should be identified and their net impact assessed.

¹⁴ URCA Act, s. 39(4)(b).

¹⁵ Draft at p. 22.

¹⁶ See also *supra* footnote 10.

For example, the Draft (at page 23) mentions that there has been a change in the licensing process and payment of fees applicable to maritime radio licences. However, the net impact of this change on URCA's budget is unclear. According to URCA's Guidance on Transition to the New Licensing Regime (ECS 14/2009):

"[C]ertain equipment and equipment operators, such as marine radio telephone operators and aeronautical telephone operators, which were licensed under the Telecommunications Act will no longer be licensed under the Comms Act. Such operators are not providing an electronic communications service contemplated under the Comms Act. Therefore, URCA has no statutory jurisdiction to licence these operators."¹⁷

It is not obvious to what extent the PUC was actually involved in the licensing of these activities, whether URCA will be involved in these activities going forward and if so, whether it will require substantial resources for carrying out these activities. It is also not clear how the costs will be allocated and by whom they will be paid.¹⁸

The impact of the proposed budget increase on industry participants that are subject to the payment of URCA fees may also be affected by the reclassification of certain previously licensed activities as either licence-exempt or subject to un-registered class licences under the new framework.¹⁹ It is unclear from the Draft what the net effect of these changes will be, *i.e.* how much revenue these licensing activities previously generated for the PUC, the associated costs of administration, and the net effect of deregulation on staffing and other costs going forward. The Companies would be surprised if the impact is non-trivial.

Finally, and of greatest concern, is the very limited amount of detail that is contained in URCA's proposed budget, which covers barely half a page.²⁰ A number of explanatory notes accompany the skeletal budget but, as noted above, these raise as

¹⁷ Guidance on Transition to the New Licensing Regime under the Communications Act, 2009 (ECS 14/2009) at p. 4: <http://www.urcabahamas.bs/download/042290400.pdf>

¹⁸ The Comms Act, s.92(2), provides that URCA's fees must be set on an "objective, non-discriminatory, transparent and proportionate basis." The fees paid should therefore bear some relationship to the type of licence issued.

¹⁹ See Draft at p. 23, bullet points 4 & 5.

²⁰ Draft at p. 21.

many questions as they answer and are not adequate for a meaningful evaluation. The Companies therefore urge URCA to provide interested third parties with an opportunity to comment on a more detailed budget that would include, at a minimum, the following information:

- A line-by-line comparison to the PUC budget for the period 1 July 2008 – 31 July 2009, with a detailed explanation of any significant variations;
- With respect to compensation:
 - Disaggregation of compensation categories for Non-Executive, Executive and staff;
 - Publication of the full compensation packages for each Board Member (executive and non-executive);
 - Specification of other staff headcount numbers per department or major function, comparing PUC to URCA figures; and
 - Basis for determining compensation levels, increases, etc.;
- Detail on capital budget and depreciation expenses (types of equipment, depreciation schedules, etc.);
- Detail on rent and utilities (which appear to be increasing substantially over time);
- Detail on key expenditures for services (which represent about 33 percent of the total budget), including contracted versus projected expenses and a statement of procedures that URCA follows in procuring these services;
- Separation of “consumer education” from “consultations” into discrete line items since these are for the most part distinct types of activities, and clarification as to what types of costs these items cover that are not already caught by other categories (*e.g.* staff compensation, services, office services, etc.);

- Separation of costs according to major categories such as Individual Operating Licences, Class Licences, Radionavigation and Aeronautical Radio Licences (if applicable), other spectrum licences, and broadcasting;
- Projected revenues separated as above (and from any other sources, including loans, etc.)
- Some detail as to the types and levels of internal controls that will be in place to ensure fiscal prudence (specifically, the “checks and balances” relating to initiation and payment of expenses and to ensure efficient and transparent bidding procedures where applicable).

The Companies respectfully submit that this level of detail (and more) is normally provided by independent regulators in other countries, such as the United Kingdom, where the regulatory bodies are subject to a far greater degree of external government oversight than URCA. Full transparency is therefore of particular importance to ensuring fiscal responsibility and accountability under the framework established by the URCA Act.

4. **COMMENTS ON URCA'S "INDUSTRY OVERVIEW"**

As part of the introductory section, the Draft contains an "Industry Overview" (section 1.3). This is not strictly required by section 41 of the URCA Act but, in principle, such an overview may provide helpful background for setting URCA's priorities for the relevant period. However, it is not obvious what conclusions URCA wishes the reader to draw from the overview contained in the Draft. If URCA decides to include an Industry Overview in the final plan, the document should contain an accurate and evidence-based description of the relevant facts and circumstances.

