

Statement of Results & Final Position

Net Neutrality and OTT Services in The Bahamas

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1 Introduction

The Utilities Regulation & Competition Authority (URCA) issues this Statement of Results and Position Statement on *Net Neutrality and OTT Services in The Bahamas* in accordance with sections 11 and 12 of the Communications Act, 2009 (Comms Act). This document marks the conclusion of the public consultation process on “URCA’s Preliminary Position on Net Neutrality and OTT Services in The Bahamas.”¹

1.1 Background

Globally, the availability of OTT services has grown exponentially over the past ten years. The Bahamas has seen similar growth in the availability of OTT services and related innovations as the rest of the world. The increasing availability and demand for OTT services has created a dilemma for telecommunications regulatory authorities. On the one hand, the availability of OTT services advances the ECSP objectives by:

- i. Promoting the availability of a wide range of content services which are of high quality; and
- ii. Enhancing the efficiency of the Bahamian electronic communications sector and the productivity of the Bahamian economy.

On the other hand, take-up of availability of OTT services can result in reduced profit margins for some telecommunications service providers and consequently hinder the advancement of specific ECSP objectives such as, among other things:

- i. Promoting investment and innovation in electronic communications networks and services; and

¹ <http://www.urcabahamas.bs/wp-content/uploads/2018/04/URCA-Preliminary-Position-on-Net-Neutrality-and-OTT-Services-in-The-Bahamas.pdf>

- ii. Promoting affordable access to high-quality networks and carriage services in all regions of The Bahamas.

This regulatory dilemma is causing telecommunications regulatory authorities to review their regulatory framework and ensure alignment between the network traffic management policy of telecommunications providers and national electronic communications policy objectives. This public consultation process along with this Statement of Results and Final Position provides URCA's response to that regulatory dilemma.

1.2 Responses to the Consultation

On 13 April 2018, URCA published its consultation document "URCA's Preliminary Position on Net Neutrality and OTT Services in The Bahamas", ECS 03/2018, seeking comments from interested parties and the public. The period for submission of written responses and comments to the consultation document closed on 14 May 2018. During the consultation period, URCA received written responses from:

- Bahamas Telecommunications Company Ltd. (BTC);
- Cable Bahamas Ltd. (CBL);
- Be Aliv Ltd; and
- Facebook.

URCA thank the respondents for participation in this public consultation process. URCA has summarised the comments submitted by the respondents' in this Statement of Results and issued its Final Position. Interested parties can obtain the full text of the respondents from URCA's website at www.urbahamas.bs.

In this document, URCA has sought to provide a summary of the responses considered and discussion of URCA's position on those responses. However, URCA may not have reproduced all matters considered. The lack of response to a comment or any issue raised by a respondent does not signify URCA's agreement in whole or in part with the comment, nor should it be taken to

mean that URCA has not considered the comment or that the comment was considered to be unimportant or without merit.

1.3 Structure of the Remainder of this Document

The structure of the remainder of this document is as follows:

- Section 2: Responses to the Preliminary Position;
- Section 3: Responses received to the consultation questions;
- Section 4: Final Determination (Conclusion & Next Steps).

2 Responses to the Preliminary Position

2.1 General Comments

2.1.1 CBL and ALIV

CBL and Aliv (CBL/Aliv) offered similar responses to the consultation document. Due to the similarity of the comments by CBL and Aliv, URCA treats with those comments jointly below. In summary, CBL and Aliv's general comments were as follows:

URCA should give separate consideration to OTT services and Net Neutrality

CBL/Aliv opined that URCA should have addressed OTT services and Net Neutrality in separate processes and reasoned that the joint approach to addressing these issues did not allow URCA to address either issue sufficiently. CBL/Aliv explicitly disagreed with the assertion by the International Telecommunications Union (ITU) which suggests that telecommunications operators and content providers can achieve a win-win collaboration if telecommunications operators adopt data-centric financial models. Further, CBL/Aliv suggested that a more effective remedy to the challenges faced by telecommunications operators would be for URCA to treat OTT services as an electronic communications service, since in CBL/Aliv's understanding the definition of OTT service falls within the definition of an electronic communications service as

defined in the Communications Act 2009 (Comms Act). Further, CBL/Aliv argued that the availability of OTT services has a significant impact on the market structure and retail pricing. CBL suggested that URCA conduct a new market review and use the new market data to determine the current impact of OTT services on the businesses of network providers.

