

DECISION ON –
COMPLAINT MADE BY DR. BERNARD J. NOTTAGE ON 5
FEBRUARY 2010 AGAINST THE BROADCASTING CORPORATION OF
THE BAHAMAS UNDER CLAUSE 17 OF THE INTERIM CODE FOR
POLITICAL BROADCASTS

ECS 03/2010

Issue Date – 12 February 2010

DECISION

In response to a complaint made to the Utilities Regulation and Competition Authority by Dr. Bernard J. Nottage, MP, JP, against the Broadcasting Corporation of The Bahamas on 5th February, 2010, consistent with Clause 17 of the Interim Code of Practice for Political Broadcasts (ECS 01/2010) issued on 19th January 2010, the Utilities Regulation and Competition Authority has investigated the complaint and hereinafter states its formal decision on the matter and the reasons for that decision.

DEFINITIONS

In this Decision, the following terms have the following meanings:

"BCB" means the Broadcasting Corporation of The Bahamas;

"Broadcasting Act" means Ch. 305 of the Statute Laws of The Bahamas;

"Broadcasting Rules" means the Broadcasting Rules, 1992 (S.I. 46 of 1992);

"Broadcasting Licensing Rules" means the Broadcasting (Licensing) Rules, 1993 (S.I. 77 of 1993);

"Comms Act" means the Communications Act, 2009;

"Dr. Nottage" means Dr. Bernard J. Nottage, the Member of Parliament for the Bain and Grants Town Constituency and the complainant in this matter;

"Election period" means, in relation to a bye-election, the period commencing with the issue of a Writ of Election and ending with the close of poll;

"Interim Code" means the Interim Code of Practice for Political Broadcasts (ECS 01/ 2010) issued by URCA on 19th January, 2010;

"Parliamentary Elections Act" means Ch. 7 of the Statute Laws of The Bahamas;

"URCA" means the Utilities Regulation and Competition Authority;

"ZNS" means the radio and television stations operated by the BCB.

A. BACKGROUND TO THE INTERIM CODE OF PRACTICE FOR

POLITICAL BROADCASTS

1. On 6th January 2010, the Member of Parliament for the Elizabeth Constituency resigned from the House of Assembly, thereby creating a vacancy in the House of Assembly. Pursuant to section 33 of the Parliamentary Elections Act, the Governor-General subsequently issued a Writ of Election for a bye-election in the Elizabeth Constituency. That bye-election is scheduled to be held on 16th February 2010.
2. Section 18(1)(c) of the Broadcasting Act permitted the Minister responsible for the BCB to make rules "to prescribe the proportion of time which may be devoted to political broadcasts and to assign such time on an equitable basis to all parties and rival candidates". The rules were subsequently set out in subsidiary legislation (i.e., the Broadcasting Rules and the Broadcasting Licensing Rules).
3. Part III of the Broadcasting Rules included a set of rules governing political and election broadcasts on services provided by ZNS. Rule 20 of the Broadcasting Licensing Rules (inter alia) extended the rules governing political broadcasts in the Broadcasting Rules to any licensed broadcasting station in The Bahamas.
4. Section 18 of the Broadcasting Act and the subsidiary legislation made thereunder, including the Rules relating to political broadcasts, were repealed by section 120(1) of the Comms Act when it came into force on 1st September 2009.
5. Section 53(1) of the Comms Act requires URCA to issue Codes of Practice, and section 54 of the Comms Act requires URCA to develop complaints-handling procedures, for content. Prior to the announcement of the bye-election in the Elizabeth Constituency, URCA was in the process of finalising a public consultation document setting out its proposals to exercise its powers of delegation in section 55 of the Comms Act to delegate to an industry Working Group the development of new Codes of Practice and the monitoring of compliance with the Codes. The public consultation document was subsequently issued on 4th February 2010.

