



## **ADJUDICATION**

### ***APPLICATION FOR APPROVAL OF CHANGE IN CONTROL OF LAST MILE COMMUNICATIONS LTD.***

**ECS 08/2017**

10 AUGUST 2017

## **ADJUDICATION made pursuant to Section 75 of the Communications Act, 2009**

### **In the matter of a request for approval of a change in control of Last Mile Communications Ltd to VosCom Inc. (USVI)**

**WHEREAS** the Utilities Regulation and Competition Authority (URCA) having received from Last Mile Communications Ltd (as the “Licensee”) and VosCom Inc.(USVI) (as the “Acquirer”) on 22 May 2017, a Simplified Notification in which the Licensee and the Acquirer request URCA’s consent to a Transaction in which the Acquirer will purchase from the Licensee, one hundred per cent (100%) of all the outstanding shares of the Licensee (the “Transaction”), has duly deliberated upon the information provided and matters set out in the Notification;

**AND WHEREAS** the Transaction is also conditional upon URCA approving the change in control pursuant to Condition 8 of the Licensee’s Individual Operating License and Condition 8 of the Individual Spectrum License, which has been approved by URCA and this will be granted in writing upon completion of the Transaction;

**AND WHEREAS** URCA having given members of the public in The Bahamas reasonable opportunity to submit representations regarding the Transaction has given due consideration to all such representations received.

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

#### **Impact of the Transaction on Competition in the Relevant Markets**

The Acquirer is not active as a network operator or service provider in any markets in The Bahamas. URCA has taken into account its analysis of the relevant markets, and finds that the change in control contemplated by the Transaction would not have either of the adverse effects set out in Section 72: substantially lessening competition in The Bahamas; or in a case of a change of control involving a media public interest, an effect contrary to the public interest.

#### **URCA’s Consent to a Change in Control of Last Mile Communications Ltd**

On the basis of the findings set out in the Summary of Deliberations and Reasons (hereto attached), URCA hereby grants its consent to a change in the control of the Licensee (for the purposes of Section 70 of the Comms Act) to the Acquirer as set out in the Simplified Notification submitted to URCA by the Licensee and the Acquirer on 22 May 2017.

## Summary of Deliberations and Reasons

### 1. Introduction

- 1.1 URCA is an independent regulator, established under the Utilities Regulation and Competition Authority Act, 2009 (the “URCA Act”). URCA’s powers, functions and duties in relation to competition within the electronic communications sector (ECS) are set out in the URCA Act and the Communications Act, 2009 (the “Comms Act”).
- 1.2 URCA has powers to regulate electronic communications services and network operators within the legislative framework. This summary of deliberations and reasons sets out URCA’s analysis of the effect of the notified Transaction on competition in electronic communications markets in The Bahamas, pursuant to section 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 URCA’s remit in relation to the review of the Transaction extends to a consideration of expected changes to the law and the Electronic Communications Sector Policy (ECS) which may affect the competitive landscape in The Bahamas. This is because merger control, by its very nature, is a forward-looking process and seeks to determine whether a change in control can be expected to lead to a substantial lessening of competition in the relevant markets in The Bahamas within a reasonable timescale, following the change in control of a licensee.

### 2. Background

- 2.1 Part XI of the Comms Act sets out the competition provisions that apply to the ECS. 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.
- 2.2 On 17 April 2017 Licensee and the Acquirer executed a Letter of Intent (LOI) whereby the Acquirer expressed the binding terms on which it sought to purchase the shares (the “Shares”) of the Licensee. A Definitive Stock Purchase Agreement (the “Agreement”) was drafted between Licensee and the Acquirer setting out the terms and conditions regarding the acquisition of a one hundred per cent (100%) shareholding in the Licensee by the Acquirer. The Agreement was to be executed between Licensee and the Acquirer on or before 1 July 2017 after which under the terms of the Transaction, the Acquirer would take control of the Licensee on 1 July 2017, bring initial working capital and investment capital to Licensee, absorb its debts, and provide for a success based monetary earn-out for the current stockholders.