URCA's consideration of Net Neutrality is one sided

CBL/Aliv suggested that URCA did not take a balanced approach to the presentation of opposing arguments for the imposition of ex-ante of regulation for Net Neutrality. More specifically, CBL/Aliv argued that URCA approach was biased in that URCA did not present arguments against the imposition of Net Neutrality. Based on that position, CBL/Aliv questioned URCA's justification for its proposals.

URCA should rely on market forces

CBL/Aliv argued that URCA did not justify the view that market forces in The Bahamas are insufficient to achieve the ECSP objectives. CBL/Aliv stated that market forces had produced four extensive high capacity broadband networks, which have provided consumers with a wide range of electronic communication services, including OTT service. CBL/Aliv argued that in light of the current market conditions, URCA had not provided sufficient justification for the introduction of ex-ante regulations governing Net Neutrality. CBL/Aliv further argued that there are sufficient competitive forces in the market to advance the relevant ECSP objectives and suggested that URCA rely on the ex-post regulatory measures to address breaches of the regulations and anticompetitive behaviour. CBL suggested the URCA should follow the approach taken by the FCC in the USA.

2.1.2 BTC

BTC stated that it would be opposed to the introduction of open internet regulations if the regulations prohibited BTC from blocking and throttling of data over its networks. BTC suggested that blocking and throttling are practices that are used to ensure the proper maintenance of its network, which includes the prevention of the transmission of illegal or malicious content through the networks. BTC identified OTT services, such as Skype, FaceTime and WhatsApp, as

some of the most significant threats to the telecoms industry over the last few years. The operator claimed that the availability of OTT services in the telecommunications market in The Bahamas has resulted in declining revenues, which lessen BTC's ability to invest in new network infrastructure. Notwithstanding BTC's objection to URCA's proposal to impose Net Neutrality regulations, BTC opined that the outcome of this consultation should be limited to a determination of the need and justification for the introduction of the regulations. However, the operator suggested that if URCA introduced regulations, URCA should ensure that the regulations are explicitly specified, measured, and well reasoned.

2.1.3 Facebook

Facebook stated that it is a strong supporter of Net Neutrality and believes that it is critical that the internet should be kept open for everyone. Facebook agreed that URCA should consider Net Neutrality and OTT services from a regulatory perspective. However, Facebook suggested that URCA should address the issues of Net Neutrality and OTT Services separately. Facebook further suggested that OTT services should not be subject to licensing requirements. Notwithstanding that suggestion, Facebook expressed the view that policies developed by URCA should safeguard the operator's ability to innovate through zero-rating and differential pricing offers.

2.1.4 URCA's Comments

URCA notes that the network operators (BTC, CBL and Aliv) are generally opposed to the introduction of ex ante regulations that would impose rules regarding Net Neutrality, especially the introduction of regulatory measures restricting network management practices such as blocking and throttling, and that the network operators all expressed a general preference for ex-post regulations. The operators expressed the view that market forces would result in the furtherance of the ECSP objectives identified by URCA and argued that where market forces fail to further that objective, URCA could take ex-post regulatory action. In contrast to the position set forth by the network operators, Facebook, a content provider, encouraged URCA to impose regulations that would promote Net Neutrality. However, Facebook agreed with CBL/Aliv that URCA should address the regulatory considerations for Net Neutrality and OTT service separately.

URCA's approach was partially informed by the comparative analysis consisting of the nine (9) jurisdictions included in the study, the ITU, and the related electronic communication policy objectives mentioned in the consultation document.

URCA disagrees with the Aliv/CBL comment that URCA's consideration of Net Neutrality is one-sided. URCA notes that CBL/Aliv referred to the position taken by the FCC in defence of its argument. URCA reminds Aliv/CBL that a detailed discussion of the FCC's recent approach was presented by URCA in its proposal, to provide a counterpoint to the view of the other nine (9) jurisdictions included in the study, the ITU, and the related electronic communication policy objectives mentioned in the consultation document.

