

THE COMMUNICATIONS ACT

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INTRODUCTION

Telecommunications in The Bahamas were, in theory, liberalized in 2000 with the passage of the Telecommunications Act, 1999. However, for many reasons, including the desire of The Bahamas Government to privatise the national telecommunications company, BTC, liberalization was not fully realized; BTC retained its monopoly over cellular services, and only one other player, Systems Resource Group, was licensed as a telecommunications carrier. The doors are being reopened with the introduction and passage of the Communications Act ("ComsAct").

ComsAct represents a complete revision of the Telecommunications Act, 1999, the majority of which will be repealed on its coming into force. The most radical changes include: the specification of Government policy objectives and guidelines; the introduction of a more robust, flexible and powerful regulator under the Utilities Regulation and Competition Authority ("URCA"); the convergence of telecommunications and broadcasting under one roof; provisions for consumer protection; the inclusion of a Utilities Appeal Tribunal; and, for the first time in Bahamas legislation, provisions for the regulation of competition. ComsAct is joined by two other pieces of legislation, the URCA Act and the Tribunal Act, to assist with liberalization.

Status

ComsAct will come into force on the date specified by a notice published in the Gazette which is to be the earlier of the date when the Government no longer holds the majority of shares in BTC; or as soon as practicable thereafter or such other earlier date as the Minister may appoint. ComsAct binds the Crown.

POLICY AND REGULATORY GUIDELINES

Unlike the Telecommunications Act, which referred to but did not specify Government policy objectives and guidelines, ComsAct is more clear. The objectives of the electronic communications policy are:

- to benefit consumers by way of competition;
- to enhance efficiency;
- to promote investment/innovation;
- to encourage sustainable competition;
- to promote optimal use of state assets;
- to provide persons in The Bahamas affordable access;
- to maintain public safety and security;
- to contribute to privacy;
- to limit public nuisance;
- to protect the environment; and
- to provide content services.

The guidelines for the regulation and Government measures are:

- market forces are to be relied upon to achieve communications policy objectives;
- regulatory and other measures will be introduced when market forces won't achieve results within a reasonable time frame and having regard to costs;
- regulatory and other measures must be introduced in a manner that is transparent, fair and non-discriminatory; and
- regulations that amend government policy must specify the electronic communications policy objective advanced and demonstrate compliance with the said guidelines.

The Minister, which is defined by ComsAct as the Minister charged with the responsibility for the electronic communications sector other than the Minister for URCA and the Minister for the Corporation, will publish sector policy in the Gazette setting out aims of Government to meet the policy objectives including:

- priority of liberalizing the sector;
- the manner in which Government sees its role in sector; and
- plans for efficient use of state assets and aspects of social policy such as scope of universal service and public service broadcasting.

The sector policy comes into force on the date of its publication in the Gazette. A month from ComsAct coming into force, the first sector policy will be published by the Minister. The sector policy must be revised after 3 years and a new sector policy published within 3 months.

URCA

Under ComsAct, URCA is the regulator of electronic communications; it replaces the Public Utilities Commission under the Telecommunications Act. It has been said that, this time around, the regulator has been given teeth.

ComsAct specifies the functions of URCA as:

- to regulate;
- competition law;
- represent the Government in the region;
- charge licence fees;
- act on behalf of government for billing and fees; and
- perform functions under ComsAct.

ComsAct designates powers to URCA to:

- make determinations;
- make adjudications;
- impose conditions and penalties;
- issue regulations;
- issue directions, decisions, statements, instructions and notifications;
- publish and maintain registers or lists;
- issue technical rules and standards;
- institute prosecutions to enforce ComsAct;
- issue, suspend, vary or revoke licences, permits and exemptions;
- conduct inquiries, investigations and oral hearings;

- require licensee to furnish information; and
- conduct market investigations and market reviews.

ComsAct allows URCA to transition from a licensing regime to a general authorization regime. In a general authorization regime, communication service providers do not need a licence but can operate and deliver electronic communications networks or services further to compliance with general and specific conditions of entitlement.

General conditions of entitlement include:

- conditions to protect consumers;
- conditions to secure service interoperability;
- conditions for securing functioning networks;
- conditions to give effect to determinations;
- conditions in event of disaster;
- conditions to protect public health; and
- conditions requiring compliance with international standards.

However, URCA may not introduce general conditions of entitlement to set conditions applicable to the identity of the provider of the network or carriage service; or to set conditions that differ according to the identity of the provider of the network or carriage service. Special conditions of entitlement will relate to the provision of universal services and the provision of information demonstrating compliance with a universal service obligation and conditions on SMP licensees.

