

Holland & Knight

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212-513-3268
eric.fishman@hklaw.com

February 9, 2011

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

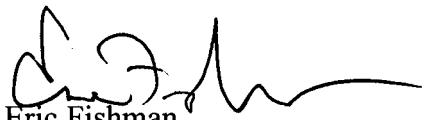
Re: Application of Systems Resource Group Limited for Transfer of Control,
FCC File No. ITC-T/C-20101203-00472

Dear Ms. Dortch:

On February 4, 2011, the Utilities Regulation & Competition Authority of The Bahamas ("URCA") issued a ruling approving the merger of Systems Resource Group Limited into Cable Bahamas Limited. A copy of URCA's ruling is enclosed herewith.

Should any questions arise concerning this matter, please feel free to contact the undersigned counsel directly. A copy of this letter and enclosure is being sent to Executive Branch agencies.

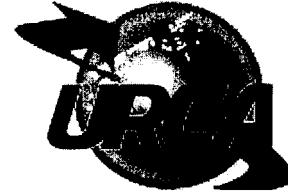
Sincerely yours,



Eric Fishman

Counsel to Systems Resource Group Limited and Cable Bahamas Limited

Enclosure



NOTICE OF PROPOSED CHANGE IN CONTROL OF BTC

pursuant to SECTION 75(2)(a) of the COMMUNICATIONS ACT, 2009

1. The Utilities Regulation and Competition Authority (URCA) hereby gives notice that on February 8, 2011, it received from Bahamas Telecommunications Company Limited (BTC) and Cable and Wireless Communications Plc. (CWC) jointly, a Full Notification of a transaction between CWC and the Government of The Bahamas (the "Government") which will result in the acquisition by CWC from the Government of a majority of the issued share capital of BTC (the "Transaction") for approval in accordance with section 70(3) of the Communications Act, 2009.

DETAILS OF THE TRANSACTION

2. On February 8, 2011 the Government and CWC entered into a Share Purchase Agreement under which, CWC Bahamas Holdings Limited, a company incorporated in the Commonwealth of The Bahamas whose ultimate parent company is CWC, will acquire fifty-one per cent (51%) of the issued share capital of BTC from the Government, thereby becoming the voting controller of a majority of the shares of BTC. As voting control of BTC will be transferred to CWC, the Transaction will constitute a "*change in control*" of BTC within the meaning of section 71 of the Communications Act, 2009, and requires URCA's approval before it can be implemented.
3. BTC is currently 100% owned by the Government and operates networks and provides carriage services in the markets for fixed voice, fixed data, mobile voice and mobile data services in The Bahamas. BTC has been determined to have Significant Market Power in the markets for fixed voice, mobile voice and mobile data services.
4. CWC is a multinational provider of electronic communications services, headquartered in London, with presence in 38 countries worldwide. As of September 2009, CWC provided services to 1.8 million fixed, 8.3 million mobile and 600,000 broadband customers worldwide. CWC operates as "LIME" in the Caribbean, providing services to

1,279,000 mobile, 645,000 fixed and 204,000 broadband customers in 13 countries. During the year ended 31 March 2010, LIME produced revenues of US\$873 million, as against total CWC revenues of US\$2.346 billion. CWC currently has no operations in the electronic communications sector in The Bahamas

ISSUES TO BE DETERMINED BY URCA

5. The questions to be determined by URCA in relation to a change in control are set out in section 72 of the Communications Act, 2009. As neither of the parties to the Transaction nor BTC is involved in broadcasting or publishing newspapers, the question to be determined by URCA is whether the Transaction would have or is likely to have the effect of a substantial lessening of competition in a market in The Bahamas. For a further explanation of the approach to be used by URCA, respondents should be guided by URCA's *Competition Guidance: Merger Control – Substantive* (ECS COMP.2) which can be downloaded from its website (www.urcabahamas.bs).
6. In assessing the competition effects of the Transaction, URCA's assessment will include the review of issues such as the definition of the relevant market, what would happen in the absence of this transaction (known as the "counterfactual"), the potential efficiencies and consumer benefits. In that regard, URCA notes that the Government has publicly disclosed a number of considerations that assist with the analysis of consumer and economic benefits including price reductions, network investment, efficiencies improvements, new product offerings. The Transaction also includes an agreement by the Government to extend the period of BTC's cellular exclusivity period and amendments to the Communications Act, 2009 and the Electronic Communications Sector Policy to that effect have been tabled in the House of Representatives. Interested parties should take note of these factors in submitting responses to URCA.
7. Interested parties should note that URCA was not a party to the negotiations nor the transaction itself. Decisions made to extend the cellular exclusivity period are the responsibility of Government as policy maker for the sector and emanate from commercial negotiations between the Government and CWC. The processes for engagement between URCA and the Government on the Sector Policy, as envisaged under section 6 of the Communications Act 2009, are now addressed in the aforementioned amendments to the Sector Policy and legislation tabled.