CBL/Aliv argue that URCA should rely on market forces to achieve the electronic communications policy objectives. URCA notes that while reliance on market forces is to be promoted generally, with the electronic communications market in The Bahamas being a maturing market in which effective competition has not yet been fully realized, relying solely on market forces may be insufficient to achieve the electronic communications policy objectives.

URCA agrees with BTC's comments that service providers should be allowed to implement mechanisms to safeguard their networks from abuse and to enforce fair usage policy and other policies that are in line with international best practices in the telecoms industry. URCA assures BTC and other stakeholders that its Final Position will consider the concern raised. In addition, URCA will strive to ensure that there is clarity on any measures introduced.

URCA notes Facebook's response expressing its support for an open internet. URCA is of the view that there may be cases where it is in the best interest of all stakeholders to allow service providers to manage their networks to avoid illegal activities, denial of service events, and other disruptive acts (whether intentional or not) that lead to network inefficiencies. URCA also noted Facebook's comment that any policy introduced by URCA in regards to Net Neutrality and OTT services should avoid stifling the emergence of new, innovative products and services. URCA stresses that one of the critical electronic communications policy objectives considered in

drafting the consultation document is *“to promote investment and innovation in electronic communications networks and services.”*

3 Responses to Consultation Questions

In this Section, URCA summarises and responds to the comments received from the respondents to the specific questions posed by URCA in the consultation document. URCA notes that the comments from Cable Bahamas Ltd. (CBL) and Be Aliv Limited (Aliv) are similar in content. Therefore, URCA will address these respondents collectively.

3.1 Question 1: Summary of Responses and Final Position

Do you agree that URCA should consider regulatory intervention only where market conditions warrant the issuance of ex-ante regulations to align The Bahamas’ practices with International Best Practices that are consistent with the ECSP objectives?

Aliv/CBL’s Comments

Aliv/CBL referred to section 5 (a) of the Comms Act, which requires that URCA take regulatory action only when market forces are unlikely to achieve the ECSP objective. CBL/Aliv added that the Comms Act also requires URCA to consider the costs and implications of regulatory measures on the affected parties.

BTC’s Comments

BTC stated that URCA should only consider ex-ante regulatory intervention where market conditions warrant such regulatory measures and, where URCA intervenes, URCA should proceed in accordance with sections 4 and 5 of the Comms Act. BTC further commented that international best practice should not be the sole basis for the adoption of ex-ante regulations, even when international best practices are consistent with the ECSP objectives.

Facebook’s Comments

Facebook agreed that URCA should consider regulatory intervention only where market conditions or the network providers actions warranted regulatory intervention and suggested that the regulations should only be introduced where there is apparent, identifiable harm to

consumers and where it has been demonstrated the only method of addressing such is by means of regulation.

URCA’s Response to Comments Received/Final Position

URCA appreciates and agrees with the feedback received in regards to the question of URCA’s responsibility to consider regulatory intervention only where market conditions warrant the issuance of ex-ante regulations, and to align The Bahamas’ practices with international best practices that are consistent with the ECSP objectives. Respondents generally opposed the introduction of ex ante regulations and considered that regulatory intervention should be considered only when market conditions warrant such intervention. Accordingly, URCA does not propose to introduce ex ante regulatory measures in relation to Net Neutrality at this time.

Final Position: URCA will not impose ex-ante regulations related to Net Neutrality at this time. Any ex ante regulations will only be considered subject to further review and consultation where URCA considers that the current approach has been inadequate to achieve the desired market outcomes. However, URCA will continue to monitor the ECS market and take appropriate action where there is evidence or a complaint of anticompetitive or discriminatory internet traffic management practices.

3.2 Question 2a: Summary of Responses and Final Position

Do you agree that URCA should introduce a regulatory measure that would prohibit blocking and throttling?