URCA also has powers of investigation. URCA may accompany a peace officer and inspect premises. To promote a stable regulatory environment that is attractive to local and international investors, it is important that URCA acts fairly and is seen to act fairly. There is a wide obligation on URCA to publish significant documents and consult with the public. URCA is required to implement standard ADR procedures for disputes between licensees and between licensees, service providers and consumers.

LICENSING OF ELECTRONIC COMMUNICATIONS AND RADIO SPECTRUM

Under ComsAct, URCA has 2 types of licences at its disposal:

1. an individual operating licence; and
2. a class operating licence.

It is a criminal offence to provide a network or service without a licence, unless one is an exempt person and an exemption applies. The exempt persons are:

- Royal Bahamas Police Force;
- Royal Bahamas Defence Force;
- Providers of fire brigade, ambulance, coast guard; and
- Military services duly authorized to operate in The Bahamas.

Individual Licence

Individual licences must be issued to the named licensee and will come into force pursuant to an application process. An individual licence may be granted by URCA with conditions which must comprise substantially the same for all licensees. Licensees are required to notify URCA of any subsidiary undertaking.

Application Process

Persons wishing to apply for an individual licence must submit an application in the form and manner and with the information specified by URCA. A fee may be payable on application. URCA must treat persons seeking an individual licence to provide a network or carriage service and the right to use radio spectrum for such network or carriage service under a single application process in order to minimize the administrative burdens and uncertainties for such persons of dual application or registration processes. Persons wishing to apply for an individual licence must:

- be legal entities incorporated in The Bahamas;
- conduct the administration and management of the business from premises in The Bahamas;
- be a fit and proper person to establish, maintain and operate a network or carriage service or use radio spectrum;
- demonstrate sufficient intention, financial strength and resources to meet their obligations under ComsAct; and
- meet any other requirements including provision of information and data that URCA may require.

URCA will review all applications for individual licences and within 30 days of receipt:

- approve the application and grant a licence(s);
- reject the application specifying the reasons for the rejection; or
- request further information necessary to evaluate the application. In this case, URCA will have 1 month from the date of receiving information to evaluate the licence application.

If the Minister or URCA intend to restrict the number of individual licences to be granted for the right to use the same or similar radio spectrum, then the Minister or URCA will select such licensees for those individual licences pursuant to a competitive selection process. A competitive selection process will provide for selection by the Minister or URCA based on objective criteria, including:

- applicant's financial bids;
- relevant experience;
- commitments of applicants with respect to the type, quality and geographical coverage of the relevant services; or
- any combination of the foregoing.

Individual licences must be for a term of not less than 5 years. URCA will, on application of a licensee renew an individual operating licence unless the licensee has repeatedly contravened, or failed to cure a material contravention of ComsAct or any other regulatory measure, including the conditions of the individual operating licence. URCA may amend the terms of an individual licence that is to be renewed in order to conform to determinations, adjudications, orders or regulations then in force.

URCA may by determination, on its own motion or on written application of the relevant licensee, modify, vary, restrict the conditions of or revoke any licence granted to a licensee if:

- it is necessary to comply with international treaties;
- it is necessary to further the communications policy objectives and there is justification;
- the licensee has repeatedly contravened ComsAct;
- the licensee made a material misrepresentation in its licence application;
- the licensee has entered into receivership or liquidation;

- the licensee is not providing the network or carriage service authorized by and specified in its licence and URCA is satisfied the licensee does not have the intention or financial strength;
- it is in accordance with the procedure of URCA's power to make orders; and
- it is in accordance with the terms of the licence.

The licence will be affected 30 days after the date of written notice, and the licensee before the date specified in the licence may appeal to the Tribunal. URCA must take into account continuity of service to users. URCA is required to maintain a register in electronic paper form of all individual licensees.

Class Licence

URCA may establish class licences not requiring registration. Any person meeting the specified qualification criteria can provide the service in accordance with the published conditions in the class licence.

If URCA establishes class licences requiring registration, it must publish a standard registration form for class licences. URCA will publish guidelines for registration and deregistration of class licensees. Any person meeting the specified qualification criteria published by URCA for a class licence requiring registration may register and remain registered for that class licence by filing with URCA the appropriate registration form and paying application or other fees. If the registration is non-effective, URCA must provide written notice of this. Registration takes effect 45 days after filing. URCA may not restrict the number of persons that may register under a class licence.

Radio Spectrum Management

URCA has the exclusive right to manage, allocate and assign all frequencies in the radio spectrum in The Bahamas. However, the Minister is responsible for deciding the method of allocating frequencies in the premium spectrum band of the spectrum plan. The Minister will set spectrum fees or the method for setting those fees.