Thus, for example, the overview should avoid making references to unsubstantiated claims, such as the Draft's reference to "anecdotal evidence" of customer dissatisfaction.²¹ Moreover, there should be no inference, as might be implied by the

²¹ Draft at p. 5.

somewhat ambiguous commentary contained in the Draft, that regulatory intervention is what is needed to improve the rate of broadband take-up.²²

On the contrary, there is strong and growing platform competition in the provision of broadband services in The Bahamas today, and these market forces will intensify as the sector is further liberalised. According to the comparative broadband penetration rates per 100 inhabitants that are depicted in Figure 1 of the Draft (at page 5), The Bahamas ranked sixth out of 19 countries in the region in 2008, following Barbados, Bermuda, Canada, the USA and Aruba. Although the overall accuracy of these figures may be open to question,²³ they nonetheless paint a positive picture of the progress that has been made in The Bahamas in terms of broadband take-up. In accordance with the Comms Act and the government's policy, market forces should continue to be relied upon as the broadband market develops.

It is worth noting that The Bahamas has a much lower GDP per capita than the United States and Canada but faces many of the same types of challenges associated by high population dispersion and the proportion of remote service areas. Yes, The Bahamas places relatively well compared to its much larger neighbours. Moreover, the three Caribbean islands that reportedly have higher penetration rates than The Bahamas – Aruba, Bermuda and Barbados – all have the benefit of being single-island countries rather than an archipelago.

The Companies believe that customers are by and large satisfied with the broadband offerings and services that are provided by CBL. If, as the Industry Overview section suggests, URCA intends to conduct any customer surveys during the coming year,²⁴ URCA should focus on identifying demand-side factors that may be impeding further broadband take-up in The Bahamas. Experience elsewhere has shown that these factors, as much as anything, can account for stagnated broadband penetration beyond a certain level. Such factors can include, for example, unemployment, low

²² Recent efforts in the United States to establish a correlation between the presence of "open access regulation" and the level of broadband penetration have been discredited as fundamentally flawed. See, e.g., Comments of the National Cable & Telecommunications Ass'n on NBP Public Notice No. 13, GN Docket NO. 09-51 (Nov. 16, 2009); PHOENIX CENTER PERSPECTIVES No. 09-05: George S. Ford, *Whoops! Berkman Study Shows "Open Access" Reduces Broadband Consumption* (Nov. 12, 2009): <http://www.phoenix-center.org/perspectives/Perspective09-05Final.pdf>

²³ The figures were obtained by URCA from local and ITU sources, but there is some basis for scepticism as to their accuracy. For example, the 65% penetration figure for The Barbados seems improbable since this would suggest that there is more than one broadband connection per household for most families.

²⁴ Draft at pp. 5 & 15.

penetration of computers, computer literacy, age-related issues, and disability-related issues.²⁵ A study of the impact of these factors on broadband take-up in The Bahamas, and solutions for addressing them, would be welcome.

5. CONCLUSIONS AND NEXT STEPS

The Companies respectfully submit that the proposed plan and budget raise a number of important questions that require further consideration. In particular, the following information would be helpful:

- Basis for URCA's decisions on the timing of major initiatives, and an explanation of how the various elements of URCA's workplan interrelate as dependencies and in terms of timing
- Budget and revenue details as proposed in Section 3.2 above
- Information about future reductions in budget and fees
- A detailed description of URCA's governance structure and systems
- A description of URCA's procurement procedures.

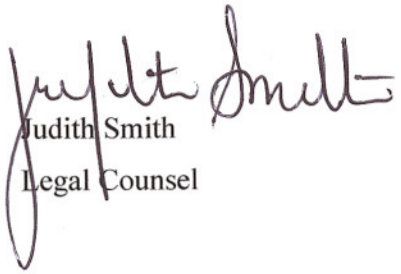
The Companies request URCA to publish a revised draft of its plan and budget for 2009/2010, and thereafter to convene an industry meeting for discussion of any additional information that is made available.

In the future, URCA should publish its draft plan and proposed budget at least three months before the close of each financial year in order to have an approved plan in place at the start of the relevant financial year. It appears that URCA does not propose to publish an Annual Report for financial year 2009, based on the timetable provided in the Draft (page 24). The Companies believe that a separate report on 2009 should be made available with the understanding that there will be anomalies and gaps due to the start-up nature of the period. A report for 2009, even if informal, would be helpful to have for future benchmarking purposes.

²⁵ See, *e.g.*, Advanced Competition Law and Policy Institute, *Barriers to Broadband Adoption: A Report to the Federal Communications Commission* (Oct. 2009).

The Companies look forward to working with URCA and other industry stakeholders in this continuing process.

Respectfully submitted


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