

ADJUDICATION:

**IN THE MATTER OF AN APPLICATION FOR APPROVAL
OF CHANGE IN CONTROL OF CLASSICAL FM**

ECS 66/2019

12 September 2019

This Adjudication is made pursuant to Section 75 of the Communications Act, 2009 (Comms Act) in the matter of a request for approval of a change in control of the FM radio station Classical FM.

WHEREAS on 18 June 2019, the Utilities Regulation and Competition Authority (“URCA”) having received from TNG Radio Ltd. (the “Acquirer”) and Classical FM Bahamas Ltd. (the “Licensee”) a Simplified Notification Form (the SNF), in which the Acquirer and the Licensee request URCA’s consent to a transaction under which the Acquirer will purchase all of the shares of the Licensee in relation to the ownership and operation of the radio station “Classical FM” (the “Transaction”), has duly deliberated upon the information provided and matters set out in the SNF;

AND WHEREAS URCA having given members of the public in The Bahamas reasonable opportunity to submit representations regarding the Transaction and has not received any such representations;

NOW pursuant to section 75(1)(a), URCA makes the following Adjudication:

Impact of the Transaction on Competition in the Relevant Markets – the proposed change in control between the Acquirer and the Licensee would not be likely to have the adverse effects, as set out in Sections 72(a) or 72(b) of the Comms Act; and

Impact of the Transaction on Media Public Interest in The Bahamas – the proposed change in control is not likely to have an effect contrary to public interest in The Bahamas, as set out in Section 74(3) of the Comms Act.

1 Introduction

- 1.1 The Utilities Regulation and Competition Authority (URCA) is an independent regulator established under the Utilities Regulation and Competition Authority Act, 2009 (the “URCA Act”). Part XI of the Comms Act sets out the competition provisions that apply to the electronic communications sector. Under Section 70 of the Comms Act, no change in control of a licensee can be implemented without obtaining the prior written approval of URCA.
- 1.2 This Adjudication sets out URCA’s analysis of the effect of the notified Transaction on competition in the relevant market in The Bahamas, pursuant to section 75(1)(a) and 75(1)(b) of the Comms Act, and in accordance with section 103 of the Comms Act. In accordance with section 66 of the Comms Act, URCA has undertaken its analysis in a manner which is consistent with international best practice.
- 1.3 This Adjudication also sets out URCA’s analysis of the effect of the notified Transaction on media public interest in The Bahamas, pursuant to section 74 of the Comms Act.

2 Background

- 2.1 On 2 March 2010 URCA granted the Licensee a Class Operating Licence Not Requiring Registration (COLNRR) and an Individual Spectrum Licence (ISL) pursuant to section 26 of the Comms Act to provide FM radio broadcasting services on the island of New Providence using radio spectrum frequency 98.1 MHz. The Licensee thereby became subject to the change in control as contained in Part XI of the Comms Act.
- 2.2 The Acquirer has ██████ share ownership in Guardian Radio Limited and ██████ share ownership in Pure Gold Investments, two radio stations licensed by URCA to provide FM radio broadcast services on the island of New Providence. The Acquirer has an interest in other electronic communications sector licensees and is therefore required under URCA’s Competition Guidance: Merger Control – Procedure ECS COMP. 1 to submit a Simplified Notification Form to URCA for approval of the proposed change in control.

- 2.3 On 14 June 2019 the Acquirer executed a Share Purchase Agreement (the “Agreement”) with Papillion Investments Ltd. (PIL) who owns █████ of the shares in the Licensee which, subject to regulatory approval by URCA, will result in, *inter alia*, the change of control of the radio station owned and operated by the Licensee.
- 2.4 On 18 June 2019 the Acquirer submitted the SNF (with accompanying documents), which will be referred to where appropriate, to URCA in compliance with the Comms Act for regulatory approval of the proposed change in control of the radio station owned and operated by the Licensee.
- 2.5 On 3 July 2019 URCA issued a public notice giving interested persons a reasonable opportunity to submit written representations to URCA for consideration regarding the proposed change in control, before forming any opinion or issuing any Adjudication.

3. The Parties

The Licensee – Classical FM Bahamas Ltd.

