

RESPONSE TO

CALL FOR INPUTS

ON

THE FUTURE OF LOCAL TELEVISION

(Ref: CD 2014-1)

By E-mail to: consultations@icta.ky
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I. Introduction

1. Cable and Wireless (Cayman Islands) Limited, trading as LIME (“**LIME**”) is pleased to provide the following response to the Call for Inputs on *The Future of Local Television broadcasting* published by the Information and Communications Technology Authority (the “**Authority**”) on 8 April 2014. After a few preliminary observations, LIME will address each of the Authority’s questions in turn.

2. LIME expressly states that failure to address any issue raised in this Call for Inputs does not necessarily signify its agreement in whole or in part with any position taken on the matter by the Authority or any respondents. LIME reserves the right to comment on any issue raised in the Call for Inputs at a later date.

II. Executive Summary

3. There are a several regulatory and structural issues in the both the “cable TV” and broadcast TV markets which are preventing fair and sustainable competition. Most notably,

- a. the Local Content obligation only applies to new entrants, not the incumbent operators
- b. the Authority permits unlicensed satellite TV operators to compete with duly licensed operators (both incumbents and new entrants)
- c. the incumbent and unlicensed operators pirate much if not all their television content, unlike the new entrants.

4. As a result, new entrants like LIME and Logic face additional costs and hurdles in the market that the incumbents do not face, even though the new entrants are breaking the monopolies of the incumbents and bringing competition into the market.

5. Unfortunately, this proceeding on Local TV is addressing only one small part of those issues and will not result in a level playing field. Competition cannot be put back onto an even keel unless:

- a. the "cable TV" and broadcast TV are treated like the different markets that they are, and competition and success (or failure) in one is not contingent on competition, and success (or failure) in the other;
- b. all operators in each of those markets are subject to the same set of rules applicable to that market. In particular, all television providers (whether subscription, satellite, broadcast, etc.) must be required to be licensed by the Authority. Competition cannot thrive, and consumers cannot benefit, if something as fundamental as licensing is applied in a discriminatory fashion;
- c. Local TV and Local Content rules should be as light as possible and rely to the greatest extent as possible on market forces. Otherwise, the resources of the competitors risk being wasted on complying with needless bureaucracy, instead of being used to provide the highest quality services possible to their customers and audiences;
- d. Local TV operators are given full flexibility to decide how best to meet the needs of their audiences. The audience knows best the type, quality and quantity of television content that they want to watch, and Local TV operators need to be free to respond to those needs; and
- e. no television provider is permitted to broadcast or re-transmit overseas content without the written consent of the owner of that content.

III. Preliminary Observations

6. Before addressing the Authority's questions, LIME offers the following three preliminary observations that inform and guide LIME's comments later in the document.

7. First, LIME notes that, while the Authority poses several questions under eight high-level headings, the Call for Inputs is in fact addressing two separate issues. Specifically, the matter of whether a Subscription Television ("**STV**") Service Licensee should be required to provide a Local Television ("**Local TV**") service is separate and distinct from what standards, if any, should apply to Local TV services.

8. For example, even if the answer to the first matter is "no", there may still be a need to address the second issue and determine whether Local TV Licensees should comply with certain rules and standards. Conversely, even if it is determined that the answer to the first matter is

“yes”, the public interest might not require or be best served by imposing standards on Local TV. This distinction should be kept in mind when reading LIME’s comments below.

9. Second, LIME submits that, the standards for Local TV, if any, which are eventually determined must apply to all Local TV services. The purpose of this Call for Inputs is to determine the public interest in local television broadcasting and the set of rules or requirements which best satisfy that public interest. If the public interest does in fact require the imposition of a given set of quality or content standards or obligations on Local TV providers, it would be inappropriate to then exclude certain types of Local TV providers from their application (e.g. government, religious broadcasters). All Local TV broadcasters provide a public service in the same geographic and service market to the same general public, and should be held to the same standards.

10. Third, LIME notes that competition in the existing subscription and broadcasting television markets is highly distorted and skewed in favour of the incumbent television service providers.¹ The Authority is aware from previous correspondence from LIME that there are a large number of issues to be addressed if there is to be fair and sustainable competition in the country. Unfortunately, the scope of the Call for Inputs is quite narrow and will not address most of them.