INVITATION FOR COMMENTS

8. Under section 75(2) of the Communications Act, 2009, before forming any opinion or issuing its adjudication on the proposed change in control, URCA is required to give any interested persons a reasonable opportunity to make representations, and shall consider any such representations made.
9. URCA notes that there has been considerable public interest in various matters relating to the proposed change of control of BTC, and in that regard considers it necessary to clearly define the scope of URCA's jurisdiction in relation to the Transaction. As stated above URCA's power to consider and approve a change in control of BTC relates **solely** to the question of whether or not the Transaction would or is likely to result in a substantial lessening of competition in a market within the electronic communications sector in The Bahamas. URCA therefore advises that in its review of the Transaction *URCA will only consider* representations which are relevant to this aspect of the Transaction.
10. Pursuant to section 78 of the Communications Act, 2009, URCA is required within thirty (30) calendar days of its receipt of the notification, to either issue its adjudication, or open an in-depth investigation of the change in control (in which case extended timeframes would apply to URCA's consideration of the Transaction). It is therefore necessary that representations from interested persons are received by URCA well within the thirty (30) day timeline in order to ensure that such representations can be considered, analysed and incorporated into URCA's deliberations. Therefore, **URCA will only consider representations on the proposed change in control which are received by 5:00pm on February 24, 2011** (i.e. midway through the thirty (30) day period).
11. URCA invites interested parties to submit written representations regarding the proposed change in control for consideration, to the Director of Policy and Regulation, either:
 - a. by hand, to the office of the Utilities Regulation and Competition Authority (URCA) situated at the UBS Annex Building, East Bay Street, Nassau, Bahamas; or
 - b. by mail, to URCA at P.O. Box N-4860 Nassau, Bahamas; or
 - c. by fax, to (242) 393-0153; or
 - d. by email, to info@urcabahamas.bs.

Adam Goldberg
38 Park Ave
Rutherford, NJ 07070

800-795-6200

Adam@telcoexperts.com

CURRENTLY CHIEF OPERATING OFFICER, TELCO EXPERTS, LLC

HISTORY

Gemini Communications

1996-Present

Principal

- In 1996 Adam with his brother Peter, started up the Telecom consulting firm Gemini Communications. This company is still in existence and is one of the largest telecom agents in the country. As agents, Peter and Adam learned all aspects of customer service, order processing and selling proper services to potential clients. They have worked with multiple carriers including Broadview Networks, Paetec, ACC Business, Covad, Verizon and others. Responsibilities included selling, managing the provisioning process, as well as, servicing a client base that currently bills out over \$1,000,000 per month

Alnet Communications

1993 – 1996

Sales Account Manager

- Adam started as an entry level sales person at Alnet Communications. Adam performance was recognized by earning several sales achievement awards. Adam was promoted to Channel Sales Manager.

EDUCATION

University of Maryland

BA Degree Marketing

1993

**Eric Klein
38 Park Ave
Rutherford, NJ 07070
800-787-5050
Eric@Telcoexperts.com**

CURRENTLY CHIEF EXECUTIVE OFFICER, TELCO EXPERTS, LLC

HISTORY

Telco Expert, LLC

2007-Present

CEO

- Eric is considered one of the top telecom sales professionals in the country. He is considered to be in the top one percent. He has the rare ability to be a star sale professional and have the follow up skills and the work ethic to support some of the best customers in New York City. Eric will be guiding Telco Experts with controlled growth and is tasked with assuring our back office systems are prepared for exponential growth.

ESK Consulting

2002-2007

- Sold Telecommunications services as an independent agent for 5 years

Stock Broker

5 Years

EDUCATION

Baruch College, City University of New York

2002

4.0 GPA In Finance

Peter J. Goldberg

38 Park Ave. Rutherford, NJ 07070
800-795-6200 – Peter@Telcoexperts.com

Professional Summary

Currently, member owner and Vice President of Telco Experts, LLC.

Experience

1996 - present

Gemini Communications

Principal
Responsibilities

In 1996 with my brother, Adam, we started up the Telecom consulting firm Gemini Communications. This company is still in existence and is one of the largest telecom agents in the country. As agents, I learned all aspects of how to service clients. This included, but was not limited to, selling, customer service, troubleshooting and provisioning. Over the years, I engaged with multiple carriers including Broadview Networks, Paetec, ACC Business, Covad, Verizon and others in order to negotiate agreements and ensure our clients were receiving the best possible level of service.

Responsibilities included selling, managing the provisioning process, as well as, servicing a client base that currently bills out over \$1,000,000 per month.

1995 - 1996

MFS Intelenet

Sr. Account Manager
Responsibilities

While at MFS, I actively pursued revenue objectives generated by selling MFS's services to their defined user base of small to medium size businesses. I was responsible for prospecting new business through cold and warm lead generation. Responsible for reactivating closed or inactive accounts in addition to securing new business. Was responsible for maximizing profits by accurately evaluating a customer's requirements and coordinating the matching products and services. Also responsible for reviewing and evaluating Sales Representative Accounts for accuracy and stability of the life of the account; while ensuring customer satisfaction.

1993 - 1995

Metro Media

Account Executive
Responsibilities

As an Account Manager (AM), I was responsible for the overall care, growth and retention of my commercial customer base or book of business ('BOB') in a specified geographically assigned territory. My primary responsibility was to grow Metro Media's revenues, increase product saturation in the market and improve overall profitability. This was achieved by increasing the penetration of Metro Media's products through our existing customer base and referrals.