- 3.1 The SNF states that the Licensee is a company duly incorporated under the Companies Act 1992, Statute Laws of The Bahamas. Papillion Investments Ltd. holds █████ of the shares in the Licensee.
- 3.2 The Licensee has operated a FM radio station on the island of New Providence since 2010 and primarily provides classical music genre of programming to the listening public.
- 3.3 The Licensee does not hold an interest in any other licensee under the Comms Act.

The Acquirer – TNG Radio Ltd.

- 3.4 The SNF states that the Acquirer is a Bahamian limited liability company duly incorporated under the Companies Act 1992, Statute Laws of The Bahamas.

3.5 The Acquirer is owned by the Nassau Guardian Limited (NGL), who holds [REDACTED] ownership in Guardian Radio Limited (GRL), a radio station that provides FM radio broadcast services in New Providence, using the frequency 96.9 MHz. GRL's genre of programming is mixed and include talk, sports, music, news and podcasts. NGL also holds [REDACTED] ownership in Nassau Guardian Investments who holds [REDACTED] of the shares in Pure Gold Investments (Star FM), another radio station that provides FM radio broadcast services in New Providence, using the frequency 106.5 MHz. Star FM's genre of programming is also mixed and includes talk, sports, music, news and podcasts.

4. The Transaction

4.1 The SNF shows that the Licensee was incorporated with an initial authorized share capital of B\$5,000 divided into 5,000 shares of B\$1.00 each of which 5,000 shares have been issued. The Licensee and the Acquirer executed the Agreement on 14 June 2019, which is conditional on regulatory approval being obtained for the change of control to take effect.

4.2 In accordance with the Agreement, the Licensee proposes to sell, and the Acquirer proposes to purchase all the shares of the Licensee. The Acquirer will purchase all of the said shares at a purchase price in the amount of [REDACTED].

4.3 URCA notes from information provided by the parties that the potential reasoning for the Transaction is that the Licensee *"has been losing money for several years"* and that it has *"a negative Shareholder's Equity"*. In this regard, URCA particularly notes that, subject to the approval of the proposed change in control, the Acquirer's business plan is to reduce some of the Licensee's expense lines and increase its revenue by increasing marketing efforts combined with the introduction of sales incentives.

5. Third Party Representations

5.1 Under section 75(2) of the Comms Act, URCA is required to give interested persons a

reasonable opportunity to make representations and to consider the representations before forming any opinion or issuing any adjudication.

5.2 Consequential to the public notice referenced at Paragraph 2.5 above, URCA has not received any representations (written or otherwise) on the proposed change in control from interested parties and the public, including competitors or customers of the Parties up to the close of submissions on 18 July 2019.

6. Change in control

6.1 Under Section 71 of the Comms Act, a “change in control” occurs when a person, either alone or with any affiliated company:

- (a) *acquires control (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating the licensee or any other corporation or otherwise, to ensure that strategic decisions of the licensee are conducted in accordance with the wishes of that person;*
- (b) *becomes the beneficial owner or voting controller of more than thirty percent of the voting shares in the licensee; or*
- (c) *becomes the beneficial owner or voting controller of more than fifteen percent of the voting shares but not more than thirty percent of the voting shares in the licensee concerned unless that person either alone or with any affiliated company-*
 - (i) *is not, or does not concurrently become, the beneficial owner or voting controller of more than five percent of the voting shares in any other licensee; and*
 - (ii) *does not have the power (including by the holding of voting shares), or does not concurrently acquire control (including by the acquisition of voting shares), by virtue of any powers conferred by the memorandum or articles of association or other instrument regulating any other licensee or*

any other corporation or otherwise, to ensure that the affairs of such other licensee are conducted in accordance with the wishes of that person.”

6.2 The Agreement, as submitted in the SNF, provides that the Acquirer “*will purchase **all of the Shares** free and clear of all encumbrances at the price of [REDACTED] [REDACTED] in the currency of the Commonwealth of The Bahamas (“the said Purchase Price”)*. Reference to “all of the Shares” under the Agreement is to the 5,000 Class A shares issued in the company Classical FM Bahamas Ltd., of which PIL is the beneficial owner. The Agreement further states that upon payment of the said purchase price, PIL will transfer the said shares to the Acquirer by way of Deed Transfer. URCA considers that the cumulative effect of the foregoing is that, under the Agreement, the Acquirer will acquire control of the radio station owned and operated by the Licensee to ensure that the strategic decisions are conducted in accordance with the wishes of the Acquirer consequential to the change in control.