11. In particular, LIME notes that the Authority expressly excludes, in paragraph 6 of the Call for Inputs, matters relating to copyright. While copyright legislation might not be core to the Authority’s jurisdiction, ensuring fair and sustainable competition in the ICT sector is central to the Authority’s jurisdiction. This includes reviewing and taking all appropriate actions to remedy situations where the abuse or absence of non-ICT rules, such as copyright law, gives some ICT Licensees an unfair economic advantage over other ICT Licensees, and allows them to compete unfairly. Further, the Authority is entitled, as an administrative tribunal, to review and interpret other legislation, especially when decisions taken under that other legislation harms fair and sustainable competition within the sector under Authority jurisdiction. The Authority is, therefore, fully empowered to consider copyright matters when reviewing the state of competition and actions by dominant operators in the STV and Local TV markets. Given the close connection between television and copyright, the Authority will not have discharged its duty to ensure fair and sustainable competition in the ICT sector until it addresses copyright matters.

¹ These are the Authority’s STV and Local TV licensees other than Infinity (trading as C3), LIME, WestTel (trading as Logic) and Digicel.

12. In addition, as the Authority is aware from LIME's 7 November 2013 and 18 February 2014 letters to it, copyright matters are not the only factor distorting competition in the market. LIME estimates that approximately one quarter of the STV market is served by satellite television operators (for, example, Dish Direct TV). However, none one of those operators is licensed by the Authority, even though a plain reading of the Authority's Section 23(2) Notices suggests they should be. As unlicensed operators, they compete with duly licensed operators, but they contribute nothing to the Government in terms of licence fees and they are free from even minimal oversight by the Authority. They are also free of any Local TV obligations. These factors give the satellite television operators a great advantage in terms of costs, and an unfair competitive edge in the market. Again, as in the case of copyright matters, the Authority will not have discharged its duty to ensure fair and sustainable competition in the ICT sector until it addresses satellite television operator licensing matters.

13. The remainder of LIME's submissions in response to the Call for Inputs will address each of the Authority's questions in turn.

III. Should each Television Service Licensee be obligated to provide a Local Television service?

14. The obligation imposed on every STV licensee to provide a Local TV service is long-standing, having been included in the first Section 23(2) Notice issued by the Authority under the *Information and Communications Technology Authority Law* (the "**Law**") on 26 August 2002.² Indeed, LIME offers its Local TV service, "Nexus Networks", to the public in compliance with this obligation.

15. LIME has been unable to find, though, where the Authority articulated the reasons for its decision to impose the linkage, prior to the publication of this Call for Inputs, despite holding a public consultation on licence application matters in June 2003. While LIME welcomes this current consultation with interested parties on this matter, this is something that should have been done much earlier. Further, having the reasons for the decision to impose the linkage would have been helpful for the purposes of this consultation. To the best of LIME's knowledge, the Authority's requirement is unique. While STV operators in other countries may have "public service" obligations, these are typically requirements to make channels available to the community or to specified broadcasters, or to carry a minimum number of local broadcast

² In other words, even before liberalization of the ICT sector in the Cayman Islands. A copy of that Section 23(2) Notice was appended to the Authority's "Public Consultation on Applications for ICT Licence(s)" (CD (2003) 3a), dated 4 June 2003.

stations. They do not include the obligation to produce programming for a television channel, as is the case here.

16. In any event, the short answer to the Authority's question is "no". STV and Local TV are separate services, and there are no necessary linkages between the two (other than STV services can and should carry Local TV services). The Authority has acknowledged this fact when it assigned them different licence "types" ("Type 6" vs "Type 7")³ in that first and all subsequent Section 23(2) Notices. The two types of activities represented by these two types of licences rest on different economic assumptions, derive revenues in different ways, and require fundamentally different business models, technical personnel, commercial relationships, and management structures, even if they may occasionally be provided by the same person.

17. Because the two services and the two markets in which they are provided are so different, there should be no regulatory assumption that they should be treated the same, and no requirement for one business, which is operating on the basis of one type of investment, to be forced to make the other type of investments merely because of an arbitrary regulatory mandate. Given the lack of natural linkage between the two services, there must be a good public policy reason before such a requirement should be instituted.

18. In paragraphs 18 to 25 of the Call for Inputs, the Authority contrasts several pros and cons for the obligation imposed on STV licensees to provide a Local TV service. These include the high cost to provide Local TV services, the need for a cross-subsidy from revenues from other services, the inefficient use of resources, and the importance of Local TV to the community.