URCA is required to publish the spectrum plan. The spectrum plan must be consistent with applicable international treaties, commitments or standards including the International Telecommunications Union. It must specify those frequency bands that are premium spectrum bands. Within 3 years of each publication of a spectrum plan, URCA must formulate and submit a revised spectrum plan to the Minister. The Minister may approve or amend the proposed spectrum plan within 45 days of submission by URCA.

Objectives Of Radio Spectrum Management

The Minister and URCA must ensure that radio spectrum is managed and used in a manner that:

- is open, objective, transparent and non-discriminatory;
- is economically efficient;
- meets the needs of government departments and agencies.

URCA must take enforcement action promptly to ensure protection of licensed radio spectrum bands from interference.

URCA may by determination establish 1 or more of the following:

- exemptions from a requirement to be licenced;
- class licences; and

- requirements for radio spectrum individual licences.

URCA can establish:

- requirements for authorization of use of radio equipment, including technical requirements and standards in relation to radio interference; and
- procedures, conditions and restrictions applicable to the use of radio spectrum and radio equipment.

Vacation of Radio Spectrum

URCA may by determination made on application or on its own motion, without compensation, declare vacant any radio spectrum that has been assigned to a person and assign such spectrum to a different person on the following grounds:

- the relevant radio 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;
- such variation is necessary to comply with international treaties;
- the person agrees to vacate it;
- the person has contravened a determination, adjudication or order relating to management or operation of radio spectrum;
- the person previously assigned the relevant radio spectrum made a statement or omitted to make a statement relating to the management or operation of radio spectrum;
- the person previously assigned the radio spectrum made a statement resulting in a material misrepresentation in the assignment of it; or
- the person previously assigned the radio spectrum has entered into receivership or liquidation.

URCA may by determination made on application or on its own motion, require a person to vacate radio spectrum previously assigned to it, and assign the radio spectrum to a different person on other grounds if:

- necessary or expedient to further the electronic communications policy objectives; or
- there is justification for causing hardship that may result to the licensee.

A determination made of the above may be conditional on payment by the new persons assigned the relevant radio spectrum of compensation to the person required to vacate the radio spectrum. URCA's determination made to vacate the radio spectrum will take effect on date specified by URCA not less than 30 days after the date of written notice given by URCA to a licensee affected by that determination. The licensee may appeal to the Tribunal against the determination. URCA must provide written notice to a person previously assigned radio spectrum that it intends to vacate the relevant radio spectrum and the person may within 30 days appeal to the Tribunal for:

- the determination of his interest/right;
- the legality of the vacation of the spectrum;
- the reasonableness of the time given to vacate the spectrum;
- the amount of any compensation; and
- the period of time in which it is paid.

A Licensee is not permitted to assign the use of radio spectrum to a third party; however, URCA may publish further rules on this.

COMPETITION PROVISIONS

ComsAct is the first time Bahamas legislation has made explicit competition, also called antitrust, provisions. These are provisions that prevent one carrier from becoming overly dominant such that a monopoly is formed. ComsAct states that, so far as is possible, matters of competition are to be dealt with in a manner which is consistent with international best practice.

SMP

URCA is, at any time, enabled by ComsAct to designate a licensee an SMP licensee, if the licensee enjoys a position of economic strength which hinders the maintenance of effective competition on the relevant market; this happens if it behaves to an appreciable extent independently of its competitors, consumers and subscribers. URCA may publish criteria relating to the definition of markets in the electronic communications sector; and against which market power may be assessed, in order to enable it to determine whether a licensee is an SMP. URCA's criteria is:

- market share;
- ability to influence market conditions;
- access to financial resources; and
- experience in providing products to the market.

ComsAct sets out a non-exclusive list of the obligations imposed on licensees deemed to have SMP. URCA can oblige the licensee that has SMP to offer access or interconnection to other service providers at rates approved by URCA and published in a reference offer, and/or the licensee to submit its retail tariffs to URCA for approval.

URCA may impose specific conditions on licensees determined to have SMP in the relevant market, including:

- price controls;
- equivalence of access/interconnection;
- submission of financial statements;
- retail price regulations;
- sharing of facilities;
- access to systems used to provide content;
- offering services on non-discriminatory basis;
- provision of standard terms of business;
- provision of service level guarantees; and
- such other obligations as URCA deems necessary to meet policy objective.

Prior to imposing obligations on SMPs, URCA is required to:

- ensure mandated pricing methodology is sustainable and benefits consumers;
- take into account investment made by licensee and allow a reasonable rate of return;
- cost accounting system made publicly available; and
- prices available in comparable markets.

