



FINAL DETERMINATION (CLOSURE OF ORIGINAL SECTION 100 PROCESS AND TIMELINES) ON:

TYPES OF OBLIGATIONS ON BAHAMAS TELECOMMUNICATION COMPANY LTD (BTC) UNDER S. 116(3) COMMUNICATIONS ACT, 2009

AND

TYPES OF OBLIGATIONS ON CABLE BAHAMAS LTD. UNDER S.116(3) COMMUNICATIONS ACT, 2009

ECS 04/2010

15 February 2010

UTILITIES REGULATION & COMPETITION AUTHORITY

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FINAL DETERMINATION

HAVING REGARD TO THE COMMUNICATIONS ACT, 2009 AND IN PARTICULAR SECTION 116 (3) AND SECTION 100;

AND HAVING REGARD TO THE PRELIMINARY DETERMINATION ON TYPES OF OBLIGATIONS ON BAHAMAS TELECOMMUNICATIONS COMPANY LTD. UNDER S.116(3) COMMUNICATIONS ACT 2009 – ECS 18/2009 ISSUED BY THE UTILITIES REGULATION AND COMPETITION AUTHORITY ON 30 SEPTEMBER 2009, AND THE COMMENTS SUBMITTED IN RESPONSE THERETO BY INTERESTED PARTIES;

AND HAVING REGARD TO THE PRELIMINARY DETERMINATION ON TYPES OF OBLIGATIONS ON CABLE BAHAMAS LTD. UNDER S.116(3) COMMUNICATIONS ACT 2009 – ECS 19/2009 ISSUED BY THE UTILITIES REGULATION AND COMPETITION AUTHORITY ON 30 SEPTEMBER 2009, AND THE COMMENTS SUBMITTED IN RESPONSE THERETO BY INTERESTED PARTIES;

AND HAVING REGARD TO THE REVISED TIMETABLE FOR BAHAMAS TELECOMMUNICATIONS COMPANY LTD. (BTC) AND CABLE BAHAMAS LTD. (CBL) TO SUBMIT PROPOSED OBLIGATIONS WHICH WAS PUBLISHED ON 3 NOVEMBER 2009; THE UTILITIES REGULATION AND COMPETITION AUTHORITY, PURSUANT TO SECTION 100(5) OF THE COMMUNICATIONS ACT, 2009, HEREBY MAKES THE FOLLOWING FINAL DETERMINATION:

Having regard to the comments received during the consultation period, and for the reasons set out in Annex A to this Final Determination, the Utilities Regulation and Competition Authority (URCA) hereby issues a Final Determination that it does not intend at this time to issue an order under section 95 of the Communications Act and closes the section 100 process and timelines.

In accordance with section 116(3)(b) of the Communications Act, BTC and CBL submitted proposed obligations on 22 January 2010, which in their view are suited to the objective in section 116(2), subject to section 114, of encouraging, promoting and enforcing sustainable competition, having had due regard to the preliminary views expressed by URCA when issuing the Preliminary Determinations. URCA will review the proposed obligations submitted by BTC and CBL within the three (3) months prescribed in section 116(3)(c) and accept, object or request changes to the proposed obligations to ensure that they satisfy section 116(2) by 22 April 2010.

This Final Determination is a procedural step and is without prejudice to BTC's and CBL's obligations under their Individual Operating Licences or the ongoing review of those obligations proposed by BTC and CBL pursuant to section 116(3)(b) of the Communications Act, 2009 (the "Comms Act").

This Final Determination is without prejudice to URCA's powers under the Comms Act in general and section 116(3)(c) in particular, the outcome of any ongoing or future consultation, regulatory or other measures carried out by URCA pursuant to such powers; and

This Final Determination shall come into effect from the date of its issuance.

**For the Utilities Regulation and Competition Authority
Michael J. Symonette
Chief Executive Officer
15 February 2010**

ANNEX A

Reasoning and Reasons for the Final Determination Types of Obligations on Bahamas Telecommunications Company Ltd. and Cable Bahamas Ltd.

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A. Reasons for Final Determination