- 2.3 On 22 May 2017, the Licensee and the Acquirer jointly submitted to URCA in compliance with the provisions of Section 70(3) of the Comms Act, a notification seeking approval by URCA of the proposed transaction which will result in the acquisition by the Acquirer from the Licensee of all the outstanding shares of the Licensee. The Notification was in the form of the "Simplified Notification Form" as required by URCA's " *Competition Guidance: Merger Control- Procedure*" (ECS COMP.1) and included in support thereof copies of the following documents:
- i. Letter of Intent (LOI);
  - ii. Draft Definitive Stock Purchase Agreement; and
  - iii. Last Mile Communications Ltd Financial Statements for 2015 and 2016.
- 2.4 The Notification and the supporting documents were submitted to URCA on a confidential basis by the parties. URCA has reviewed all of the relevant information submitted and has ensured that none of the parties' confidential information is included or disclosed in this document.

### **3. The Parties**

#### **The Licensee- Last Mile Communications Ltd.**

- 3.1 The Licensee was issued by URCA on 30 November 2009 an Individual Spectrum Licence (ISL) for use of specified spectrum throughout The Bahamas and was issued by URCA on 22 October 2012 an Individual Operating Licence (IOL. The Licensee is a wireless Internet service provider as well as a provider of voice telephony services. The Licensee owns one hundred per cent (100%) of a Bahamian Internet Service Providers Licence ("ISP Licence").
- 3.2 Having assumed operations in The Bahamas in 2009, the Licensee is authorized and permitted to provide certain telecommunications and broadband services including wireless Internet and Voice over Internet Protocol ("VOIP") services for the entire Island of New Providence and all of the Islands of The Bahamas both to residential and corporate customers.
- 3.3 The services provided by the Licensee in The Bahamas include:
- a. Residential services;
  - b. Commercial services;
    - i. Commercial Internet;
    - ii. Hot standby redundant Internet;
    - iii. Hotel, marinas and complexes;
    - iv. Construction and remote sites;
  - c. Telephone service;
  - d. Max- TV-IPTV;
  - e. Wi-Fi hotspots; and

- f. Prepaid cards.

#### **The Acquirer- VosCom Inc. (USVI)**

- 3.4 The Acquirer is a company incorporated in the United States Virgin Islands, and situate in St. Croix. It is a new company and a wholly owned subsidiary of VOS Holdings, Inc., a Delaware USA based company. The Acquirer has not conducted business operations in The Bahamas since incorporation and does not hold an interest in any other licensee under the Comms Act.
- 3.5 The Acquirer is funded by its Principals and has significant capital to invest in upgrading and building new generation networks in The Bahamas. The Acquirer’s Principals have a long history in the broadband arena, having designed and built more than 2.5 million homes and businesses in 42 markets throughout the United States, the Caribbean and Europe. The Principals have also financed and own a service provider infrastructure company in the United States called Atlantic Fiber Networks, which owns and operates broadband networks in three states.
- 3.6 The Acquirer is seeking to become the leading alternative telecommunications provider in key local markets throughout the Caribbean region and plans to launch the first “true” high capacity broadband networks in targeted markets in the Caribbean, including The Bahamas.

The Acquirer has acquired and continues to acquire wireless spectrum assets and operating licences as part of its business development initiative to provide seamless mobile broadband coverage to residences and local businesses throughout the Caribbean region, and is in the process of developing and acquiring proprietary undersea fiber optic capacity between the United States and select Caribbean island nations. The Acquirer management team has a twenty-five (25) year accomplishment of investments, mergers and acquisitions in the international telecommunications industry, including development and management of numerous private and publicly traded companies.

#### **4. The Transaction**

- 4.1 Supplemental to the Simplified Notification submitted to URCA by the parties, the Licensee and the Acquirer also submitted a conditional Definitive Stock Purchase Agreement (the “Agreement”).
- 4.2 The terms of the Transaction include:
  - a. Subject to URCA’s approval, the Acquirer will take control of the Licensee, bring initial working capital and investment capital to the Licensee, absorb the debt of

the Licensee, and provide for a success based monetary earn-out for the current stockholders.

4.3 Consequential to the Transaction, the Acquirer will own one hundred per cent (100%) of the fully-diluted shares of the Licensee.