19. LIME agrees with Authority that the production and provision of Local TV is expensive.⁴ While the Authority suggests that Local TV can generate revenue in the form of advertising and sponsorship, LIME notes that, because of the size of our community, the total pool of advertising and sponsorship revenues in the Cayman Islands is quite limited. Further, advertisers (e.g. businesses) share that limited pool of ad revenues among various radio, Local TV, newspaper and other media outlets. The advertising and sponsorship monies available to fund Local TV is, therefore, even further limited.

³ While the Section 23(2) Notice refers to "Type 6" Public Service Television Broadcasting Licences and "Type 7" Subscription Television Service Licences, LIME will refer to them in this document as "Local TV" and "STV" licences, respectively.

⁴ This is not unique to Local TV. The acquisition of television programming from third-party suppliers is also quite expensive.

20. LIME notes the Authority's comment in paragraph 23 that Local TV "is an important link and source of information for the general community, especially in times of national need or in an emergency situation, such as when there is a hurricane". LIME submits that radio is likely to be a more important link and source of information for the community in times of national need or emergency situation, especially given lower power requirements of radios than television sets. However, LIME does agree in part that Local TV is important to the local community, especially in terms of cultural expression and enabling a community to see itself reflected in its local media. There is, however, no evidence that the Authority's chosen approach is the best way to achieve that goal.

21. This then is the crux of the issue: how can the Authority best ensure the people of the Cayman Islands continue to receive important Local TV services, when these services are so expensive and revenues are limited.

22. The use of the term "continue to receive" in the preceding paragraph is deliberate. This is because the Authority skirts around but does not address squarely what is in fact the most important issue facing the local television sector – that of sustainability. A regulatory framework that mandates unsustainable market entry will result in total market failure and inability to achieve national objectives.

23. The Authority's existing rules require five different STV Licensees⁵ to provide a Local TV service as a condition of providing an STV service. The rules do not explicitly specify whether the STV Licensee must create its own Local TV service, or whether it could choose to simply re-broadcast someone else's Local TV service, but it is most likely that the Authority intended for the creation and broadcast of separate, independent Local TV channels. The Authority would have been aware in 2002 of the existence of "must-carry" rules in other countries and, if it had intended in 2002 for STV Licensees to satisfy their Local TV Licence obligations by simply re-broadcasting existing Local TV services, it would have imposed a much simpler, more traditional, and more cost-effective "must-carry" rule⁶ on STV providers. At the time (and today), several such Local TV services already existed. The Authority was, therefore, not faced with the challenge of creating Local TV services where none existed before, and as a result

⁵ As noted by the Authority in paragraph 1 of the Call for Inputs, these are Infinity (trading as C3), Digicel, LIME, WestTel (trading as Logic) and WestStar.

⁶ While the details of the rules and the scope of the obligation may vary, many countries require "cable TV" operators to carry the broadcast television channels available in the serving area of the cable TV operation. Others require cable TV operators to make channels available to community, education and/or government groups for the distribution of programming created by those groups. This, however, is very different from mandating that cable TV operator to create or acquire the programming itself. In that regard, the Authority's rules requiring STV licensees to have a Local TV Licence is extremely rare, if not unique, and completely out of step with regional and international best practice.

could have easily adopted a “must-carry” rule. The fact that the Authority chose not to do so strongly suggests each STV Licensee was expected to have its own separate Local TV service.

24. The problem facing the Cayman Islands is immediately apparent: a market with five separate Local TV stations competing with each other for limited advertising or sponsorship funds, and vying for continuing subsidies from their investors, is unsustainable. Ultimately, none will be economically viable and the end result will be market failure and closure of the Local TV stations. In a best case scenario, the Cayman Islands would be left with one, or maybe two, Local TV stations. In a worst case scenario, all Local TV stations would be forced to close, leaving the country in a worse position than if the Authority had not created the Type 6 – Type 7 linkage in the first place in 2002.

25. However, the effect of this market failure will be more far-reaching than it would otherwise have to have been. Because of the linkage to the STV market mandated by Authority’s Section 23(2) Notices, a market failure in the Local TV market will necessarily result in the reduction of competition in the STV market, even if the STV market on its own could have sustained more market players. An STV Licensee that no longer has a Local TV service (because it was economically unviable and it failed) would no longer comply with the conditions under which it received the STV Licence in the first place, and would be forced to relinquish the STV Licence as well.

26. The ultimate outcome of the obligation mandated by the Authority back in 2002, that all STV Licensees also provide a Local TV service, would be no or reduced competition in two separate ICT markets in this country. This would be a negative, completely avoidable and unnecessary outcome for consumers and for the country.