SMP licensees are required:

- not to unduly discriminate against particular persons in terms of electronic communications offered by them;
- provide technical specifications about any interconnection on a reasonable and timely basis when information is required by another licensee to provide its licensable services; and

- not adopt technical specifications for a network that prevents interconnection or interoperability with a network of a competitor.

If an SMP licensee is subject to an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs lies with the SMP licensee concerned.

ComsAct provides that there will be a presumption of SMP for the following:

- BTC in the provision of fixed voice;
- Cable Bahamas in the provision of high speed data services and connectivity;
- BTC in the provision of mobile voice and mobile data services; and
- Cable Bahamas in the provision of pay TV services;

Anticompetitive Agreements

ComsAct prohibits agreements, decisions and practices implemented in The Bahamas which prevent, restrict or distort competition relating to communications. These agreements are ones which:

- fix purchase prices;
- limit markets, technical development or investment;
- share markets;
- apply dissimilar conditions to equivalent transactions; and
- make the conclusion of contracts subject to acceptance of supplementary obligations.

Abuse Of Dominant Position

Any conduct by a licensee which relates to communications and is an abuse of the licensee's dominant position in a market is prohibited. Conduct may be abuse if it:

- imposes unfair purchase prices;
- limits market development;
- applies dissimilar conditions to equivalent transactions;
- requires supplementary obligations; and
- limits access to a network.

Merger Control

No change in control of a licensee can be implemented without obtaining the prior written approval of URCA. The acquirer or licensee must notify URCA within 7 days of concluding an agreement or announcing a public bid that would result in a change of control of a licensee.

BROADCASTING AND PUBLIC SERVICES

ComsAct has been called "state of the art" because it converges traditional telecommunications with broadcasting services. In the digital age, high speed internet has led to a unifying of these mediums, and ComsAct embodies this unification. Thus, the sector is called the electronic communications sector because it encompasses the provision of all electronic communications, including broadcasting.

After ComsAct comes into force, URCA is required to review the Broadcasting Act and publish recommendations to the Minister about:

- necessary amendments to the Broadcasting Act;
- the role of public service broadcasting in The Bahamas;
- the remit and corporate governance rules of the Corporation; and

- the preferred method of funding any public service broadcasting obligations.

Based on recommendations presented by URCA, the Minister must specify in the sector policy or by notice published in the Gazette the public service broadcasting obligations within 3 months of submission by URCA of the recommendations.

URCA may designate a public service broadcaster. A public service broadcaster is entitled to apply for funding from the public service broadcasting fund; and other benefits determined by URCA. ComsAct establishes the public service broadcasting fund into which are to be paid any money appropriated by Parliament, including the imposition of a levy; and any grant, contribution or loans from any international organization or donors.

Content Regulation

URCA may issue regulatory and other measures to regulate content services intended for subscribers. URCA is required to issue codes of practice that are to be observed by licensees providing audiovisual media services in The Bahamas. These may include:

- methods of ensuring protection of children from exposure to programme material which may be harmful;
- promoting accuracy and fairness in news;
- preventing broadcasting of programmes that mislead or alarm audiences;
- time, standards required, and kinds of sponsorship for advertising;
- captioning for hearing impaired;
- teletext;
- political broadcasts;
- sports and national events;
- regulations and national emergency and disaster conditions.

In developing codes of practice the following taken into account:

- physical and psychological violence;
- sexual conduct and nudity;
- use of drugs including alcohol and tobacco; and
- matters that are likely to perpetuate racism.

A person who fails to comply with any regulatory or other measures is liable to pay a fine.

Universal Service

ComsAct contains universal service provisions. It provides for the Minister to determine services which the Government insists a designated licensee give to persons in The Bahamas or in other specific locations in The Bahamas.

Under ComsAct, BTC is required to provide:

- Basic dial-up internet services to populated areas;
- Basic internet services to specified institutions;
- Basic telephony services to all populated areas; and
- Public access to pay apparatus.

and Cable Bahamas is required to provide for basic television services in specified locations.

Consumer Protection

URCA has a duty to monitor and enforce the consumer protection conditions in the licences. URCA may issue general regulations relating to protection of consumers, which might include:

- standard of service, quality, safety;
- handling of consumer complaints;
- any other matter to secure effective protection of consumers.

Following a request by URCA, licensees must publish performance against any key performance indicators and provide details of their performance against key performance indicators. URCA may prohibit use of network or carriage service to provide unsolicited communications to reduce annoyance, inconvenience or anxiety. Licensees must keep consumer data confidential and only disclose a subscriber's name, address and listed telephone in a directory. A licensee is allowed access to a subscriber's property to operate, maintain in good working order and repair all facilities belonging to it.