6.3 URCA further considers that the threshold test to determine whether there is change in control between the Acquirer and the Licensee is therefore satisfied under Section 71(a) of the Comms Act, as cited above.

7. Issues to be determined

7.1 Under Section 72 of the Comms Act, on receiving a notification, URCA is required to form an opinion on whether “*a proposed change of control of a licensee:*

- (a) would have, or likely to have, the effect of substantially lessening competition in a market in The Bahamas; and*
- (b) in the case of a change in control involving a media public interest, whether the change in control would have an effect, or would be likely to have an effect contrary to the public interest”.*

7.2 Therefore, the issues to be determined by URCA are whether the change in control would

have or likely to have the effect of substantially lessening competition; and in the case of media public interest, whether the change in control would have an effect, or would be likely to have an effect contrary to public interest.

Substantial lessening of competition in a market in The Bahamas

- 7.3 In determining whether the merger between the Acquirer and the Licensee would be likely to have the effect of substantially lessening competition in a market in The Bahamas, URCA must firstly look at the relevant market. In looking at the relevant market, URCA will consider market definition and the level of concentration in the market.
- 7.4 Markets can be defined by the relevant product and the relevant geographic area. Free-to-air radio broadcasters in The Bahamas have two sets of customers: (i) listeners; and (ii) advertisers. While the Licensee provides free-to-air radio broadcasting to the general public in New Providence, its revenue generating service is primarily radio advertising (although its ability to succeed in this area is dependent on the number and type of listeners that it has).
- 7.5 It may be possible to define the market more narrowly, according to the type of advertisers or listeners targeted by the Licensee, or more widely including alternative advertising or entertainment media. However, for the purpose of the present adjudication, the question whether the market can be segmented by type of free-to-air radio station or whether other forms of entertainment and advertising media are in the same or of different product markets can be left open since the transaction assessed under these alternatives would not be expected to lead to a substantial lessening of competition.
- 7.6 The scope of the relevant geographic market for the Licensee is determined by geographic restrictions on spectrum use under the Comms Act licence¹. Under the Individual

¹ See URCA Licensing Guidelines – 2017 Revision ECS 19/2017 par. 2.10.2.

Spectrum Licence granted to the Licensee by URCA, the Licensee may only transmit on radio frequency 98.1 FM in New Providence². As URCA may place geographic limitations on spectrum use to operate in New Providence, it is likely that this is a separate geographic market. However, for the purpose of the present adjudication, the question whether New Providence is in a separate geographic market can be left open since the Transaction assessed under these alternatives would not be expected to lead to a substantial lessening of competition.

7.7 The structure of the FM radio broadcast/radio advertising market or market concentration is also a key factor in determining whether the proposed change in control between the Acquirer and the Licensee will give rise to a substantial lessening of competition. In this regard, URCA has considered the market shares and concentration ratios.

7.8 Current statistical data to determine market shares of radio broadcasters in the radio broadcasting/radio advertising markets in The Bahamas, or specific islands of The Bahamas are not available. However, according to a 2008 media survey conducted in The Bahamas by Belden Associates on people's radio listening habits, of the 506 respondents in the telephone households polled, 60% of the persons indicated that they will listen to "any radio station". The highest number of votes obtained by an individual radio station was [REDACTED] with 13% and the Licensee was in one of the lowest categories with under 2% of the votes. A complete listing of the results for the survey by Belden Associates is contained in the following table:

² See Table A of Appendix to Individual Spectrum Licence granted to the Licensee 2 March 2010.