## 5. Change in Control

5.1 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*

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*(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 requirements of the share threshold test in Section 71(b) are satisfied in that the Acquirer will become the beneficial owner (and voting controller) of more than thirty per cent of the voting shares in the Licensee.

- 5.4 As stated above, the Licensee is the holder of an Individual Operating Licence and an Individual Spectrum Licence granted by URCA under the Comms Act. Accordingly, the Transaction is a “change in control” of a licensee which, pursuant to Section 70(1) of the Comms Act, may not be implemented without having obtained the prior written approval of URCA.
- 5.5 Section 75 of the Comms Act provides that URCA’s decision in respect of a request for approval of a change in control of a licensee is to be given by way of Adjudication. URCA has followed the procedures established for the making of adjudications under Section 75, which are set out in the Competition Guidelines: Merger Control, issued by URCA (ECS COMP. 1 to ECS COMP.3).

## **6. Questions to be determined, the Review Process and URCA’s Approach**

- 6.1 Section 72 of the Comms Act provides that URCA, on receiving a notification of a change in control of a license under section 70(3) shall form an opinion on whether “*a proposed change of control of a licensee-*
- (a) would have, or be 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.”*
- 6.2 Upon receiving the notification, URCA must within thirty (30) days either:
- a. Issue its adjudication; or
  - b. Inform the acquirer and the licensee that URCA is opening an in-depth investigation into the change in control.
- 6.3 URCA may request further information from the Licensee and the Acquirer as set out in Section 77 of the Comms Act as is necessary to assist URCA in deciding the specific issue of whether the merger will have the impact of “*substantially lessening competition*” in the relevant market. Under section 78(4) of the Comms Act, the timetable for URCA to issue its adjudication is paused if further information is requested and will restart from the date when URCA receives a complete response to its request. URCA requested from the parties further information in respect to the Definitive Stock Purchase Agreement and provided a time frame by which such information should be submitted. The parties were

notified that upon receipt and review of the information URCA would make a determination as to whether an in-depth investigation would be opened.

- 6.4 URCA may open an in-depth investigation where it considers that there is significant prospect that the change in control is likely to have one or both of the adverse effects set out in Section 72 of the Comms Act, and the parties have not volunteered any proposals to address URCA's concerns. In the event that URCA opens an in-depth investigation, URCA must issue its adjudication within ninety (90) days. Upon receipt of the requested information from the parties as indicated at paragraph 6.3 above, URCA determined that an in-depth investigation was not required.
- 6.5 In the event that URCA determines that a change in control of a licensee would not have the adverse effects listed in Sections 72(a) and 72(b) of the Comms Act, Section 75(a) provides that URCA shall issue an adjudication giving consent to the change in control.
- 6.6 In the event that URCA determines that a change in control of a licensee would have the adverse effects listed in Section 72(a), and 72(b) of the Comms Act, Section 75(b) provides that URCA shall take one of the following actions-
- a. deny its consent to change in control;
  - b. give consent subject to an order that the acquirer or the licensee concerned takes the action that URCA considers necessary to eliminate or avoid any adverse effect;  
or
  - c. give consent without requiring any action to eliminate the adverse effects where URCA is satisfied that any substantiated and likely efficiencies put forward by the acquirer or the licensee are necessary and outweigh any potential harm to consumers and citizens.
- 6.7 Section 74 of the Comms Act provides that a change in control shall be deemed to involve a media public interest if at least one of the persons involved in the Transaction is an enterprise involving either both of broadcasting and/or publishing newspapers. Neither the Licensee nor the Acquirer is involved in broadcasting and or publishing newspapers in The Bahamas. Therefore, the provisions of Section 72(b) do not apply to the Transaction.
- 6.8 Accordingly, the only question to be determined by URCA in relation to the Notification is whether the proposed change in control of the Licensee would have, or would be likely to have, the effect of substantially lessening competition in a market in The Bahamas. In order to satisfy the requirements of subsection 72(a), it is not enough to find that there might be a substantial lessening in competition; in order for an event to be "likely", it must reasonably be expected to happen.