6. In order to ensure that content rules relating to political broadcasts were in force to cover the forthcoming bye-election in the Elizabeth Constituency (and any other elections that might take place before the new Codes are adopted), URCA issued the Interim Code on 19th January 2010, to specifically cover political broadcasts, and the Interim Code is intended to remain in force until the new content Codes are published. The substantive provisions of the Interim Code are taken verbatim from the Broadcasting Rules and the Broadcasting Licensing Rules, modified to reflect the new Comms Act environment and the powers of enforcement that are now vested in URCA. The Interim Code specifies a new complaints-handling procedure from those in the repealed Rules, responsibility for the implementation of which is now shared between broadcasters and URCA.

B. FACTORS LEADING UP TO THE COMPLAINT

7. It is URCA's understanding that on 3rd February 2010, the BCB and other broadcasting and print media were notified by the Bahamas Information Services, an official arm of the Bahamas Government, that the Prime Minister of The Bahamas, the Rt. Hon Hubert Ingraham, would be delivering his "2010 Address to the Nation" at 8:00 PM on 4th February 2010.

8. On 4th February 2010, Dr. Nottage wrote a letter to the General Manager of the BCB formally requesting fifteen minutes of airtime on radio and television for a political broadcast by the Official Opposition to be aired on 8th February, 2010. Dr. Nottage contended that the PLP were aware that the BCB intended to allow the Prime Minister to air a fifteen minute broadcast, which, he alleged, was in breach of Clause 7 of the Interim Code, and that it was equally unfair and a breach of the Interim Code for the BCB to refuse equivalent time for the Official Opposition to make a political broadcast. The letter to the BCB was copied to URCA "to ensure that there is fairness and equal treatment by [BCB]".

9. On the same date (4th February), Dr. Nottage wrote a letter to (sic) the Executive Director of URCA, formally protesting the Prime Minister's intended National Address that evening on ZNS TV 13, pointing out that Clause 7 of the Interim Code prohibits such a broadcast during an election period, which Dr. Nottage contended must equally apply during a bye-election. The letter stated that notwithstanding the decision by the BCB to allow such a broadcast, in flagrant violation of the Interim Code, the BCB had

refused to allow equal time to the Official Opposition to make a similar broadcast or a rebuttal. Dr. Nottage contended that the Prime Minister's intended broadcast was a clear violation of the terms and spirit of the Interim Code, and the BCB's refusal to allow the Official Opposition equal air time to reply amounted to a policy that favoured one political party to the disadvantage of the other in respect of broadcast time. Dr. Nottage urged URCA to act in a manner that protects and guarantees equal broadcast rights and privileges to the Official Opposition, and enclosed a copy of the letter to the General Manager of the BCB.

10. The General Manager of the BCB responded to Dr. Nottage by letter dated 5th February 2010. The BCB's position was that Dr. Nottage's request for equal broadcasting time for the Official Opposition might violate Clause 8(2) of the Interim Code. The BCB pointed out that they were currently in an election period due to the bye-election in the Elizabeth Constituency and that the requested political broadcast could not be allowed as it would offend Clause 8(2) of the Interim Code. The BCB advised Dr. Nottage that the Prime Minister's "annual National New Year's message" is allowed under Clause 16 of the Interim Code.

11. Dr. Nottage wrote a letter to the General Manager of the BCB on 5th February 2010, disagreeing with the BCB's interpretation of the Code and reiterating the Official Opposition's request for fifteen minutes of air time on radio and television to respond to the Prime Minister's national address. Dr. Nottage stated in his letter that Clause 7 of the Interim Code prevented the governing party from making such a broadcast during an election period, and that it was a breach of the spirit of the Interim Code to refuse the Official Opposition equal broadcast time.

12. Dr. Nottage contended that the Prime Minister's national address did not fall within Clause 16 of the Interim Code as there was no legislation before Parliament that required an explanation, that there was no action to be taken by the Government that demanded such broadcast, and that the broadcast did not meet the test of "an appeal on a matter of national importance". Dr. Nottage continued that Clause 16 of the Interim Code might beg a subjective interpretation by licensees, but licensees (and URCA) should seek to apply an objective standard and thereby arrive at an interpretation that affords fairness and balance in political broadcasts, necessitating an evaluation of the content of the broadcast.