Education

1993

- Graduated - University of Florida 1993 – Degree in Marketing
-

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 10/15/10
 Accrual Basis

Telco Experts LLC
Balance Sheet
 As of September 30, 2010

	Sep 30, 10
ASSETS	
Current Assets	
Checking/Savings	
1000 · Cash - Chase Checking	288,855.09
1010 · Cash - BOA - Sales Tax Account	78,092.80
Total Checking/Savings	366,947.89
Accounts Receivable	
1300 · Accounts Receivable	323,810.46
Total Accounts Receivable	323,810.46
Total Current Assets	690,758.35
Fixed Assets	
1400 · Equipment	36,484.25
1490 · Accumulated Depreciation	-25,771.12
Total Fixed Assets	10,713.13
Other Assets	
1700 · Security Deposits	40,052.00
Total Other Assets	40,052.00
TOTAL ASSETS	741,523.48
LIABILITIES & EQUITY	
Liabilities	
Current Liabilities	
Credit Cards	
2100 · American Express Payable	71,847.81
Total Credit Cards	71,847.81
Other Current Liabilities	
2300 · Sales Tax Payable	
2325 · Sales Tax Payable - New Hampshi	55.84
2301 · Federal Telecommunications Tax	106,871.82
2302 · Sales Tax Payable - New York	24,270.14
2303 · Sales Tax Payable - New Jersey	-343.17
2304 · Sales Tax Payable - Connecticut	-626.73
2305 · Sales Tax Payable - California	2,258.98
2306 · Sales Tax Payable - Pennsylvani	1,016.34
2311 · Sales Tax Payable - Maryland	6.00
2312 · Sales Tax Payable - Tennessee	1,356.91
2313 · Sales Tax Payable - Texas	424.13
2314 · Sales Tax Payable - Minnesota	124.32
2315 · Sales Tax Payable - Arizona	-91.08
2316 · Sales Tax Payable - Virginia	-114.61
2317 · Sales Tax Payable - Florida	37.08
2319 · Sales Tax Payable - Massachuset	40.85
2320 · Sales Tax Payable - Arkansas	50.78
2324 · Sales Tax Payable - Illinois	-113.33
2326 · Sales Tax Payable - Delaware	408.92
Total 2300 · Sales Tax Payable	135,633.19
Total Other Current Liabilities	135,633.19
Total Current Liabilities	207,481.00
Long Term Liabilities	
2500 · Customer Security Deposits	7,317.66
Total Long Term Liabilities	7,317.66
Total Liabilities	214,798.66

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10/15/10
Accrual Basis

Telco Experts LLC
Balance Sheet
As of September 30, 2010

	<u>Sep 30, 10</u>
Equity	
3000 · Capital ESK Consultants LLC	21,692.74
3100 · Capital - Adam Goldberg	21,692.74
3200 · Capital - Peter Goldberg	21,692.74
3500 · Retained Earnings	157,939.63
Net Income	303,706.97
Total Equity	<u>526,724.82</u>
TOTAL LIABILITIES & EQUITY	<u><u>741,523.48</u></u>

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10/15/10

Accrual Basis

Telco Experts LLC
Profit & Loss
January through September 2010

	<u>Jan - Sep 10</u>
Ordinary Income/Expense	
Income	
3999 · Service Income	
4002 · Service Income - Ottawa, ON	2,840.96
4001 · Service Income - Montreal, QC	952.62
4000 · Service Income - New York City	2,511,743.88
4010 · Service Income - New York State	117,290.97
4016 · Service Income - Virginia	8,296.30
4019 · Service Income - Massachusetts	2,334.20
4020 · Service Income - New Jersey	182,609.48
4030 · Service Income - California	39,278.45
4040 · Service Income - Illinois	9,300.63
4050 · Service Income - Florida	2,710.13
4060 · Service Income - Maryland	1,752.40
4070 · Service Income - Connecticut	53,351.03
4080 · Service Income - Pennsylvania	29,781.02
4090 · Service Income - Tennessee	92,583.84
4091 · Service Income - Missouri	10,403.75
4092 · Service Income - Texas	14,980.81
4093 · Service Income - Minnesota	1,516.64
4094 · Service Income - Arkansas	499.59
4095 · Service Income - Arizona	9,983.36
4096 · Service Income - Delaware	7,059.76
3999 · Service Income - Other	7,850.05
Total 3999 · Service Income	<u>3,107,119.87</u>
4100 · Installation Income	
4110 · Installation Income - NYC	2,035.20
Total 4100 · Installation Income	<u>2,035.20</u>
4200 · Consulting Income - NY	1,535.00
4300 · Finance Charges	13,709.39
4900 · Sales Tax Vendor Credits	659.77
Total Income	<u>3,125,059.23</u>
Cost of Goods Sold	
5000 · ISP Provider	1,162,014.51
5100 · Installation Costs	23,168.57
5200 · Host Monitoring	247,549.79
5300 · Number Inventory	-19,904.76
Total COGS	<u>1,412,828.11</u>
Gross Profit	1,712,231.12
Expense	
5400 · Consulting	200,557.05
6000 · Commission Expense	179,407.10
7000 · Guaranteed Pymt - Adam Goldberg	
7001 · Payments - Adam	155,000.00
7002 · Taxes - Adam	10,229.00
Total 7000 · Guaranteed Pymt - Adam Goldberg	<u>165,229.00</u>
7003 · Guaranteed Pymt - Peter Goldber	
7004 · Payments - Peter	155,000.00
7005 · Taxes - Peter	12,213.00
Total 7003 · Guaranteed Pymt - Peter Goldber	<u>167,213.00</u>
7007 · Guaranteed Pymt - Eric Klein	
7008 · Payments - Eric	203,000.00
7006 · Medical Insurance - Eric	5,627.12
7009 · Taxes - Eric	12,263.00
Total 7007 · Guaranteed Pymt - Eric Klein	<u>220,890.12</u>