6.9 In determining whether the change in control of the Licensee would have, or be likely to have the effect of substantially lessening competition in a relevant market for electronic communications services in The Bahamas, URCA adopts the following approach set out in ECS COMP.2, “Competition Guidance on Merger Control – Substantive” (the “Substantive Merger Control Guidance”):

- a. Identification of the relevant markets: URCA must first identify the relevant market(s) for electronic communications services in The Bahamas to which the change in control is relevant<sup>1</sup>.
- b. Assessment of Impact on Competition in the relevant markets: Once the relevant market(s) have been identified, URCA shall assess the impact that the change in control would have on competition in those markets, considering the horizontal, vertical and conglomerate effects, as well as any other possible effects. In that regard:
  - i. For the identified markets, URCA will consider any change to the parties’ market shares caused by the Transaction, and any change in market concentration (using the Herfindahl-Hirschmann Index (HHI) as appropriate). Significant market shares or significant increases in market concentration are indicators of possible harmful effects of the Transaction on competition, although they are not of themselves conclusive. URCA will also consider other possible “theories of harm”, features of the Transaction which might harm competition in the relevant market(s).
  - ii. In order to determine whether a change in control would harm competition in a relevant market, URCA will also consider the “counterfactual”, that is, what would happen if the Transaction were not approved by URCA, as compared to the position if the Transaction were allowed to proceed. URCA’s intent in each case is to determine whether competition would be substantially lessened if the change in control were approved.
  - iii. URCA will assess the presence or absence of barriers to entry in the relevant market(s). This will assist URCA in assessing whether any short term impact on competition will or is likely to have lasting effects.
  - iv. URCA may also look at the countervailing buying power of customers in the relevant market(s), if this is considered relevant. A finding that customers are able to significantly influence the terms on which they acquire services from the parties to the Transaction reduces the likelihood of as substantial lessening of competition.

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<sup>1</sup> See section 4.1 of ECS COMP.2

- c. Efficiencies brought on by the Change in Control: In the event that URCA identifies that the change in control would result in a substantial lessening of competition in a market for electronic communications services in The Bahamas, URCA will then consider whether any substantiated or likely efficiencies have been identified by the parties which would outweigh the potential harm to consumers and citizens, as contemplated by section 75(2)(iii) of the Comms Act.
- d. Possible Steps to Mitigate Harm: Where URCA considers that a substantial lessening of competition is or would be likely, which is not outweighed by substantiated or likely efficiencies identified by the parties, URCA will consider any proposals put forward by the parties setting out actions that they could take which would satisfactorily address URCA's concerns, as contemplated by section 75(2)(ii) of the Comms Act.

## 7. Identification of Markets

### Process for Identifying Markets

- 7.1 The Comms Act restricts transactions which would have or be likely to have the effect of lessening competition in a market for electronic communications services in The Bahamas. It would be only in highly unusual circumstances that a merger between a company which does not operate at all in The Bahamas and a company which operates in The Bahamas will be found to *have the effect of lessening competition in a market for electronic communications services* in The Bahamas. This could be the case, for example, if it could be proved that, in the absence of a change in control, the company with no operations in The Bahamas nevertheless had clear defined plans to enter The Bahamas within a reasonable timescale as an independent competitor.
- 7.2 Having said that, URCA's starting point is to identify those markets for electronic communications services in The Bahamas in which the Licensee currently operates, and then to consider the effects of the change in control on these markets. As set out in the Substantive Merger Control Guidance, 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 which are sufficiently substitutable for each other. As set out in ECS COMP.5 (the Market Definition guidelines), it may be sufficient to identify several possible 'markets' without settling on a final market definition, if the substantive competition assessment would be the same whichever of the possible descriptions of the market is adopted.

### The Parties' submissions on the Relevant Markets

- 7.4 The parties have identified the following retail products provided by the Licensee in ECS in The Bahamas:
- a. Telephone services;
  - b. Max-TV-IPTV ( Pay TV);
  - c. Broadband Internet; and
  - d. Prepaid cards