27. As noted earlier, there is no natural linkage between the STV and the Local TV markets (other than the fact that STV services can and should carry Local TV services). Nor is there any good public policy reason to link the two markets via a regulatory licensing mandate, and the Authority should abandon this requirement.

28. LIME proposes that the Authority impose an alternative obligation on STV Licensees: each STV Licensee must carry every Local TV service in the basic service package or lowest tier of its television channel line-up. This “must-carry” rule is far more likely to achieve the goal of promoting the creation and distribution of Local Content. Mandating STV Licensees to carry all Local TV services would enable wider distribution of those services, but more significantly, would facilitate the distribution of the Local Content included in those services, which in turn would promote the creation of more Local Content.

29. This is because the distribution of Local Content includes two types of costs, those involved in the production of the content, and those involved in getting that content out to the public. A “must-carry” rule for Local TV services ensures the maximum viewership / penetration of those services, and will therefore maximize the potential advertising and sponsorship revenues for, and economic viability of, those Local TV services. Economically-viable Local TV services, in turn, become reliable outlets for the distribution of content produced by local entrepreneurs who do not have the resources to broadcast that content free-to-air or otherwise distribute it island-wide. (However, for clarity, the responsibility for broadcasting Local Content would belong to the owners and management of the Local TV channels in question, and not to the STV Licensees. It would simply be the case that, when such channels are available, the STV Licensee would have an obligation to distribute via its STV service.)

30. Further, competition in both the STV and Local TV markets is more likely to be sustainable, as entry into both markets would be determined by the factors that apply in those markets, and not by a regulatory fiat linking one to the other. Because competition in the Local TV market would be sustainable, there would be no public policy basis to require STV licensees to pay the Local TV operators for what the Local TV operators broadcast free of charge to the public in exchange for advertising and sponsorship revenues anyway.

IV. How should Local Content be defined?

31. As the Authority points out, the five STV Licences currently only provide illustrative examples of what is “Local Content”. In the Call for Inputs, the Authority attempts to describe how other countries, specifically The Bahamas, the United Kingdom and Canada, have defined “Local Content”. With some exceptions, however, the three examples do not quite define “Local Content” *per se*. Rather, they primarily define the broadcasting obligation of the public (i.e. state) broadcaster. As in the case of the Authority’s STV Licences, they generally describe the type of programming that should be broadcast, instead of defining “Local Content”.

32. For example, the definition of “public service broadcasting” proposed by the sector regulator in The Bahamas specifies the cultural, social, democratic and educational “purposes” of “public service content”.⁷ While these “purposes” may be more easily fulfilled by creating or broadcasting “local” content, they are not inherently or necessarily “local”.

⁷ Paragraph 28 of the Call for Inputs, derived from “Revised Recommendation 1: Definition of PSB” at page 9 of URCA, *Statement of Results* to the Public Consultation on Review of Public Service Broadcasting, ECS 13/2011, issued 7 July 2011. A reading of the rest of the Statement of Results and of the originating *Consultation Document*

33. One element of the example from The Bahamas, however, does address the definition of “local”, insofar as “public service broadcasting” would be defined as “... the provision of domestically-produced content ...”. It is not entirely clear, however, that a definition taken from the mandate of a state broadcaster would be appropriate for private broadcasters, such as those that operate Local TV stations in the Cayman Islands.

34. Defining Local TV as “domestically-produced” would also have a number of inherent downsides. For example, there could be “foreign-produced” content that might otherwise satisfy the specified purposes but could not be considered “Local TV” because it was not produced domestically. A simple example would be a program produced by an overseas network or channel on a local music festival or cultural event. A definition of this kind would also require a clear definition of “domestically-produced”. As is apparent from the Canadian example (see below), this is not an obvious exercise and can lead to significant complexity and bureaucracy.

35. The example provided from the United Kingdom is similarly broad and illustrative. Instead of requiring that “public service broadcasting” must be “local”, section 264 of the UK *Communications Act 2003* (as amended) (the “**UK Act**”) specifies the types of programming that it must include in order to satisfy the requirements of the UK Act.

36. LIME appreciates that the Authority provided a summary and restatement of subsection 264(6) of the UK Act in paragraphs 29 of the Call for Inputs, and that any summary necessarily entails the loss of some detail. A review of section 264 of the UK Act, however, showed that some of that detail is in fact relevant to the issues being discussed in the Call for Inputs.