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10/15/10
Accrual Basis

Telco Experts LLC
Profit & Loss
January through September 2010

	<u>Jan - Sep 10</u>
7010 · Gross Salaries	114,800.94
7020 · FICA Expense	8,754.73
7030 · NJ Unemployment Insurance	2,767.31
7040 · Federal Unemployment Insurance	183.81
7060 · Group Medical Insurance	4,537.13
7080 · Workers Compensation	645.40
7090 · Payroll Service	1,122.71
7100 · Billing Expense	61,079.12
7120 · Rent	69,358.06
7130 · Utilities	3,129.15
7150 · Telephone and Internet	10,122.91
7155 · Answering Service	1,273.33
7180 · General Insurance	3,153.57
7200 · Office Supplies and Expense	6,531.79
7220 · Bank Charges	2,058.70
7230 · Postage	2,308.12
7260 · Computer and Software Expense	6,030.57
7300 · Accounting	42,364.37
7310 · Legal	37,433.51
7330 · Dues and Subscriptions	785.00
7340 · Filing Fees	4,086.08
7350 · Licenses and Permits	1,498.00
7370 · Advertising and Marketing	770.00
7381 · Penalties	716.85
7390 · Credit Card Discounts	10,091.56
7405 · Automobile Expense	3,045.79
7410 · Travel	14,254.69
7420 · Meals and Entertainment	7,962.94
7460 · Charitable Contributions	665.00
7470 · Holiday Expense	1,230.80
Total Expense	<u>1,356,058.21</u>
Net Ordinary Income	356,172.91
Other Income/Expense	
Other Income	
8000 · Interest Income	339.76
Total Other Income	339.76
Other Expense	
9000 · New Jersey LLC Tax	17,032.00
9010 · California LLC Tax	800.00
9020 · Connecticut LLC Tax	250.00
9040 · New York TAF	1,667.70
9050 · DC LLC Tax	625.00
9060 · Illinois LLC Tax	29.00
9070 · NYC UBT Tax	32,402.00
9900 · Voided Checks	0.00
Total Other Expense	<u>52,805.70</u>
Net Other Income	<u>-52,465.94</u>
Net Income	<u><u>303,706.97</u></u>



February 4, 2011

Ms. Judith Smith
Legal Counsel
Cable Bahamas Ltd.
Robinson & Marathon Roads
Nassau, Bahamas

Dear Ms. Smith,

Re: Merger Control Adjudication

The Utilities Regulation and Competition Authority (URCA) has completed its full analysis of the Full Merger Notification Form and the accompanying documents submitted to URCA regarding the proposed merger of Systems Resource Group Limited and Cable Bahamas Ltd. URCA has also completed its in-depth investigation into the proposed merger.

URCA hereby gives its consent to the merger and approves the change in control consequential thereto.

Kindly find the adjudication attached which provides URCA's reasons and reasoning for its decision.

Yours faithfully,

A handwritten signature in black ink, which appears to read 'Kathleen Smith', is written over the typed name.

Kathleen Smith
Director of Policy and Regulation

UTILITIES REGULATION & COMPETITION AUTHORITY

UBS Annex Bldg., East Bay Street | P.O. Box N-4860 Nassau, Bahamas | T 242.393.0234 | F 242.393.0153

www.urcabahamas.bs



MERGER CONTROL ADJUDICATION:

SYSTEMS RESOURCE GROUP LIMITED

AND

CABLE BAHAMAS LTD.

February 4, 2011

UTILITIES REGULATION & COMPETITION AUTHORITY

UBS Annex Building, East Bay St | P.O. Box N-4860 Nassau, Bahamas | T 242.393.0234 | F 242.393.0153

www.urcabahamas.bs

Adjudication made pursuant to Section 75 of the Communications Act, 2009 in the matter of: a request for approval by the Utilities Regulation and Competition Authority (URCA) of the merger of Systems Resource Group Limited and Cable Bahamas Ltd.

Please note that the square brackets indicate figures or text which have been deleted for reasons of commercial confidentiality.

1. The Parties

Systems Resource Group Limited

- 1.1 Systems Resource Group Limited (the "Licensee") is a privately owned limited company duly incorporated in The Bahamas. It is primarily active in the provision of fixed voice telephony services under the registered business name IndiGO Networks. In November, 2009, the Licensee was issued an Individual Operating Licence and an Individual Spectrum Licence by URCA in accordance with the Communications Act, 2009 (Comms Act), which established the new licensing regime.
- 1.2 The Licensee wholly owns four (4) subsidiaries: Digital Systems (Bahamas) Limited, Tribune Satellite Limited, Internet (Bahamas) Limited and XT Wireless Limited, none of which are currently trading.
- 1.3 The Licensee does not hold an interest in any other Comms Act licensee.

Cable Bahamas Ltd.

- 1.4 Cable Bahamas Ltd. (the "Acquirer") is a publicly traded limited company duly incorporated in The Bahamas. It is primarily active in the provision of cable television services and broadband internet services. In October, 2009 the Acquirer was also issued an Individual Operating Licence and an Individual Spectrum Licence by URCA in accordance with the Comms Act.
- 1.5 The Licensee wholly owns three (3) subsidiaries: Cable Freeport Ltd., Caribbean Crossings Ltd. and Maxil Communications Ltd.
- 1.6 The Acquirer does not hold an interest in any other Comms Act licensee.

2. Background

- 2.1 In October 2002, the Licensee was licensed under the Telecommunications Act, 1999 (Tel Act). In September 2009, the Comms Act came into force which substantially repealed the Tel Act and required licensees under the legacy licensing regime to

transition to the new licensing regime. The Licensee transitioned to a Comms Act licence in November 2009 and thereby became a licensee under the Comms Act, subject to the merger control provisions in Part XI of the Comms Act.

- 2.2 In October 1994, the Acquirer was issued an exclusive Cable TV licence and franchise by the Government of The Bahamas under the Broadcasting Act, Chapter 278 to establish, maintain and operate a cable television system throughout The Bahamas (exclusive of Freeport, Grand Bahama) for a period of fifteen (15) years with effect from October 13, 1994. The exclusivity period expired October 13, 2009. The Acquirer transitioned its exclusive licence to a Comms Act licence in October 2009, thereby becoming a licensee under the Comms Act, also subject to the merger control provisions in Part XI of the Comms Act.
- 2.3 On September 7, 2010 the Licensee and the Acquirer executed a Share Purchase Agreement (SPA) which, subject to regulatory approval by URCA, will result in, *inter alia*, the change of control of the Licensee to the Acquirer.
- 2.4 Part XI of the Comms Act sets out the competition provisions that will 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.
- 2.5 On September 17, 2010 the Parties jointly submitted a Full Merger Notification Form (with accompanying documents which will be referred to where appropriate) to URCA in compliance with the Comms Act for regulatory approval of the proposed acquisition of a controlling shareholding in the Licensee.
- 2.6 URCA published a Notice of its receipt of the merger Notification on its website on September 20, 2010 inviting representations from interested parties to the proposed merger. URCA has received comments from interested parties and the public in respect of the proposed merger, which comments have been reviewed and considered.
- 2.7 As a result of a preliminary assessment of the representations received, URCA determined that the proposed merger raised certain competition concerns that merited an in-depth investigation as set out in the URCA Competition Guidelines¹. This was communicated to the Parties on November 5, 2010 and a Notice to this effect was published on the URCA website.
- 2.8 During the investigation, URCA collected additional information from the Parties necessary to assess the competitive effects of the proposed merger. The information submitted by the Parties during the in-depth investigation has been considered by URCA.