- 7.10 URCA would consider market share data of the Acquirer and the Licensee and apply such figures to the Herfindahl-Hirschman Index (HHI) to measure the pre-merger and post-merger market concentration. The listenership of the Acquirer would be a combination of those who listen to Guardian Radio 96.9 FM and Star 106.5 FM, as these may be considered a single economic entity. This is consistent with the judgment in international judicial precedents³. However, current market share data for the parties are not available and it would have been useful for URCA to have received views from interested third parties in relation to the issue of market concentration. URCA is therefore unable to determine market concentration consequential to the Transaction.
- 7.11 To determine whether there is likely to be a substantial lessening of competition, URCA has also considered the extent to which there may be barriers to entry that adversely affect the likelihood, timeliness and sufficiency of other operators' ability to enter or expand in the relevant market⁴. These barriers to entry may include, but are not limited to: (i) legal barriers (such as the requirement for a licence); and (ii) technical barriers (such as the availability of spectrum).
- 7.12 The licensing regime under the Comms Act effectively removes any legal barriers to entry to the relevant market. The licensing regime, when taken as a whole, encourages, promotes and enforces sustainable competition in the electronic communications sector. Additionally, the promotion of investment and innovation in electronic communications networks and services is a core policy objective under the Comms Act. URCA has published its Licensing Guidelines⁵ which, *inter alia*, describe the licensing framework and the criteria for obtaining a Comms Act licence. Of particular note, the Licensing Guidelines expressly provide that URCA may not limit the number of licences it issues save for where there is a limited scarce resource, such as spectrum.

³ See the judgment of the European Court of First Instance in the case of *Cementbouw v Commission* [2006] ECR II-319 at par. 72.

⁴ See URCA's Competition Guidance: Merger Control – Substantive ECS COMP. 2 section 4.5.

⁵ See URCA's published document Guidance On The Licensing Regime Under the Communications Act, 2009 - 2017 Revision ECS 19/2017.

- 7.13 URCA notes that the technical barrier to entry to the FM radio broadcast market in New Providence is high because of the current unavailability of spectrum for FM radio broadcast services in that market. However, the question technical barriers to entry can be left open since the Transaction assessed under this issue would not be expected to lead to a substantial lessening of competition.
- 7.14 To determine whether there is likely to be a substantial lessening of competition, URCA has also considered what would happen if it does not approve the proposed change in control. This is known as the “counterfactual”. URCA begins with the presumption that the counterfactual scenario is the *status quo*. However, the Acquirer has provided evidence to rebut this presumption by indicating that the Licensee “*has been losing money for several years*”, it “*has a negative Shareholder’s Equity*” and that it has been “*actively trying to sell the station*”. In the absence of evidence to the contrary, URCA accepts this evidence by the Acquirer. URCA considers that the cumulative effect of the foregoing is that the Licensee may have exited the market but for the Transaction.

Media public interest

- 7.15 Under Section 74 of the Comms Act, a change in control of a licensee is deemed to involve a media public interest where at least one of the persons involved in the transaction is a media enterprise (i.e. an enterprise involving either or both of (a) broadcasting and (b) newspaper publishing). As stated at Paragraph 3.2 above, the Licensee operates a FM radio broadcast station.
- 7.16 In assessing whether a proposed change in control between the Acquirer and the Licensee would be contrary to public interest, URCA has considered the following:
- (i) the need for accurate presentation of news and the free expression of opinion in media;

- (ii) the need in relation to every different audience in The Bahamas, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience;
- (iii) the need for the availability throughout The Bahamas of a wide range of content services, which (taken as a whole) are both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- (iv) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment of the electronic communications policy objectives.

7.17 URCA notes that there are no plans by the Acquirer to change the existing genre of programming format provided by the Licensee. The Acquirer has also stated in its business plan to work with the current music format; but that if this format is determined not to be commercially viable the Acquirer will explore a format change.

7.18 URCA believes that its Content Regulation⁶ issued under the Comms Act licensing regime provides the necessary mechanism through which accurate representation of news and free expression of opinion in media can be fostered and the electronic communications policy objectives achieved. Therefore, the Transaction is not likely to be contrary to the media public interest.

8. URCA's decision

8.1 Having provided the foregoing reasons, URCA hereby issues its opinion and decision in accordance with Section 75(1)(a) of the Comms Act, that the proposed change in control between the Acquirer and the Licensee would not be likely to have the adverse effects as set out in Sections 72(a) or 72(b) of the Comms Act.

⁶ Content Regulation: Code of Practice For Content Regulation – ECS 06/2012.