37. In particular, section 264 of the UK Act does not require each and every public service television broadcaster to fulfill the mandate set out in that section. Rather, the “purposes of public service television broadcasting” are to be fulfilled by all relevant television services “taken together”.⁸ This means there is scope for individual public service television broadcasters to contribute to the purposes of “public service television” without necessarily producing everything set out in subsection 264(6) of the UK Act.

38. Subsections 11 and 12 are also particularly relevant for the purposes of the issues being discussed in the Call for Inputs. These are reproduced below.

(ECS 29/2010, issued 31 December 2010) shows that URCA was focused on the mandate and remit of the state broadcaster.

⁸ The words “taken together” or “taking them all together” appear all throughout the section.

- (11) The following are relevant television services for the purposes of this section—
- (a) the television broadcasting services provided by the BBC;
 - (b) the television programme services that are public services of the Welsh Authority (within the meaning of section 207);
 - (c) every Channel 3 service;
 - (d) Channel 4;
 - (e) Channel 5;
 - (f) the public teletext service.
- (12) The following are public service broadcasters for the purposes of this section—
- (a) the BBC;
 - (b) the Welsh Authority;
 - (c) the providers of the licensed public service channels; and
 - (d) the public teletext provider.

39. Given that there are television services and television service providers in the UK which are not enumerated in subsections 11 and 12, the “public television service” mandate clearly does not apply to all television service providers. While this model is an example of how a “public service television” mandate can be applied to non-state-owned broadcasters, the UK model is, in LIME’s view, an inappropriate model for the Cayman Islands. If it is determined that the public interest requires the imposition of rules and obligations on Local TV providers, those rules and obligations should apply to all providers in the market.

40. Finally, as in the case of the example from The Bahamas, the Authority presented in paragraph 31 of the Call for Inputs the mandate of the state broadcaster, the Canadian Broadcasting Corporation. It is therefore not clear that this would be an appropriate mandate for private television broadcasters such as operate in the Cayman Islands. It is also not clear why the Authority chose to highlight the mandate of the state broadcaster in paragraphs 3(1)(l) and 3(1)(m) of the *Canadian Broadcasting Act 1991* (the “**Canadian Act**”), when the same section 3(1) of the Canadian Act contains other parts which address the broadcasting system as a whole. While section 3(1) of the Canadian Act is long, it is worth reproducing here:

- 3. (1)** It is hereby declared as the broadcasting policy for Canada that
- (a) the Canadian broadcasting system shall be effectively owned and controlled by Canadians;

- (b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;
- (c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;
- (d) the Canadian broadcasting system should
 - (i) serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada,
 - (ii) encourage the development of Canadian expression by providing a wide range of programming that reflects Canadian attitudes, opinions, ideas, values and artistic creativity, by displaying Canadian talent in entertainment programming and by offering information and analysis concerning Canada and other countries from a Canadian point of view,
 - (iii) through its programming and the employment opportunities arising out of its operations, serve the needs and interests, and reflect the circumstances and aspirations, of Canadian men, women and children, including equal rights, the linguistic duality and multicultural and multiracial nature of Canadian society and the special place of aboriginal peoples within that society, and
 - (iv) be readily adaptable to scientific and technological change;
- (e) each element of the Canadian broadcasting system shall contribute in an appropriate manner to the creation and presentation of Canadian programming;
- (f) each broadcasting undertaking shall make maximum use, and in no case less than predominant use, of Canadian creative and other resources in the creation and presentation of programming, unless the nature of the service provided by the undertaking, such as specialized content or format or the use of languages other than French and English, renders that use impracticable, in which case the undertaking shall make the greatest practicable use of those resources;
- (g) the programming originated by broadcasting undertakings should be of high standard;

- (h) all persons who are licensed to carry on broadcasting undertakings have a responsibility for the programs they broadcast;
- (i) the programming provided by the Canadian broadcasting system should
 - (i) be varied and comprehensive, providing a balance of information, enlightenment and entertainment for men, women and children of all ages, interests and tastes,
 - (ii) be drawn from local, regional, national and international sources,
 - (iii) include educational and community programs,
 - (iv) provide a reasonable opportunity for the public to be exposed to the expression of differing views on matters of public concern, and
 - (v) include a significant contribution from the Canadian independent production sector;
- (j) educational programming, particularly where provided through the facilities of an independent educational authority, is an integral part of the Canadian broadcasting system;
- (k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;
- (l) the Canadian Broadcasting Corporation, as the national public broadcaster, should provide radio and television services incorporating a wide range of programming that informs, enlightens and entertains;
- (m) the programming provided by the Corporation should
 - (i) be predominantly and distinctively Canadian,
 - (ii) reflect Canada and its regions to national and regional audiences, while serving the special needs of those regions,
 - (iii) actively contribute to the flow and exchange of cultural expression,
 - (iv) be in English and in French, reflecting the different needs and circumstances of each official language community, including the particular needs and circumstances of English and French linguistic minorities,
 - (v) strive to be of equivalent quality in English and in French,
 - (vi) contribute to shared national consciousness and identity,