1. Section 116 of the Comms Act establishes the framework for the introduction of obligations on BTC and CBL that would be designed to maintain, subject to section 114 of the Comms Act, the objective of encouraging, promoting and enforcing sustainable competition.
2. Section 116(3) of the Comms Act sets out key steps that must be followed by URCA when introducing these obligations. First, URCA must indicate the types of obligations that in its view would satisfy the requirements of section 116(2) of the Comms Act. BTC and CBL may then submit proposed obligations that they consider would satisfy section 116(2) of the Comms Act. URCA could either accept or reject these obligations. If URCA rejects these obligations, it may request BTC and CBL to submit revised proposed obligations or it could mandate different obligations.
3. Whilst section 116 of the Comms Act sets out the general framework for introducing obligations on BTC and CBL, including key steps in the process, it does not prescribe a specific procedure for engaging with licensees and for consulting with interested parties. For this reason, and as more fully explained in Part 1, paragraph 1.4 of the Preliminary Determinations, URCA adopted the determination procedure set out in section 100 (and section 95) of the Comms Act.
4. Accordingly, URCA fulfilled its statutory duty under section 116(3)(a) of the Comms Act to inform BTC and CBL of the “types of obligations” (the “TOs”) that URCA considered would satisfy section 116(2) of the Comms Act by issuing Preliminary Determinations and draft Orders on 30 September 2009. In particular, URCA set out possible TOs in the draft Orders attached to the Preliminary Determinations.
5. If BTC and CBL had agreed with URCA’s assessment in the TOs, URCA and each of BTC and CBL would have worked towards developing a final set of obligations from the TOs. Procedurally, these could have been published in an Order attached to a Final Determination.
6. In accordance with section 116(3)(b), BTC and CBL on 22 January 2010, submitted proposed obligations (“POs”) which in their view, having had due regard to the views expressed by URCA when issuing the TOs, are suited to the objective in section 116(2), namely to maintain, subject to section 114, the objective of encouraging, promoting and enforcing sustainable competition. These POs from BTC and CBL differ substantially from the TOs published by URCA.
7. URCA, in accordance with the Public Notice published on 3 November 2009, will review the POs within the three months prescribed in section 116(3)(c). No obligations will be imposed on BTC and CBL in an Order attached to this Final Determination.

B. Response to Comments on Procedure

8. Annex 1 to CBL's submission responding to the Preliminary Determinations contained objections to the legal procedure adopted by URCA. URCA has summarised and grouped below the procedural points raised by CBL, on which it provides its comments.
9. CBL also raises a number of substantive comments on the suitability of the TOs to address specific concerns. URCA will consider these substantive comments (including those regarding the proportionality of any obligations) in the course of the process going forward.

Whether the statutory procedure is ultra vires

10. CBL raises a general objection to the use of the section 100 procedure in the context of section 116 of the Comms Act, and four specific objections.
11. As URCA understands it, the general objection is that the procedure followed by URCA – as outlined in section 1.4 of the Preliminary Determinations – is inconsistent with section 116 of the Comms Act and is therefore *ultra vires*. CBL states that section 116 of the Comms Act sets out a statutory procedure that must be followed by URCA and that use of the determination procedure under section 100 of the Comms Act is inconsistent with that section 116 procedure.
12. As explained in Part 1, paragraph 1.4 of the Preliminary Determinations, section 116 sets out the general framework for the introduction of obligations on BTC and CBL, but is silent as to the specific process to be followed. Section 11 of the Comms Act makes it clear that URCA has discretion as to the procedure to be followed when no specific obligation is imposed under the Act, provided that the requirements in section 11(1) are complied with.
13. Having considered the regulatory instruments available, URCA decided to follow the determination procedure in section 100 because it included a clear procedure for consulting with the public and was designed to ensure high levels of transparency. The fact that URCA followed the determination procedure in section 100 obviously does not oblige URCA to issue obligations in a form substantially similar to the TOs. The determination procedure provides a procedural framework within which obligations could have been imposed.
14. In addition to this general objection to the use of the section 100 procedure in the context of section 116 of the Comms Act, CBL then raises four specific objections.
15. First, CBL asserts that URCA's decision to consult publicly on the Preliminary Determinations prejudiced CBL's interests as URCA did not engage with CBL privately before issuing the Preliminary Determinations.
16. URCA does not accept that the adopted procedure prejudiced CBL's interests. Section 116(3)(a) states that URCA must indicate to the relevant licensees in writing the types of obligations that it considers would satisfy section 116(2) of the Comms Act. Section 116 does not state that URCA should not consult with the public. Indeed, section 11 of the Comms Act requires URCA to consult on any regulatory measures that are of public significance. URCA is of the view that the interim SMP obligations that may be imposed under section 116(2) of the Comms Act are of public significance.