13. Dr. Nottage's letter stated that the substance of the Prime Minister's address failed to satisfy the conditions established in Clause 16 of the Interim Code. His position was that the fact that, historically, a prime minister might elect to address the nation at the beginning of the year did not mean that such a broadcast automatically fell within the regime set out in Clause 16 of the Interim Code as the language employed therein required the occurrence of a specific set of circumstances, none of which were met by the broadcast. Conversely, he argued, if the Prime Minister's address had occurred outside of the election period, there would be no objection as the right to make such a broadcast is allowed under Clause 7 of the Interim Code. He claimed that the Official Opposition's review of the content of the Prime Minister's address could not satisfy the test in Clause 16 of the Interim Code, even on a purely subjective basis, so that the broadcast must have been made under Clause 7 of the Interim Code and amounted to a violation of the clause, which could only be cured by allowing equal time to the Official Opposition to make a similar broadcast. The letter was copied to URCA.

14. On 5th February 2010, URCA acknowledged receiving Dr. Nottage's letter of 4th February, notified him that URCA is committed to carrying out its statutory obligations and advised him that the procedure for handling complaints required that the complaint be first addressed to the licensee (broadcaster) which if not satisfactorily resolved within 48 hours may then be brought to URCA.

15. On 5th February 2010, Dr. Nottage submitted another letter to (sic) the Executive Director of URCA, acknowledging receipt of URCA's letter of the same date, and formally notifying URCA of the Official Opposition's dissatisfaction with the BCB's response to Dr. Nottage dated 5th February, so as to trigger URCA's jurisdiction under Clause 17 of the Interim Code.

16. On 9th February 2010, URCA notified Dr. Nottage that it was conducting an investigation of his complaint to determine whether there had been a breach of the Interim Code and that URCA would revert to him in due course with its findings.

17. On the same date (9th February), URCA submitted a formal notice to the General Manager of the BCB, notifying him that URCA was formally investigating the complaint. In order to assist URCA with its investigation, the

BCB was asked to urgently respond to the following questions and provide copies of any relevant correspondence or other documentation:

Provide the name or identity of the person or entity that arranged for the broadcast of the Prime Minister's New Year's Address on 4th February 2010, and the circumstances under which such arrangements were made;

- Advise who paid for the broadcast, whether the governing party or some other entity;
- If BCB had records available, advise whether previous Prime Ministers have made and broadcast New Year's Addresses, with dates, length of broadcast, and information on who would have paid for such broadcasts;
- If BCB had records available, advise whether previous Leaders of the Opposition have made and broadcast New Year's Addresses, with dates, length of broadcast and information on who would have paid for such broadcasts;
- Advise on what steps BCB took, if any, to satisfy itself in advance of the subject broadcast that the New Year's Address would satisfy the criteria laid out in Clause 16 of the Interim Code;
- Advise on what steps BCB took, if any, to satisfy itself in advance of the subject broadcast that no portion of the New Year's Address could be construed as a broadcast "for the purpose of inviting support for the programme of the governing party" as contemplated by Clause 7 of the Interim Code.

18. The BCB responded to URCA by letter dated 10th February 2010, as follows:

On 3rd February 2010, the BCB (and other radio and television stations) were notified by Bahamas Information Services (the official public and media relations arm of the Government) that the Prime Minister would be airing a national address at 8:00 PM on 4th February. BCB was provided with a tape for broadcast at about 5:00 PM on that date;

The Prime Minister's New Year's Address was not a paid broadcast; it was

aired by BCB as a national service, in accordance with custom, to allow the nation's Chief Executive to indicate to the people of The Bahamas on the Government's policies on national issues for the New Year;

The BCB aired a similar New Year's Address by the same Prime Minister in 2009 on January 29th of that year, as a national service. BCB's experience was that the current Prime Minister had, since his first term in office, made it a regular annual feature of his administration to make a national address at the beginning of the year commencing in 1993, while the current Leader of the Opposition had, when he was Prime Minister, regularly availed himself of the "good graces" of the BCB and, in accordance with broadcast rules, made unpaid national addresses on issues deemed to be of national importance. BCB notified URCA that, prior to 4th February 2010, current Prime Minister Ingraham and former Prime Minister Perry Christie had between them made the following national addresses on BCB on the following dates:

- o 1st January 1993
- o 1st January 1995 (Mid-Term Report)
- o 8th January 1996
- o 2nd January 1997
- o 2nd January 1998
- o 4th January 1999
- o 13th January 2000
- o 15th January 2001
- o 24th January 2002
- o 9th May 2002
- o 21st February 2006 (Cabinet Reshuffle)
- o 4th April 2007 (Address to the Nation)
- o 13th January 2008
- o 29th January 2009

BCB stated that it could not find any record of the Leader of the Opposition requesting, or, if such a request was ever made, the Leader of the Opposition being allowed to make, a New Year's Address, or national address at any other time following a national address by a sitting prime minister; BCB further stated that the subject matters in Prime Minister Ingraham's address on 4th February touched on the economy, investment, reducing crime, education and health following a year of recession globally which affected The Bahamas, issues considered (by BCB) to be of national importance, non-

partisan and non-political;

BCB advised that they viewed the Prime Minister's address while converting it from digital to analog format compatible for airing, and that the General Manager personally viewed segments of the recording before airing and was satisfied that it did not offend broadcast rules.

19. As part of its investigation, URCA also made telephone contact with the Bahamas Information Services to ascertain from them the names or identities of all the local broadcast media entities that they might have notified about the Prime Minister's New Year's Address, and to determine from BIS whether any of the local broadcasters had been paid to carry the broadcast. BIS advised URCA as follows:

That they have a Broadcast Unit that has been in existence for a number of years and that Unit has recorded and distributed all national addresses by both Prime Ministers Ingraham and Christie in recent times;

The taping of the broadcast that was aired on 4th February was done at the BIS studio;

That the recording of the broadcast that was aired on 4th February was distributed to all three (3) local television stations and about 10 or 12 local radio stations for simultaneous broadcast at 8:00 PM on 4th February;

That none of the local broadcasters who carried the Prime Minister's Address on 4th February were paid to air the broadcast and have never been paid to air any national addresses by a Prime Minister of The Bahamas;

That the broadcasters carry such national addresses as a courtesy to the office of the Prime Minister and they are all obliged to play it at the same time on the same date.

20. This Decision and the reasons for such Decision as set out below constitutes URCA's formal conclusion of the matter.

C. URCA's REASONS FOR ITS DECISION

21. The substantive issues for URCA to decide are (i) whether the BCB has acted in breach of the Interim Code by airing the Prime Minister's "2010

Address to the Nation" at 8:00 PM on 4th February 2010; and (ii) whether, under the Interim Code, the Official Opposition has a right of reply to the Prime Minister's national address.

22. Clause 7 of the Interim Code states in part:

"(1) Subject to paragraph (2), the political party which is the governing partyforming the Government may, in any year commencing on the 1st day of January, purchase four fifteen-minute programmes of air time on radio and an equal number of such programmes on television for the purpose of inviting support for the programme of the governing party
.....

(2) During an election period, no purchase may be made under paragraph (1) and no use made may be made of any air time so purchased." [Emphasis added].

23. Clause 8 of the Interim Code states in part:

"(1) Subject to paragraph (2), a political party in opposition to the Government may, in any year commencing on the 1st day of January, purchase –

(a) two fifteen-minute programmes of air time on radio and an equal number of such programmes on television, if such party has one-third or more of the seats in the House of Assembly;

(b) one fifteen-minute programme of air time on radio and one such programme on television, if such party has less than one-third of the seats in the House of Assembly, for the purpose of inviting support for its programme.

(2) During an election period, no purchase may be made under paragraph (1) and no use made may be made of any air time so purchased." [Emphasis added].

24. Clause 16 of the Interim Code states:

"Nothing in this Code shall be construed as precluding a Minister of the Government from broadcasting –

- (a) an explanation of legislation passed or action taken or to be taken or Government policy or policy approved by Parliament;
- or
- (b) an appeal on a matter of national importance."

25. The most obvious difference between a political broadcast under Clause 7 (and Clause 8) of the Interim Code and a broadcast by a Minister of the Government under Clause 16 is that air time for political broadcasts under Clause 7 and 8 are purchased either by the governing or opposition parties "for the purpose of inviting support for the programme" of either party, whilst air time for broadcasts by Ministers of the Government under Clause 16 are neither purchased nor are they permitted for the purpose of inviting support for the programme of the governing party.