- (vii) be made available throughout Canada by the most appropriate and efficient means and as resources become available for the purpose, and
- (viii) reflect the multicultural and multiracial nature of Canada;
- (n) where any conflict arises between the objectives of the Corporation set out in paragraphs (l) and (m) and the interests of any other broadcasting undertaking of the Canadian broadcasting system, it shall be resolved in the public interest, and where the public interest would be equally served by resolving the conflict in favour of either, it shall be resolved in favour of the objectives set out in paragraphs (l) and (m);
- (o) programming that reflects the aboriginal cultures of Canada should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (p) programming accessible by disabled persons should be provided within the Canadian broadcasting system as resources become available for the purpose;
- (q) without limiting any obligation of a broadcasting undertaking to provide the programming contemplated by paragraph (i), alternative television programming services in English and in French should be provided where necessary to ensure that the full range of programming contemplated by that paragraph is made available through the Canadian broadcasting system;
- (r) the programming provided by alternative television programming services should
 - (i) be innovative and be complementary to the programming provided for mass audiences,
 - (ii) cater to tastes and interests not adequately provided for by the programming provided for mass audiences, and include programming devoted to culture and the arts,
 - (iii) reflect Canada's regions and multicultural nature,
 - (iv) as far as possible, be acquired rather than produced by those services, and
 - (v) be made available throughout Canada by the most cost-efficient means;
- (s) private networks and programming undertakings should, to an extent consistent with the financial and other resources available to them,

- (i) contribute significantly to the creation and presentation of Canadian programming, and
 - (ii) be responsive to the evolving demands of the public; and
- (f) distribution undertakings
 - (i) should give priority to the carriage of Canadian programming services and, in particular, to the carriage of local Canadian stations,
 - (ii) should provide efficient delivery of programming at affordable rates, using the most effective technologies available at reasonable cost,
 - (iii) should, where programming services are supplied to them by broadcasting undertakings pursuant to contractual arrangements, provide reasonable terms for the carriage, packaging and retailing of those programming services, and
 - (iv) may, where the Commission considers it appropriate, originate programming, including local programming, on such terms as are conducive to the achievement of the objectives of the broadcasting policy set out in this subsection, and in particular provide access for underserved linguistic and cultural minority communities.
- (2) It is further declared that the Canadian broadcasting system constitutes a single system and that the objectives of the broadcasting policy set out in subsection (1) can best be achieved by providing for the regulation and supervision of the Canadian broadcasting system by a single independent public authority.

41. It is quite apparent from the length and detail of this legislative provision that the issue of “local content”, how it should be defined and what it should accomplish, are matters of considerable importance to Canadians. Section 3(1) of the Canadian Act also attempts to set out some detail around the meaning of “Canadian”. At first glance, therefore, the Canadian Act appears to be a useful model that could be considered by the Authority in its efforts to define “Local TV” or “Local Content”.

42. LIME however recommends that the Authority not adopt the Canadian model. First, section 3(1) is not a model of clarity and simplicity, and it contains a hodge-podge of different and often incompatible policy objectives. Second, the Canadian model incorporates a much more complex set of regulations than can be found in section 3(1) of the Canadian Act (which is itself already rather lengthy and complex). While the Authority summarizes the Canadian regulations in three paragraphs (paragraphs 32 to 34), this summary is so truncated that it

could be considered somewhat misleading. It does not give a true sense of the complexity and bureaucracy involved in defining what is “Canadian”.

43. For example, the Authority cites at paragraph 32 of the Call for Inputs a policy decision of the Canadian Radio-television and Telecommunications Commission (“**CRTC**”) setting out the criteria for determining what is “Canadian”.⁹ That policy decision includes an eleven-page appendix describing the standards a production must satisfy in order to be certified as Canadian. These include ensuring the producer is Canadian (and demonstrating for example via contract and affidavits that he/she is the central decision maker from beginning to end), satisfying a “points system” (where varying numbers of points are assigned to various creative functions of the production if the persons are Canadian) and demonstrating that 75% of certain expenses related to the production were paid to Canadians (including via the submission of audited statements and affidavits).