Aliv/CBL’s Comments

Aliv/CBL disagrees that a regulatory measure should be introduced to prohibit blocking and throttling. CBL highlights the following examples as arguments to not impose a measure prohibiting blocking and throttling:

- preventing access to illegal and explicit websites;
- preventing spam and malware;

- stopping denial of service (DOS) attacks on websites;
- preventing users from exceeding their usage allowance when they have not paid for additional capacity;
- enforcing approved fair usage policies;
- giving priority to emergency and disaster recovery services; and
- giving priority to services and customers that value a higher-quality services (eg. IPTV and business customers)

Further, Aliv/CBL commented that URCA had not presented evidence that a service provider has engaged in blocking or throttling to the disadvantage of an internet service provider (ISP) and content provider.

BTC's Comments

BTC disagreed with URCA's proposal to prohibit blocking and throttling. BTC argued internet traffic management practices are important for several reasons including the following:

- Blocking of illegal content
- Utilize of Fair Use Policy (FUP) or Acceptable Usage Policy (AUP)
- Prevention of bill shock
- Detecting, mitigating, and thwarting malicious traffic
- Provision of differentiated service tiers

BTC argued that URCA did not present empirical evidence in the consultation document that supports the introduction of ex ante regulations.

Facebook's Comments

Facebook agreed with the proposed no blocking/no throttling rules. Facebook asserted that a robust Net Neutrality framework must include strong protections to prevent ISPs from interfering with consumers' ability to access content and services of their choice. Moreover, Facebook urged URCA to prohibit ISPs from creating fast lanes through paid prioritization.

URCA's Response to Comments Received/Final Position

URCA has considered the arguments presented by the respondents, and URCA agrees that under certain conditions blocking and throttling may be a legitimate approach to specific network related or legal issues. However, URCA is aware that blocking and throttling may also amount to anticompetitive or unfair behaviour. URCA intends to intervene ex post where it detects blocking or throttling which constitute anticompetitive behaviour or unfair discrimination. In consideration of the concerns raised by network providers in juxtaposition with the comments of the content provider, the lack of empirical evidence supporting the need to impose ex ante regulatory measures, and the lack of clarity regarding the possible impact of ex ante regulation on the business of the network providers, URCA believes that the risks associated with the imposition of ex ante regulations prohibiting blocking and throttling exceed the potential benefits, and may have a disproportionate and unjustified impact on network operators. URCA considers that further analysis would be required to determine whether the imposition of ex ante regulations will positively impact the sustainability of ECS Licensees. Hence, for the time being, URCA will rely on ex post regulations to address any practice of blocking or throttling that URCA determines to be anticompetitive or discriminatory in nature or otherwise in breach of the Comms Act. URCA will review this position periodically to determine whether this proposed reliance on ex post regulatory measures effectively advances the ECSP objectives. Should URCA determine that ex post regulatory measures do not adequately advance the ECSP objectives, URCA will reconsider the introduction of ex ante regulations.

Final Position: URCA will impose ex post regulations on a case-by-case where URCA determines that an Internet Service Provider or network operator engages in blocking or throttling of traffic in a manner that is anticompetitive or unduly discriminatory.

3.3 Question 2b: Summary of Responses and Final Position

Do you agree that URCA should introduce a regulatory measure that would disallow unreasonable interference or unreasonable disadvantage to consumers, ICPs, ISPs and other licensees?

Aliv/CBL's Comments

Aliv expressed strong opposition to URCA's proposed regulatory measure to disallow unreasonable interference or unreasonable disadvantage to consumers, internet content providers (ICPs), ISPs, and other licensees. Aliv noted that it is possible that internet traffic management practices can be used to disadvantage competitors, but further stated, that URCA could be empowered to address any actual occurrences of anticompetitive behaviour under the Comms Act.

BTC's Comments

BTC views the proposed provision as imprecise and confusing as the objectives, and related administrative requirements in regards to Net Neutrality are not adequately developed. BTC stressed the need for URCA to ensure that any Net Neutrality rules adopted by URCA are more concise and definite.

Facebook's Comments

Facebook agreed with the proposed rule. Facebook opined that the proposed rule would help to create an interference-free environment regardless of content, applications, services, or non-harmful devices.