¹ Competition Guidance: Merger Control - Procedure ECS Comp. 1 par. 64

3. The Transaction

- 3.1 The Licensee and the Acquirer executed the SPA on September 10, 2010 conditional upon regulatory consent being obtained for the change of control consequential to the purchase of the Licensee's shares.
- 3.2 Under the SPA, the Acquirer will purchase the entire issued share capital of the Licensee. The consideration for the shares is []. The SPA also provides for an adjustment to the share purchase price to reflect any material change to the Licensee's closing balance sheet in comparison to the previous year's balance sheet.
- 3.3 Consequential to the Transaction, the Acquirer will own 100% of the shares of the Licensee. It is envisaged that post-transaction, the Licensee "*will be a wholly-owned subsidiary or a division of the Acquirer*".

4. Third Party Representations

- 4.1 URCA received comments and representations on the proposed merger from interested parties and the public, including competitors and customers of the Parties.
- 4.2 There were a total of eleven (11) representations submitted to URCA. Seven (7) interested parties opposed the merger while there were four (4) that supported the merger. The representations were largely anecdotal with no concrete theories of harm or evidence to support the competition concerns asserted. Some of the concerns were not merger specific.
- 4.3 Of particular note, a stakeholder as an interested party and competitor to the Parties, expressed serious concern that should the merger be approved it would allow the Acquirer (a designated significant market power (SMP) operator under the Comms Act subject to SMP obligations imposed by URCA) to immediately enter new markets, particularly the voice market, through its affiliate, the Licensee. The interested party submitted that this would be contrary to the statutory constraints imposed under the Comms Act².
- 4.4 It was further submitted by the stakeholder that URCA should also give consideration to the issue of the Licensee having "*virtually all of the 2.5MHz spectrum in New Providence, Abaco and Grand Bahama*" and the ability of the merged entity to be able to leverage its dominant position in the Wi-Max spectrum. The interested party submitted that URCA should impose certain conditions on the merging parties regarding the SMP obligations and to correct the anomaly in the 2.5MHz spectrum band.

² Particularly Section 116(5)

- 4.5 The stakeholder was further of the view that the proposed merger would result in much harm to the *“evolution of an emerging liberalised sector that is in the throes of early competition and serve to discourage new entrants, thereby limiting the choice and variety available to customers in The Bahamas”*. It was submitted that the merger would raise significant competition concerns because of both the elimination of actual and potential competition as between the Parties and the increased ability and incentive of the newly merged entity to eliminate actual and potential competition from third parties.
- 4.6 It was argued by the stakeholder that the proposed merger would substantially lessen competition in contravention of the stated objectives of the Government’s Electronic Communications Sector Policy by reducing competition in fixed voice services. The merged parties could potentially enter each other’s product markets.
- 4.7 Finally, the stakeholder expressed the concern that the proposed merger has the characteristics of a vertical merger, which can give rise to further competition concerns, including input and customer foreclosure.

5. Requirement for URCA’s notification and approval – “Change in control”

- 5.1 Under Section 70 of the Comms Act, no change in control of a Licensee may be implemented without URCA’s prior written approval.
- 5.2 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."

- 5.3 The Full Merger Notification Form submitted to URCA provides at paragraphs 19 and 20 respectively that *"the transaction comprises the acquisition by CBL of 100% of the shares in SRG"* and *"post-transaction, SRG will be a wholly-owned subsidiary or division of CBL...."* This is buttressed by Article II 2.1(c) of the SPA that provides: *"Cable Bahamas will, upon completion of the acquisition of the SRG Interest as contemplated herein, legally and beneficially own all of the SRG Interest free and clear of any claim, charge or encumbrance whatsoever"*.
- 5.4 The cumulative effect of the foregoing is that the "share threshold test" to determine whether there is change in control between the Acquirer and the Licensee is satisfied under Section 71(b) of the Comms Act, as cited above.

6. Non-merger specific issues

- 6.1 An interested party has raised concerns of whether the Acquirer should be permitted to enter new markets if it has not complied with its SMP obligations and the allocation of the 2.5MHz spectrum to the merged entity. URCA is of the opinion that these non-merger specific issues are of sufficient importance to require treatment independent of the proposed concentration.
- 6.2 Under the Comms Act, the Acquirer was presumed to have SMP³ and thereby subject to obligations imposed by URCA designed to maintain the objective of encouraging, promoting and enforcing sustainable competition⁴. Accordingly, no SMP licensee would be permitted to engage in the provision of any networks or carriage services, which it was not already licensed to provide when the Comms Act came into force, until URCA has confirmed compliance with any imposed obligations⁵.
- 6.3 URCA issued its Final Decision on April 22, 2010 describing the types of obligations to impose on the presumed SMP operators and the process and parameters for compliance with each of the *ex ante* obligations imposed on certain markets in which each operator has been presumed to have SMP⁶.