44. A complex regulatory framework like this one requires a large organisation to implement and manage. While LIME does not know the precise number of people employed to review programming and certify it as Canadian, LIME notes that the CRTC employs some 140+ people directly in the “broadcasting” division, and LIME assumes a certain number of the 145 people in the “internal services” division support the “broadcasting” division.¹⁰ Each of these people and the organisation supporting them need to be funded, either by taxpayers or by Licensees. LIME submits that a small market like the Cayman Islands cannot sustain the expenditure and bureaucracy involved in monitoring television programming under Canadian-like rules.

45. Having reviewed the foregoing, and the downsides of the Canadian model in particular, LIME recommends that the Authority not determine a definition of “Local Content”. The imposition of fewer rules and regulations is more likely to facilitate the proliferation of Local Content than the reverse.

46. Further, given that the issues of Local Content and broadcasting touch upon and concern fundamental rights issues of freedom of expression and speech, LIME recommends that the Authority adopt a slow, gradual approach. The development of any definitions, standards or rules that may be determined upon reasonable evidence to be necessary, ought to be driven principally by the industry, as part of a structured, industry-approved and -involved process in which the Authority and Government are important partners, but not drivers, of the

⁹ Broadcasting Regulatory Policy CRTC 2010-905, “Revision of the definition of a Canadian program to include Canadian programs that have been dubbed in Canada and outside Canada”, 3 December 2010.

¹⁰ Canadian Radio-television and Telecommunications Commission, 2012-13 Departmental Performance Report, available at <http://www.crtc.gc.ca/eng/backgrnd/dpr2013/dpr2013.pdf>.

process. LIME recommends the Authority (i) take an incremental, gradual approach to the issue and withhold from prescriptive approaches to the issue of regulation before the sector/market has had an opportunity to mature, and (ii) permit the definition, at the appropriate time, to be driven by industry consensus, after a reasonable period.

47. If, however, the Authority considers it necessary to create and apply a definition of “Local Content”, the definition should be as broad as possible. For example, a possible definition of “Local Content” could be:

“programming that is intended to serve audiences in the Cayman Islands by reflecting, reporting on or portraying life in the Cayman Islands”.

48. This programming could be news, coverage of sporting or cultural events, talk shows, drama, etc. Programming would be considered “Local TV” under the above definition if it is produced for the Cayman Islands about the Cayman Islands. This does not preclude the programming being produced in the Cayman Islands. However, it does not require it, in recognition of the realities of our small market and limited resources. The most important consideration is to grant the Local TV Licensee the flexibility it needs in order to determine how best to serve the changing information and cultural needs of its local audience.

V. a. Should there be a quality standard as to the Local Content produced?

b. In relation to 3. a., if there should, what should that quality standard be?

c. Who is best placed to assess whether Local Content meets the quality standard?

49. LIME is deeply concerned about some of the implications of the proposal to impose a quality standard on Local TV. It seems to ignore the real problem facing the sector and it suggests a degree of government intervention into a Local TV provider’s communication to its audience that is unwarranted.

50. The Authority’s comments in paragraph 39 of the Call for Inputs miss the real problem and therefore the best solution. In a competitive market, Local TV providers have a strong incentive to produce to the highest quality possible, precisely so that the public wants to watch their programs and not the competitor’s programs. However, this assumes that the participants in the Local TV market entered voluntarily because they saw a commercial opportunity. The problems raised by the Authority of low budgets, rushed production schedules, poor writing and limited production values arise principally because the regulatory framework mandates

uneconomic and unviable entry into the Local TV market. In other words, the “problem” of quality is driven by the regulatory framework.

51. Further, other than correcting the regulatory framework as proposed above by LIME, the “problem” of quality is not appropriate for government or regulators to solve. It is a matter for the industry and consumers to resolve or, in other words, the market. It is highly dangerous for the Authority to be suggesting that a standard for quality should be pre-determined, as (a) it is not a competent party to determine what that is; (b) consumers are better placed to do that through their choices; and (c) it is a dangerous encroachment on the rights of the producers of content to express themselves freely. In these circumstances, the appropriate, proportional and more effective response would be to change the regulatory framework, and not add another layer of regulation in the form of quality standards.