17. Second, CBL states that the TOs go beyond the requirements of section 116(3)(a) of the Comms Act, because they are detailed TOs.
18. Under section 8 of the URCA Act, URCA has a duty to carry out its functions and exercise its powers in a manner that makes best use of the resources available to it and is best calculated to promote the policy objectives applicable to the sector in question (in this case the electronic communications sector). URCA considered its duty to be forthcoming with the types of obligations that in its view would have satisfied section 116(2). It would have been plainly unsatisfactory of URCA and possibly wasteful of resources to have simply stated the types of obligations in outline, without showing the extent of what was proposed. The same considerations and even greater objections were likely to arise in relation to an outline proposal as have arisen with more detailed TOs. The TOs of course would have required a considerable amount of further discussion and elaboration with BTC and CBL in any event, before their finalisation into obligations to be imposed under the terms of section 116(3)(c).
19. Third, CBL asserts that the level of detail in the Preliminary Determinations suggests that URCA has already decided to impose these obligations on CBL. This comment might have been in part dictated by uncertainty about the way in which URCA interprets its mandate, which is understandable as URCA is a relatively new body. However, Preliminary Determinations are by their very nature “preliminary”. Indeed, in the instant case, URCA has decided not to mandate any Order with the Final Determination, which demonstrates that URCA does take into account information provided during a consultation period following publication of a Preliminary Determination. Issuing a Preliminary Determination does not mean that URCA has in any way pre-judged the issues.
20. Fourth, CBL considered the time set to respond to the Preliminary Determinations was too short. Under section 116(3)(b) of the Comms Act, URCA must require licensees to submit proposed obligations to satisfy section 116(2) of the Comms Act. Section 116 of the Comms Act does not specify a minimum amount of time that should be permitted for BTC and CBL to submit their proposed obligations. The minimum time for responding to a Preliminary Determination under section 100 of the Comms Act is one month. URCA initially decided to allow licensees forty-six days and requested submissions by 16 November 2009. Following a request for an extension, and after further discussions with both BTC and CBL, URCA extended the deadline for submissions to 18 December 2009.

Whether the procedure materially prejudices CBL

21. CBL asserts that the procedure adopted by URCA in the Preliminary Determinations materially prejudice CBL’s interests by: (i) shifting the burden of proof to CBL to demonstrate why URCA’s proposed obligations should not be adopted; (ii) providing CBL with inadequate time to develop its own proposed obligations; (iii) unreasonably delaying the date on which CBL would be permitted to enter new markets; and (iv) undermining CBL’s ability to enter into voluntary wholesale agreements with potential entrants.
22. Each of these concerns is addressed separately below.
23. First, URCA does not accept that publication of the TOs shifted the burden of proof to CBL. Section 116 states that URCA should indicate types of obligations to relevant licensees and then the relevant licensees are required to respond with proposed obligations. This has happened.

The TOs provided CBL and other interested parties with insight into URCA's views, entirely consistently with the Comms Act and indeed URCA's duties under the URCA Act.

24. Second, as addressed in paragraph 20 above, URCA has taken account of parties' representations on the timing for their submissions and has accommodated the request for an extension.
25. Third, the point that drafting TOs has unreasonably delayed the date on which CBL would be permitted to enter new markets is inconsistent with other points made by CBL. Indeed, one of the reasons for adopting the determination procedure in the first place was precisely to minimise delay in finalising the section 116(2) obligations. The revised proposed timetable for reviewing the POs, which was undertaken based on a request from CBL and was published on 3 November 2009, strictly follows the timeframe set out in section 116(3).
26. Fourth, CBL asserts that the publication of TOs has undermined its ability to negotiate deals with third parties. This assumes that third parties will not wish to enter into commercial negotiations in anticipation that a specific obligation (e.g., an obligation in a reference offer) will be mandated. On the contrary, URCA considers that to have highlighted in the TOs the potential for the introduction of a specific service that may be available as a wholesale service may prompt a third party to consider proactively how they could take advantage of such a service and to start commercial negotiations.

Constitutional challenge to the interim presumption of SMP

27. CBL raises constitutional concerns with the presumption of SMP in section 116 and Schedule 4 of the Comms Act. URCA does not consider that a public consultation is the proper forum to address constitutional challenges to the legislation enacted by Parliament.

C. Conclusions and Further Steps

28. Having sought public views on the types of obligations that could be introduced under section 116(2) of the Comms Act by way of a Preliminary Determination, URCA is obliged to conclude the process by issuing a Final Determination. In accordance with section 100(5) of the Comms Act, this Final Determination explains the reasons behind the adoption of the determination procedure, summarises the procedural objections received and responds to them. Finally, it states that URCA does not intend to issue an Order under section 95.
29. Publication of the TOs fulfilled URCA's statutory duty under section 116(3)(a). Receipt of the POs from BTC and CBL satisfied the requirement in section 116(3)(b). URCA now has three months to review the POs in accordance with section 116(3)(c).
30. Going forward, in the absence of a detailed procedure in section 116(3), and as discussed with BTC and CBL, URCA intends to issue a further document to highlight any evolution in its thinking that may occur following detailed consideration of the POs and comments received to date.
31. URCA envisages that the publication of this further document will occur during the first half of March. As already stated in the Public Notice published on 3 November 2009, applying the timetable in section 116(3)(c) of the Comms Act, URCA's deadline for accepting, objecting or requesting changes to the POs, to ensure that these satisfy section 116(2) will be **Thursday, 22 April 2010**.