#### URCA's Identification of Product Markets

- 7.5 URCA must conduct its assessment of the effects on competition of a proposed change in control, including analysis of third parties' comments, within the relevant context. Market definition provides this context as it assists in the identification of competitive constraints and enables URCA to consider how those constraints would change pursuant to the change in control.
- 7.6 When a change in control occurs between two parties, only one of which is active in a specific market, in the absence of unusual circumstances, a detailed market definition and market analysis exercise of those markets in which only one party operates would serve no purpose.
- 7.7 For the purposes of this Adjudication, URCA has identified the following high level markets as the appropriate reference point to enable URCA to conduct the competition analysis required to determine whether the Transaction will have the effects on competition relevant to URCA's consideration of a change in control:
- a. Fixed voice telephony services
  - b. Broadband Internet
  - c. Pay TV
- 7.8 URCA notes that even if the markets were defined more narrowly than these high level markets, it would not need to conduct its analysis in more detail than that conducted on the basis of the above definitions as there would be no change to the outcome of the analysis in this particular case.

#### URCA's Identification of Geographic Markets

- 7.9 The geographic scope of a market is the area in which the firms under examination are involved in the supply and demand matrix of the relevant products and services. The Licensee has been granted an Individual Spectrum and Operating licenses and offers its products and services throughout The Bahamas. Given that the Acquirer is not active as a network operator or service provider in The Bahamas, the competition assessment will not change even if a more narrow geographic definition is considered. For the purposes of this case, it is not necessary to consider whether there is a more narrow geographic

scope as it would not affect the final conclusion. Therefore, the geographic scope of each of the relevant markets is no wider than The Bahamas.

- 7.10 In reviewing the markets, the central fact to be emphasized again in the instant case is that there are no markets for electronic communication services in The Bahamas in which both the Acquirer and the Licensee offer products and/or services. As such, the change in control is neither a horizontal nor vertical merger which would have negative effects on competition in any of the markets. Further, as the Acquirer does not operate in any closely related market for electronic communications services in The Bahamas, there are no conglomerate effects of the change in control which URCA must consider under its merger control provisions.

#### The Counterfactual

- 7.11 In order to assess whether a merger is likely to result in a substantial lessening of competition, URCA will consider what would happen if the parties did not merge. This is known as the counterfactual. URCA begins with the presumption that the counterfactual scenario is the *status quo* prior to the proposed merger. In analyzing the counterfactual, URCA particularly considers whether the party being acquired would exit the market in the near future were it not for the merger; that the party is unable to reorganize its operations; and that there is no less anti-competitive alternative purchase to the merger. URCA believes that in this instant case, the proposed merger is not likely to have any effect so as to result in a substantial lessening of competition.

#### Barriers to Entry

- 7.12 URCA is aware of the extent to which there may be barriers that can adversely affect the likelihood, timeliness and sufficiency of other players' ability to enter or expand in the market. However, as URCA has not found there to be any harmful effects to competition in the relevant markets and considers that there are no barriers to entry of new entrants to the relevant markets consequential an approval of change in control between the parties.

#### Efficiencies

- 7.13 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.
- 7.14 The possible efficiencies to be considered by URCA under the instant merger include demand-side efficiencies such as increased network and product quality as well as cost savings. URCA concludes that 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. Representations from Interested Parties and URCA's relevant response**

- 8.1 URCA is required by Section 75(2) of the Comms Act, in determining whether to give its consent to the change in control, to give the Acquirer, the Licensee and any interested persons a reasonable opportunity to make representations; and to consider the representations made. Detailed representations were made by the Acquirer and the Licensee in the Notification.
- 8.2 URCA published a notice of proposed Transaction on its website on 12 June 2017 and in the national newspapers on 23 June 2017 giving a description of the Transaction and inviting representations from interested persons, which representations were to be submitted to URCA on or before 11 July 2017.
- 8.3 URCA received no comments from any interested persons on or before the deadline.

## **9. URCA's Decision**

- 9.1 **WHEREAS** URCA having considered the relevant market, counterfactual, barriers to entry and potential efficiencies consequential to the Transaction, has concluded that the change in control of the Licensee as set out in the Notification submitted on 22 May 2017 would not have either of the adverse effects set out in Section 72 of the Comms Act: substantially lessening of competition; or for a change in control involving a media public interest, an effect contrary to public interest.
- 9.2 **URCA therefore grants** its consent in accordance with section 75(1)(a) of the Comms Act to a change in the control of the Licensee Last Mile Communications Ltd, to the Acquirer, VosCom USVI as set out in the Notification.