Numbering and Naming Systems

With regard to Numbering and Naming Systems, ComsAct obliges URCA to publish a numbering plan for carriage services and allows URCA to make rules pursuant to that plan for the allocation of numbers to licensees and the use and assignment of those numbers to licensees. COB is given the power to manage .bs domain names in The Bahamas.

TECHNICAL MATTERS AND FEES

URCA is enabled by determination or regulation to establish technical rules and standards which are to be applicable to communications equipment manufactured within The Bahamas.

Land Access

ComsAct provides for licensees to gain access to land and facilities for the purposes of providing and developing electronic communications networks and services.

National Interest Matters

The Minister has certain powers in matters of national interest. It ensures ComsAct is compatible with requirements of the Listening Devices Act. Governor General enabled to take possession of any electronic communications network in cases of national emergency.

Fees and Payments

ComsAct sets out fees payable by licensees including Licence Fee, URCA Fee and Minister Fees. The communications licence fee will be equal to 2% of licensee's relevant turnover.

ENFORCEMENT

This time around, the regulator has been given teeth. Its actions can take any of the forms listed below.

Orders

Orders relate to the sanctions URCA may impose on licensees and content providers for a breach of legislation. Orders may include fines not exceeding 10% of the licensee's relevant turnover, specific performance, injunctions or variation suspension or revocation of licences.

Determinations

This relates to the regulatory function of URCA. URCA may investigate an alleged infringement either as a result of a third party complaint or on its own initiative.

Adjudications

Adjudications relate to the competition functions of URCA. These are used when a licensee has acted anticompetitively or is subject to a change of control.

Offences

If a person is not licenced and breaches any provision of the Act, URCA's recourse is through criminal courts. URCA has power to bring prosecutions.

Fines And Remedies

The general fine that can be imposed for contravention is a fine not exceeding 10% of the relevant turnover. It is required to be paid in one lump sum or over a period of time in smaller sums.

Utilities Appeal Tribunal

ComsAct provides a means of appealing the actions of URCA by way of the Utilities Appeal Tribunal. ComsAct affirmatively confers upon the Tribunal jurisdiction to hear and judicially review appeals from URCA, disputes between licensees and any other matter or disputes referred to the Tribunal. The Tribunal hears disputes over land access. Whenever the Tribunal's jurisdiction does not extend to the review of regulatory or other measure URCA or any public authority, normal principles of judicial review apply.

TRANSITIONAL PROVISIONS

The Minister will publish the first sector policy under ComsAct in the Gazette within 1 month of ComsAct coming into force or as soon as practicable thereafter. Any licence, permit or franchise granted under either the Broadcasting Act or Telecommunications Act in respect of a network or carriage service or radio spectrum which is in force prior to ComsAct coming into force will be an "existing licence" and will have effect as an individual licence granted by URCA for the expired term of the existing licence.

Every holder of an existing licence is required within 3 months of ComsAct coming into force to supply URCA with full details of its existing licence. Any licence for which full details are not supplied to URCA will expire on the date being 3 months after ComsAct comes into force.

An existing licensee within 1 month after the date it supplies URCA details of an existing licence must apply to be granted individual licences; or give notice of its objection to URCA requesting its existing licence continue in force for the remainder of its unexpired term or until a later date specified in the notice of objection.

If an application to be granted an individual licence is made, URCA may grant or refuse to grant an individual licence on the grounds that a company of which the applicant is a subsidiary undertaking is an existing licensee or is a company that requires or has applied for an individual operating licence.

ComsAct governs licences granted under legislation repealed by ComsAct or the URCA Act. The process for migrating licensees under the Telecommunications Act and the Broadcasting Act to licences under the new Communications regime.

Under current sector policy, BTC has a monopoly for the provision of cellular services. It is envisaged that BTC will continue to have a monopoly for the provision of cellular services until the special rights in the sector policy expires or the sector policy is no longer in effect. ComsAct lists the Acts partially repealed and replaced by ComsAct and the URCA Act. These include Telecommunications Act, Broadcasting Act, Bahamas Telecommunications Corporation Act, and the Business Licence Act.

CONCLUSION

ComsAct consists of twenty parts, unlike the meager twelve parts of its predecessor, the Telecommunications Act. ComsAct is farther reaching than the aforesaid and will provide for a more robust and expansive regulatory system. With the passing of ComsAct, it is clear the Bahamas Government is determined to liberalise telecommunications in The Bahamas.