URCA's Response to Comments Received/Final Position

In URCA's consideration, the proposed rule to introduce a regulatory measure would ensure that the network management practices of ISP will not disadvantage retail or wholesale subscribers and discourage practices that cause unreasonable interference or unreasonable disadvantage to consumers, ICPs, ISPs and other licensees. URCA notes that network operators generally disagreed with URCA's proposal on the basis that the proposal lacked clarity. URCA confirms that any regulatory measure imposed by URCA excludes cases where internet management practices aim to improve national security, promote fair use policies, and address billing issues such as non-payment of subscriber fees.

Final Position: URCA will review claims of unreasonable interference or unreasonable disadvantage on a case by case basis and will take the appropriate regulatory measure at the conclusion of the review or investigation.

3.4 Question 3a: Summary of Responses and Final Position

Do you agree that URCA should require ISPs to publicly disclose information regarding the utilisation of traffic management practices in their terms and conditions; inclusive of the traffic management practice to be utilised, the purpose of the traffic management practice, and its resulting effect?

Aliv/CBL's Comments

Aliv/CBL agreed in principle with URCA's proposal to require operators to disclose information regarding traffic management practices. However, Aliv/CBL is of the view that terms and conditions are not the appropriate place for this information. Aliv recommended that URCA work with operators in The Bahamas in order to achieve the publication of useful information as oppose to relying on regulation.

BTC's Comments

BTC did not oppose the requirement to disclose information regarding the utilization of internet traffic management practices. BTC suggests that the information could be included in the Frequently Asked Questions ("FAQ") of an operator's website or AUP and/or terms and conditions.

Facebook's Comments

Facebook did not offer a specific response to the matter regarding disclosure of information germane to the use of internet traffic management practices. In a general response, Facebook supports efforts to ensure businesses and consumers are provided with information to make informed choices about products and services.

URCA's Response to Comments Received/Final Position

URCA noted that all respondents in principle agree with the public disclosure of information relating to the use of internet traffic management practices, but have slightly different approaches as to where such information should be published. URCA believes that transparency is a key tenet in any discussions regarding Net Neutrality. URCA notes that transparency would assist consumers to make informed choices

Final Position: URCA urges ISPs to disclose information on their website regarding traffic management practices. Such information should include, inter alia, specific information about blocking and throttling practices of the ISP or network providers. In this regards, URCA reminds ISPs of their duties under Part 2.1. of the Consumer Protection Regulations, ECS 19/2013.

3.5 Question 3b: Summary of Responses and Final Position

Do you agree that URCA should require ISPs to publicly disclose information relating to the broadband Internet speed a consumer can expect during specified peak and off-peak hours?

Aliv/CBL’s Comments

Aliv/CBL agrees in principle that more detailed information with regards to a consumer broadband connection should be provided notwithstanding that operators presently publicize information relating to speed in different packages. Aliv suggested that discussions between URCA and the operators are the best approach to determine the information that should be provided.

BTC’s Comments

BTC believes that average speed is a Quality of Service (QoS) issue and not Net Neutrality. However, BTC indicated that it does not object to providing information in regards to speed which, according to BTC, it already does so in the FAQ section of its website. BTC is of the view that the disclosure requirement does not need to be enshrined in Net Neutrality regulations.

Facebook’s Comments

Facebook did not offer a direct response to this question but generally expressed that they appreciate URCA’s efforts to ensure that consumers are made aware of aspects of an ISP’s service such as speed. Facebook asserted the importance of the consumers’ ability to understand and meaningfully compare that information once provided.

URCA’s Response to Comments Received/Final Position

URCA notes that all respondents generally agreed with the concept of publicly disclosing information relating to the broadband internet speed a consumer can expect during specified peak and off-peak hours. URCA is of the view that this would enable consumers to make more informed choices when choosing a service provider.

Final Position: URCA urges all ISPs to disclose information on their website relating to minimum broadband internet speed a subscriber can reasonably expect to experience during peak and off-peak hours. In this regards, URCA reminds ISPs of their duties under Part 2.1. of the Consumer Protection Regulations, ECS 19/2013.

3.6 Question 4: Summary of Responses and Final Position

Do you agree that the rules should take effect 180 days from the date of publication of the Final Determination?

Aliv/CBL’s Comments

Aliv/CBL commented that ex-ante regulation is not necessary to address the issues presented in the consultation document, further stating rules are not needed. Aliv/CBL further articulated that the time the rules should take effect does not arise.