³ See Section 116(1) and Schedule 4

⁴ See Section 116(2)

⁵ Supra note 2

⁶ See *"Obligations imposed on Operators with Significant Market Power (SMP)"* ECS – 11/2010 published April 22, 2010

- 6.4 URCA has concluded the necessary review of the documentation submitted by the Acquirer in its application for confirmation on compliance with each of the *ex ante* obligations imposed on it by URCA. URCA has confirmed compliance with all of the obligations imposed on the Acquirer and has certified the Acquirer compliant to engage in the provision of any networks or carriage services, which it was not already licensed to provide when the Comms Act came into force on September 1, 2009.
- 6.5 URCA therefore concludes that the statutory restriction prohibiting the Acquirer from entering new markets unless it has complied with its SMP obligations is no longer germane to the instant merger notification.
- 6.6 URCA has also considered the 2.5MHz spectrum assigned to the Licensee. While URCA has the statutory power to impose conditions on the Parties, sections 36 and 37 of the Comms Act established the procedure for the vacation of spectrum. URCA has engaged the Parties on this issue within the scope of the in-depth investigation. The vacation of the spectrum prior to a determination by URCA would have to be on a voluntary basis by the Parties. As such, URCA may act *ultra vires* to impose a condition to vacate spectrum on the Parties under the merger. URCA expands on this issue at paragraphs 7.19 and 7.20 below.

7. Analysis of the proposed Transaction

- 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 would have, or be likely to have, the effect of substantially lessening competition in a market in The Bahamas.*” This will involve: (i) defining what is the relevant market; (ii) assessing market concentration; (iii) assessing the theories of harm; assessing the counterfactual; (iv) determining whether there are barriers to entry or expansion; and (v) assessing any pro-competitive effects or efficiencies which may be consequential to the proposed merger⁷.

Substantial lessening of competition in a market in The Bahamas

- 7.2 In determining whether the merger between the Licensee and the Acquirer would be likely to have the effect of substantially lessening competition in a market in The Bahamas, URCA must firstly define the relevant market⁸. As set out in the Competition Guidelines, a relevant market will normally have two dimensions: a relevant product market and a relevant geographic market.
- 7.3 A relevant product market comprises those products that are regarded as interchangeable or substitutable by the consumer by reason of the products’

⁷ See URCA’s Competition Guidance: Merger Control – Substantive ECS COMP. 2

⁸ Ibid see particularly section 4.1; see also *Continental Can v Commission* [1973] ECR 215

characteristics, their prices and their intended use. There is a demand-side substitution and a supply-side substitution to defining the relevant market. Demand-side substitution exists where, in response to a small yet significant and non-transitory price increase in a good or service supplied by the merged parties, a significant number of customers would switch to other products (This is also known as the SSNIP test)⁹. Supply-side substitution exists where, in response to a small yet significant and non-transitory price increase in a good or service supplied by the merging parties, other suppliers could easily start providing the good or service in the short term, using largely unchanged production facilities and with little or no additional investment.

- 7.4 The products provided by the Licensee are: (i) fixed wireless access (FWA); (ii) prepaid phone cards; and (iii) voice over internet. While the Licensee has been issued spectrum in the 2.5GHz spectrum band which allows it to provide high speed broadband services, URCA is unaware of any plans for new services or expansion of current services to be launched by the Licensee within the next 12-24 months. As such, broadband products are not considered within the substitution analysis. The product markets for the Acquirer are¹⁰: (i) pay TV, and (ii) high speed data services and connectivity. URCA concludes that the relevant product market of the Parties does not overlap and are distinct.
- 7.5 The relevant geographic market is the area in which the firms under examination are involved in the supply and demand matrix of the relevant product and services. Under the Comms Act licensing regime, the Parties have been issued national licences restricted only by spectrum limitations where stipulated in the Annex to the Individual Spectrum Licence. As such, the geographic market for the Parties is The Bahamas. Notwithstanding this, as the Parties are in distinct product markets, there will not be a substantial lessening of competition. The determination of the relevant geographic market therefore can be left open as the Parties are in distinct product markets and there will not be a substantial lessening of competition.

Market Concentration and theories of harm

- 7.6 The structure of a market will be a key factor in assessing whether a proposed change of control of a licensee will give rise to a substantial lessening of competition. The more concentrated the market, the more likely it is that the competitive constraints on the merging firms are weaker¹¹. Market concentration can be measured through the Herfindahl-Hirschman Index (HHI). The HHI is calculated by squaring the market share of each operator competing in a market then summing the resulting numbers. As the Parties do not compete in the same markets the market concentration will remain

⁹ Ibid

¹⁰ See the “*Obligations imposed on Operators with Significant Market Power (SMP)*” Final Decision document ECS 11/2010
URCA’s Final Decision

¹¹ See URCA’s Competition Guidance: Merger Control – Substantive ECS COMP. 2 section 4.2

unchanged. URCA therefore concludes that a decision on market concentration can be left open.

- 7.7 In assessing the proposed merger, URCA has considered the merging parties' offerings to their customers and the potential harm to those offerings. URCA has concluded that the Parties are in different relevant markets. URCA has therefore considered whether the proposed merger would result in foreclosure through tying and bundling and foreclosure through portfolio effects.
- 7.8 Foreclosure through tying and bundling occurs where the merged firm uses its market power in one market to foreclose competitors in another by employing selling practices that link the products it sells in the separate markets together. Foreclosure through portfolio effects occurs where the merger gives the merged firm a product range advantage because customers value variety and therefore wish to purchase both of the merged firm's products.
- 7.9 As described in paragraphs 7.31 through 7.33 below, the Parties will provide tied and bundled services. Tying and bundling need not be anti-competitive and can be beneficial to customers. The Parties have provided evidence to support efficiency gains consequential to tying and bundling. URCA therefore concludes, after its investigation and analysis, that the potential efficiencies resulting directly from the proposed merger are sufficiently substantial to counteract potential anti-competitive effects that would lessen competition.