26. Both the BCB and the Bahamas Information Services have confirmed to URCA that the air time for the "2010 Address to the Nation" at 8:00 PM on 4th February 2010, by the Prime Minister was not a paid broadcast. The BCB, along with other broadcasters, were advised by BIS that the Prime Minister's "2010 Address to the Nation" was to be aired at 8:00 PM on 4th February 2010, and these broadcasters all aired the said address simultaneously as a national service and as a courtesy to the office of Prime Minister. Further, both BCB and BIS confirm that the present Prime Minister has customarily addressed the people of The Bahamas on the Government's policies at the beginning of the year during each of his three terms in office, spanning a period of almost thirteen (13) years, and during almost all of which the Broadcasting Rules would have been in effect. According to BCB and BIS, not all previous Prime Ministers had a similar type of practice.

27. Upon reviewing a recording of the Prime Minister's speech, URCA finds that during his "2010 Address to the Nation", the Prime Minister discussed issues relating to the economy of The Bahamas and how it was affected by the global recession, investment initiatives and construction projects taken or about to be taken by the Government and other investors, current and future initiatives to reduce crime, improve the education and health care systems and proposals for the introduction of new legislation, among other matters.

28. URCA agrees with Dr. Nottage's suggestion to the effect that an objective application of Clause 16 of the Interim Code necessitates an evaluation of the content of the broadcast. On reviewing a recording of the national address, URCA is unable to find anything in the Prime Minister's address that was in conflict with Clause 16 of the Interim Code (i.e., it appears to be an explanation of "action taken" or "action to be taken" or "Government policy"). Similarly, after reviewing the recording, URCA is unable to find anything in the address that was explicitly a broadcast "for the purpose of inviting support for the programme of the governing party" in violation of Clause 7 of the Interim Code. URCA agrees with the BCB that the subject matters of the Prime Minister's National Address were of non-partisan and non-political national importance.

29. The BCB states that it can find no record of the Leader of the Opposition requesting, or, if such a request was ever made, the Leader of the Opposition being allowed to make, a New Year's Address, or national addresses at any other time following a national address by a sitting prime minister. URCA's conclusion on this is that, aside from purchasing air time (except during an election period) under the equivalent in the Broadcasting Rules of what is now Clause 8 in the Interim Code, the Official Opposition did not/does not have a commensurate right (nor has the Official Opposition established that any practice or precedent existed) to free broadcast air time to reply to a national address made by any Minister of Government under the equivalent in the Broadcasting Rules of what is now Clause 16 in the Interim Code or while the Broadcasting Rules were in force.

30. URCA further agrees with Dr. Nottage where he contended that, historically, the fact that a prime minister might elect to address the nation at the beginning of the year did not mean that such a broadcast automatically fell within the regime set out in Clause 16 of the Interim Code as the language employed therein required the occurrence of a specific set of circumstances. In URCA's opinion, this approach causes a broadcaster (and URCA) to revert to an objective application of Clause 16 of the Interim Code necessitating an evaluation of the content of the broadcast. In URCA's opinion, so long as a broadcaster (or URCA) satisfies itself that the Ministerial address contains an explanation of "legislation passed", and/or "action taken", and/or "action to be taken", and/or "Government policy", and/or "policy approved by Parliament", and/or contains "an appeal on a matter of national importance" AND is not made or contains anything "for the purpose of inviting support for the

programme of the governing party", then such a broadcast would legitimately fall within the parameters of Clause 16 of the Interim Code.

31. Having carefully reviewed the issues raised by Dr. Nottage, the provisions of Clauses 7 and 16 of the Interim Code, the submissions put forward by the BCB, and the recording of the Prime Minister's National Address on 4th February, URCA is satisfied that:

(a) The subject broadcast was not a political broadcast within the terms of Clause 7 of the Interim Code as neither the Prime Minister nor the governing party purchased any broadcast air time and the subject matter of the Prime Minister's broadcast was "not for the purpose of inviting support for the programme of the governing party".