BTC’s Comments

BTC stated the rules, administrative requirements and objectives are not adequately developed in dispositive form. BTC advises that should URCA decide to draft and implement Net Neutrality Regulations based on the results of the current consultation, URCA should prepare specific regulations and consult before they come into force. BTC reiterates that in its current form, there

is insufficient clarity and specificity for parties to comment on potential Net Neutrality regulations adequately.

Facebook's Comments

Facebook offered no comments to the question.

URCA's Response to Comments Received/Final Position

URCA thanks the respondents for their comments to Question 4. URCA notes the respondents' opposition to the publishing of the rules. As URCA has determined not to impose ex-ante regulation, the issue of publication of rules does not arise at this time.

Final Position: As URCA has determined above not to impose ex-ante regulation, the issue of publication of rules does not arise at this time.

3.7 Question 5: Summary of Responses and Final Position

Do you agree with URCA's assessment of the regulatory options considered? If not, why?

Aliv/CBL's Comments

Aliv stated that it disagrees with URCA's assessment of the regulatory options as it is a weak and confusing part of the consultation document. Aliv lists its reasoning for identifying Options 1 and 2 as inadequate and also argued that there are severe weaknesses found in Section 6.2 of the consultation document.

BTC's Comments

BTC disagrees with URCA's assessment of the regulatory options. BTC claimed that little, if any analysis of Option 1 was conducted; that URCA did not provide the nature of the risk it claimed may be posed as a result of Option 1, and no Net Neutrality concerns have been identified in the consultation document. Further, BTC stated that URCA did not consider a "Wait and See" approach. In regards to Option 2, BTC claims that, notwithstanding the discussion in the consultation document surrounding the recent Net Neutrality reversal in the US by the FCC, URCA

ignores the US experience and claims without analysis that the proposed regulatory measures are fair, reasonable, transparent, appropriate and efficient. In addition, BTC feels that the cost-benefit analysis, which claims that the benefits of Option 2 will exceed its incremental costs was done without any further evidence or analysis.

Facebook’s Comments

Facebook offered no comments to the question.

URCA’s Response to Comments Received/Final Position

In light of the responses and changing market dynamics, URCA considers that there may be benefits in declining to impose ex ante regulatory measures at this time. While URCA is aware that The Bahamas’ situation is unique and must be treated as such, URCA believes the experience of other jurisdictions should be used to guide The Bahamas when reviewing similar issues. URCA notes that the majority of the benchmarked countries have refrained from taking action and some of the countries that have taken action are reconsidering. Given the uncertainties regarding a clear way forward and the potential threats to the sustainability of the sector, URCA considers additional evidence is needed to determine the best approach to the furtherance of the ECSP objectives and the sustainability of the ECS.

Final Position: URCA has declined to introduce ex ante regulation at this time.

4 Conclusion & Next Steps

While URCA remains of the view that Net Neutrality and the availability of OTT services can promote the furtherance of the ECSP objectives, URCA is cognisant of the risk and uncertainty related to the introduction of Net Neutrality Regulation, and URCA is concerned that ex ante regulation may adversely impact the sustainability of the ECS in The Bahamas. Therefore, in the short-to-medium term, URCA will address breaches of the Comms Act relating to internet traffic using its ex post regulatory measures whilst monitoring the changing dynamic in the environment, with a view to revisiting this issue should it become appropriate.

As it relates to OTT services, URCA remains of the view that a significant part of the response to the prevalence of OTTs should be the adoption by affected regulated entities of innovative strategies that embrace the natural but rapid changes in the technological environment while remaining profitable, as has historically occurred in response to other disruptive influences on the electronic communications market. Also, URCA remains of the view that adaptive approaches are necessary to effectively advance the ECSP objectives especially as it relates to facilitating the availability of a wide range of content services.

Hence, URCA concludes this consultation on Net Neutrality and OTT Services in The Bahamas having taken the position to not introduce ex ante regulation at this time.

URCA concludes this public consultation process on Net Neutrality and OTT Services in The Bahamas with the publication of this Statement of Results and Final Position.