



15 June 2017

Mr. Bradley Gibson
Neman Networks Ltd.
No. 65 Collins Ave.
P.O. Box SS-5685
Nassau, Bahamas

Dear Mr. Gibson,

Re: Application for change in control in relation to ZSR 103.5 FM

The Utilities Regulation and Competition Authority (URCA) makes reference to the Simplified Application Form (with supporting documents) for approval of change in control submitted on 14 February 2017 by Brickell Management Group on behalf of Neman Networks Ltd. (the Acquirer) and Messrs. Frank Rutherford and Phillip Smith (the Licensee). URCA sets out herein its decision and reasons for its decision anent the change in control application.

Background

Grant of Licence

On 5 February 2007 Messrs. Frank Rutherford and Phillip Smith (now deceased) were granted approval by the Permanent Secretary in the Ministry of Tourism, Mr. Colin Higgs, for a broadcast licence to operate a FM radio station with coverage in New Providence subject to the following conditions:

- (i) Messrs. Rutherford and Smith obtaining a Radio Communications Licence from the Public Utilities Commission (PUC) to operate a radio transmission service;
- (ii) Receipt of Licence Fees in the amount of \$10,000.00 and;
- (iii) Submission of a business plan to the Permanent Secretary of the Ministry of Tourism.

From 1 September 2009 all existing electronic communications licensees, including FM radio broadcasters, were required under the Communications Act 2009 to obtain a licence from URCA as the regulator for the electronic communications sector in The Bahamas. On 27 November 2009 Mr. Vann Ferguson submitted a Licence Application Form ECS F2/09 for a licence to provide FM radio broadcast services in New Providence. The said application form contained, inter alia, Frank Rutherford as the Applicant, Van Ferguson as the Contact Person and Navette Broadcasting, Deward Plaza as the Address of Applicant.

On 18 January 2010 URCA issued a Class Operating Licence Not Requiring Registration (COLNRR) to Messrs. Rutherford and Smith. URCA simultaneously issued an Individual Spectrum Licence (ISL) with a Commencement Date of 15 December 2009 to use the FM radio frequency 103.5 in New Providence

UTILITIES REGULATION & COMPETITION AUTHORITY

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only. The issuance letters for the COLNRR and ISL were addressed to Messrs. Rutherford and Smith. The name Navette Broadcasting & Entertainment Co. Ltd., however, appears on both issuance letters (the significance of which and URCA's treatment of this will be addressed below).

Navette Broadcasting & Entertainment Co. Ltd.

By virtue of an agreement dated 2 September 2009 between Mr. Frank Rutherford and Mrs. Blossie Smith (widow of Mr. Phillip Smith) and Mr. Vann Ferguson and Cheryl Braynon, beneficial owners of Navette Broadcasting & Entertainment Co. Ltd., it was agreed that Mr. Ferguson and Ms. Braynon would operate the sports radio station now known as ZSR 103.5 FM on behalf of Mr. Rutherford and Mrs. Smith. Pursuant to this agreement, Mr. Vann Ferguson conducted transactions with URCA on behalf of Mr. Rutherford and Mrs. Smith inclusive of the submission of the application for the requisite licences and upon grant thereof, Navette Broadcasting & Entertainment Co. Ltd. was responsible for payment of annual regulatory licence fees associated therewith. URCA notes that the existence of this agreement does not appear to be in dispute by either of the parties to the agreement. URCA particularly notes that under the said agreement, Frank Rutherford and Blossie Smith are identified therein as the Owners of the radio station licence with an FM frequency and Navette Broadcasting & Entertainment Co. Ltd. is identified therein as Operator of the radio station.

The Application for Change in Control

As stated above, on 14 February 2017 Brickell Management Group submitted a Simplified Application Form (with supporting documents) for approval for a proposed change in control with respect to ZSR 103.5. In support of its application, a copy of a Memorandum of Understanding (MOU) executed between Frank Rutherford and Blossie Smith of the one part and Neman Networks Ltd. of the other part (hereinafter referred to as "the Parties") was also submitted. The MOU forms the basis of an intended partnership between the Parties and Neman Networks Ltd. (company duly incorporated in The Bahamas) for the ownership and operation of ZSR 103.5. Based on the terms of the MOU, ownership of the partnership will be by shareholdings in a duly incorporated company namely Paramount Systems Ltd., as follows:

- (i) 49% Frank Rutherford and Blossie Smith; and
- (ii) 51% Neman Networks.