The Counterfactual

- 7.10 To determine whether there is likely to be a substantial lessening of competition, URCA has also considered what would happen if the Parties did not merge¹². This is known as the counterfactual or "failing firm" defence. URCA begins with the presumption that the counterfactual scenario is the *status quo* prior to the proposed merger. In analysing the counterfactual, URCA particularly considers whether the firm being acquired would exit the market in the near future were it not for the merger; that the firm is unable to reorganise its operations; and there is no less anti-competitive alternative purchase to the merger¹³.
- 7.11 The Parties have provided cogent evidence to rebut this presumption by urging URCA to have regard to the Licensee's financial position and, in particular, whether this position is likely to allow the Licensee to emerge as an effective competitor capable of exercising competitive constraints on dominant operators in the sector. Under the SPA, the Licensee has an indebtedness for borrowed money in the amount of [] as at June 30,

¹² Ibid see particularly section 4.4

¹³ In addition to section 4.4 of the Competition Guidance, see EC Joined Cases C-68/94 and C-30/95, *Kali and Salz* par. 110 – 116.

2010. Additionally, the Licensee's Audited Financial Statements indicate that as at December 31, 2009 its liability totalled a higher amount of [].

- 7.12 The Parties submitted that absent the merger the Licensee is at a greater risk in its ability to compete going forward, particularly, should there be a merger between the local incumbent and Cable & Wireless Communications Limited (a strong global competitor).
- 7.13 The Parties confirmed that after an assessment of the Licensee's options, it has not been able to identify alternative sources of funding to enable the Licensee to pursue its own growth strategy. It was further submitted that even if alternative sources of funding could be identified, the Licensee's current financial position, removes any realistic possibility of securing funding necessary for growth.
- 7.14 The Parties argue that the Licensee "*will find it challenging to sustain its business without a strategic partner.*"
- 7.15 URCA is satisfied by its investigation that the foregoing submissions allow the Parties to rely on the "failing firm" defence. However, URCA is of the opinion that even where the defence does not apply, it is conceivable that the acquisition of the Licensee by the Acquirer might be permitted where it yields relevant customer benefits¹⁴. The benefits would however need to outweigh the customer detriments which arise through the loss of competition. The potential benefits to customers which might accrue under the proposed concentration are lower prices, greater choices and higher quality service¹⁵.
- 7.16 URCA believes that the continued provision of fixed voice services under the merger is vital to sustainable competition in The Bahamas. This is one of the key policy objectives of the Comms Act and the Electronic Communications Sector Policy¹⁶. URCA's conclusion regarding the counterfactual is that there is a potential loss of the only other operator currently providing fixed voice services in The Bahamas should the merger not be approved. Any such loss should therefore be avoided.

Barriers to entry and expansion

- 7.17 URCA has considered the extent to which there may be barriers that adversely affect the likelihood, timeliness and sufficiency of other players' ability to enter or expand in the market¹⁷. These barriers to entry may include, but are not limited to: (i) legal barriers

¹⁴ A position taken by the Competition Commission (UK) and reflected in the OFT Guidance, par. 4.38;

¹⁵ The Privileged and Confidential report prepared by LECG Consulting Ltd. (UK) dated 14 October, 2010 submitted by the Parties describes in detail direct benefits to be passed on to customers within a reasonable time post-merger approval.

¹⁶ Published in the Official Gazette, 7th October, 2009

¹⁷ See URCA's Competition Guidance: Merger Control – Substantive ECS COMP. 2 section 4.5

such as the requirement for a licence, (ii) technical barriers such as the availability of spectrum and (iii) access to essential facilities.

- 7.18 The licensing regime under the Comms Act effectively removes legal barriers to entry. The licensing regime, when taken as a whole, encourages, promotes and enforces sustainable competition in the 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 Guidelines¹⁸ 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. URCA has issued Comms Act licences which allow other operators to provide like services in the market as the Parties.
- 7.19 The potential technical barriers to entry consequential to availability of spectrum are addressed by the exercise of URCA's powers under Part V of the Comms Act. URCA has a statutory duty to ensure that radio spectrum is managed and used in a manner that: *"is open, objective, transparent and non-discriminatory; is economically efficient and facilitates the evolution of new technologies and electronic communications services whilst taking into account in particular investment in existing equipment configured for specific radio spectrum and the cost of migration to other radio spectrum."* URCA may by determination, without compensation, declare vacant any radio spectrum that has been assigned to a person and may assign such spectrum to a different person on certain grounds, particularly: *"the relevant spectrum is not in significant use and there is demonstrable demand from other persons for making efficient use of all or part of such radio spectrum."*
- 7.20 URCA may also by determination, with compensation, require a person to vacate radio spectrum that has been assigned to a person and may assign such spectrum to a different person on certain grounds, particularly where it is necessary or expedient to further the electronic communications policy objectives. An objective of the Electronic Communications Sector Policy is to further the interests of consumers by promoting competition and, in particular, to promote the optimal use of state assets including radio spectrum. Therefore, URCA's power of vacation of spectrum either with or without compensation lowers the barrier to entry even where there is a merger concentration.
- 7.21 While access to essential facilities can act as a barrier to entry, URCA has issued its Final Decision on obligations for SMP operators¹⁹ which are specifically designed to maintain the objective of encouraging, promoting and enforcing sustainable competition

¹⁸ See URCA's published document Guidance On The Licensing Regime Under the Communications Act, 2009 Guidelines ECS 15/2009

¹⁹ See section 4 of the *"Obligations imposed on Operators with Significant Market Power (SMP)"* Final Decision document ECS 11/2010

particularly in the markets of the SMP operators and thus remove the potential that access to essential facilities can pose as a barrier to entry. The Acquirer, as an SMP operator, has the obligation of providing its broadband services to other licensed operators on a resale basis. It also has the obligation of untying its broadband packages from pay TV packages. This also lowers the costs of entry.