URCA notes under the Simplified Application Form, the Parties seek an amendment to the existing ISL issued to Mr. Rutherford and the late Philip Smith. URCA also notes that Mr. Frank Rutherford and Blossie Smith are principals in Paramount Systems Ltd. and it is the intent of the Parties to have the licences that were granted by URCA reflect "Paramount Systems Ltd." as the Licensee consequential to the said amendment.

URCA's Findings

The following sets out URCA's findings consequential to its review of the Simplified Application Form and its engagement with interested parties:

Navette Broadcasting & Entertainment Co. Ltd.

URCA notes that the name Navette Broadcasting & Entertainment Co. Ltd. appears on the face of the COLNRR and ISL and that Navette Broadcasting & Entertainment Co. Ltd. has on various occasions acted on behalf of the Licensee in respect of the operation and maintenance of the ISL. However, based on its enquiries and the documentary evidence of which it is seized, URCA is satisfied that at all material times Navette Broadcasting & Entertainment Co. Ltd. was only intended to act and did act on behalf of the Licensee but was not itself a "Licensee" with any rights, privileges or obligations under the licences. This position is buttressed by the fact that Mr. Frank Rutherford was the applicant for the URCA licences and that both of URCA's letters issuing the said licences are specifically and expressly addressed to Messrs. Rutherford and Smith (also consistent with the previous licences issue by the PUC and the Ministry of Tourism).

URCA is further satisfied that, in accordance with the agreement dated 2 September 2009, Navette Broadcasting & Entertainment Co. Ltd. was intended to and did function solely in the capacity of Operator of the radio station, ZSR 103.5. In this regard, URCA considers it important to state that any correspondence by it addressed to Navette Broadcasting & Entertainment Co. Ltd. was in keeping with the fact that Navette Broadcasting & Entertainment Co. Ltd. was considered the contact for the Licensee (as per the licence application form).

URCA notes the comments made in correspondence on behalf of Messrs. Smith and Rutherford regarding non-compliance with the agreement by Navette Broadcasting & Entertainment Co. Ltd. URCA has not, in reaching its decision, sought to consider or determine whether or not the terms of the agreement have been complied with by Navette Broadcasting & Entertainment Co. Ltd. as URCA considers that to be a matter which lies entirely outside its jurisdiction and purview.

Grant of Licence to an un-incorporated person

Prior to the coming into force of the Communications Act, licences for the use of spectrum were granted by the PUC (URCA's predecessor) to persons whom the Minister of Tourism had approved as broadcasting licensees pursuant to the Broadcasting Act. URCA notes that the PUC received a letter from the Minister of Tourism dated 5 February 2007 requesting that URCA grant broadcast frequencies to Frank Rutherford and Phillip Smith. URCA further notes that the issuance of the ISL by URCA for the use of the FM frequency 103.5 to Frank Rutherford and Phillip Smith as private individuals was granted during the transitional period of the Communications Act regulatory regime.

Section 26(3)(a) of the Communications Act 2009 requires that persons wishing to apply for an individual licence must "*be legal entities duly incorporated in The Bahamas*". As such, the grant of an individual licence to Messrs. Rutherford and Smith not being "*legal entities duly incorporated in The Bahamas...*" is contrary to the Communications Act 2009.

Conclusion


In the circumstances, URCA considers that the current ISL document is defective and void as the named Licensee is not a legal entity duly incorporated in The Bahamas in accordance with section 26(3)(a) of the Communications Act, 2009. The application for change in control is therefore ineffectual as URCA cannot purport to exercise its competition powers under the Communications Act in relation to a licence that is void.

URCA however considers that the appropriate regulatory measure to remedy this matter is to accede to the request for an amendment/variation of the existing ISL (and accompanying COLNRR) and the reissuance of the same to a legal entity duly incorporated in The Bahamas, namely Paramount Systems Ltd., of which is consistent with the proposed ownership based on the application for change in control. This can be most efficiently achieved pursuant to Section 27(1)(a) of the Communications Act, 2009 which provides that URCA may, on its own volition, vary any licence granted to a licensee if it is necessary to comply with the laws of The Bahamas. The effect of the licence variation is that Paramount Systems Ltd. will be the licensee of record and shall have all rights, privileges and obligations under the said licences with immediate effect from the Commencement Date of the licences.

Please find attached hereto the Class Operating Licence Not Requiring Registration document and Individual Spectrum Licence in the name of Paramount Systems Ltd.

Should you have any questions or concerns in relation to this matter please do not hesitate to contact the undersigned.

Sincerely,



Donavon R. Dorsett

Director of Electronic Communications (Acting)

Cc: Mr. Frank Rutherford
Mr. Vann Ferguson c/o Navette Broadcasting & Entertainment Co. Ltd.