- 7.22 URCA may also consider the effect of a merger on the likelihood of new entry which might itself contribute to a substantial lessening of competition where the merger will reduce or eliminate the competitive constraint represented by new entry. This is especially the case where the acquired firm is one of the most likely entrants into the market of the acquiring firm.
- 7.23 The merger of the Parties will result in a reduction of the number of competitors in the market as the Acquirer would have been able to enter the market of the Licensee and the Licensee would have been able to enter the market of Acquirer. However, any new entry should be of sufficient scope to constrain attempts to exploit market power. URCA is of the opinion that small-scale entry, perhaps into a niche market, may be insufficient to substantially lessen competition. The Parties have submitted that without the merger the Licensee will be *“reduced to a mere niche player at best.”*
- 7.24 URCA has considered whether the creation of a portfolio or bundle of services by the merged entity will be a strategic barrier to entry and whether another provider could replicate such bundled services. URCA’s investigation in this regard and having regard to URCA’s comments at paragraph 7.21 above, the bundled services proposed by the Parties can be provided by other rival operators. This can act as an important constraint on the merging parties’ behaviour in the market.
- 7.25 URCA’s conclusion on the barriers to entry is that although the merger may reduce competitive rivalry in the short term, entry by new players and/or expansion by existing players consequential to low barriers to entry may be sufficient to deter or defeat attempts by the merged firm to exploit that reduction in competitive rivalry. As such, the merger would not substantially lessen competition.

Efficiencies

- 7.26 The Parties have claimed that the efficiency gains consequential to the merger will have a positive effect on rivalry. In its assessment of the claimed efficiency gains, URCA would expect the following criteria to be met: (i) the efficiencies are very likely to arise and to do so within a period of time corresponding to the onset of any adverse effects on customers, (ii) the efficiencies must be a direct consequence of the merger; and (iii) the benefits of the efficiencies must be passed on (wholly or partially) to customers of the merged firm.²⁰

²⁰ See URCA’s Competition Guidance: Merger Control – Substantive ECS COMP. 2 section 4.7

- 7.27 While there is no exhaustive list of efficiency gains that can result from a merger, the possible efficiencies to be considered by URCA under the instant merger include cost savings, more intensive use of existing capacity, economies of scale or scope, and demand-side efficiencies such as increased network size and product quality.
- 7.28 The information asymmetry between URCA and the Parties in respect of the efficiency claims requires that the evidence provided must be compelling²¹. The Parties have submitted both quantitative and qualitative data in support of the claimed efficiencies prepared by the UK based firm, LECG Consulting Ltd., which describes the efficiencies which will result from the instant merger²².
- 7.29 The report provides that the merged entity will aim to offer voice services to [%] of the Bahamian population at lower prices, with a quality at least as high as PSTN. In this regard, the merged entity will offer residential and commercial customers voice tariffs significantly lower [% and % respectively] than the rival incumbent, using the Acquirer's cable network. The merged entities have established a plan to migrate the existing customers of the Licensee to the merged entity's corresponding tariff plan.
- 7.30 The report outlines higher quality of service and reliability than the VoIP service currently provided by the incumbent and the Licensee (as a stand-alone provider) as a claimed efficiency. The report admits that the quality of service and greater reliability are difficult to quantify but asserts that consumer research indicates that these variables are the most important factors Bahamian consumers consider when choosing a fixed voice provider. Further, the merged entity will be able to provide reliable voice service and high call quality managed by the merged entity's geographical redundant next generation switching equipment and delivered by the merged entity's advanced fibre-optic network. The latter has direct benefit for corporate customers (particularly large and medium).
- 7.31 Arising from the report, the merged entity proposes to provide double, triple and possibly quadruple play bundles at bundled discounts. Relying on a Cournot model²³, the Parties proposes to treat broadband internet, pay TV and voice as complementary products and offer one of the products in the bundle at a discount. Consequently, demand for all the products in the bundle should increase. Reduced prices under the Cournot model has been claimed as a pricing efficiency by the Parties that will benefit consumers.

²¹ An international standard as adopted by OFT

²² Supra note 12

²³ The Cournot model is an economic model that attempts to predict the behavior of two businesses that make up a given market. In the Cournot Model, the variable that exists between two companies of a specific market is their output level. These companies will adjust their levels of output until they reach a point where they can lower prices while still maximizing profits. Bundled products and discounts is one method of achieving this goal.

- 7.32 The report has also described potential network efficiency consequential to the merger by combining the Acquirer's cable network with Licensee's fixed wireless network. It illustrates that the Acquirer's network passes [%] of the population on the four Bahamian islands where it operates. It has been submitted that the merged entity intends to extend its network footprint to reach an additional [%] of the population of those islands. The concentration will allow the merged entity to use the fixed line network to provide voice services to customers approximately nine (9) months earlier than without the merger.
- 7.33 The report outlines lower termination rates for international calls as an efficiency that the merged entity could not provide consumers on their own. Under the report, the Parties proffer that as lower termination rates will reduce the marginal costs of a call to the merged entity, this benefit will be shared with Bahamian consumers.
- 7.34 The report indicates that should the merged entity be given regulatory approval, the consumer benefits under the merger will be realised in 2011.
- 7.35 URCA concludes that, after its investigation and analysis, the potential efficiencies resulting directly from the proposed merger are sufficiently substantial to counteract any potential anti-competitive effects. URCA is satisfied that the efficiencies will be passed on to consumers within a reasonable time of the merger.

8 URCA's decision

- 8.1 Having provided the foregoing reasons and reasoning, 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 Section 72 of the Comms Act and therefore URCA gives its consent to the proposed merger.