52. LIME agrees with the Authority’s comments in paragraph 41 of the Call for Inputs that “quality” is a highly subjective matter. What is considered to be “quality” programming is as much a function of what people want to watch as it is of the production values of the program. This means that the market/audience will decide what is “quality” and the level of quality that the viewers will accept, provided that regulation has not interfered to make entry uneconomic or unviable. It is certainly inappropriate for any government body or any entity with a government mandate to determine whether a Licensee’s Local Content meets a given standard of “quality”.

53. LIME notes that the Authority states in paragraph 6 that the Call for Inputs is not about “whether or not the general television content... should be regulated as to the images and language broadcast”. LIME agrees with this view, namely, that the images and language broadcast should not be regulated, except under laws of general application (e.g. those prohibiting obscenity) and submits that the proposal for “quality” standard would derogate from this. For the avoidance of doubt, this does not mean that self-regulation is inappropriate. LIME as attached to this submission the “Programming Policy Statement” that it imposes on those who produce programs for its Local TV station. The key factor is that the standards set out in that Policy are determined by LIME (as Licensee) in light of the mores of the audience and of the laws of the Cayman Islands.

54. In summary, viewers in the market are capable of determining by themselves what they want to see and what they consider “quality” programming. LIME recommends therefore that no specific quality standard be established.

VI. a. How many hours of Local Content per day should each Licensee provide?

b. When should the Local Content be shown?

c. How much of that Local Content should be original?

55. LIME notes that, while the Authority's STV Licensees used to have widely varying licence obligations, the current standard for quantity of Local Content appears to have settled around 20%, with one glaring exception – even though WestStar is the incumbent STV and Local TV operator and dominant in those two markets by any measure of dominance, they have no Local Content obligation of any kind. The Authority appears to have established a regressive regulatory framework where new entrants actually have more onerous and costly obligations than the incumbent with the market power. LIME also notes that Local TV Licensees who are not STV Licensees have been permitted to operate with no Local Content obligation. The Authority's regulatory framework creates a discriminatory three-tiered system where, the dominant incumbent operator has no Local Content obligation, a few other incumbent television providers have no Local Content obligation, and every new entrant into the market is saddled with an expensive Local Content obligation. In this environment, it is virtually impossible for Local TV Licensees to compete effectively and fairly.

56. In light of this, LIME recommends that the Authority level the playing field and ensure fair competition in the Cayman Islands, by not imposing a rule for the quantity of Local Content that a Local TV Licensee must broadcast.

57. If, however, the Authority considers that a quantity standard is required, then LIME submits the same standard must be applied to all Local TV Licensees, whether or not they also have an STV Licence. With respect to the specific level, LIME submits that having fewer rules and regulations is more likely to create an environment which would facilitate the proliferation of Local Content. As above in respect of the issue of quality of Local Content, LIME recommends the Authority (i) take an incremental, gradual approach to the issue of the "quantity" of that content and withhold from prescriptive approaches to the issue of regulation before the sector/market has had an opportunity to mature, and (ii) permit the level, at the appropriate time, to be driven by industry consensus, after a reasonable period. It may be that the 20% standard that seems to have emerged is appropriate, but it would be premature to make that determination until there is some evidence available to the Authority to consider whether this level strikes the appropriate balance between ensuring a material amount of Local Content in the programming schedule and the cost to Licensees to produce or acquire that Local Content.

58. LIME does not recommend that the Authority establish detailed rules around time-of-day or to day-of-week restrictions for broadcasting Local Content. They are not required as

LIME is not aware of any Licensee, to date, attempting to game the system by broadcasting Local Content at restricted or unfavourable times of day. Regulatory rules or restrictions should be based on clear evidence that they are needed, lest they introduce unintended consequences and distort the market. In the absence of such evidence, as in this case, the Authority should refrain from regulating.

59. LIME also recommends that the Authority adopt a flexible approach in any regulatory rule-making. A rigid approach, such as requiring a set number of hours on set days or at set times of day, could result in a Licensee being forced to show content that is inappropriate or irrelevant to the specific audience on that day or at that time of day. Rather, Local TV Licensees should have flexibility to meet the demands of their audience as they determine

60. In brief, LIME recommends that the Authority not establish rules about number of original hours of Local Content to be broadcast by Local TV Licensees. LIME is concerned about cost to Licensees entailed by such a rule, and notes that there is no evidence that such a rule is required. LIME also notes that forbearing from creating such a rule, and lifting any such requirements as currently exist in licences, would assist in promoting fair and sustainable competition in the STV and Local TV markets in the Cayman Islands.

VII. How should the production and provision of Local Television be funded?

61. Local TV is presently funded by a mix of advertising, sponsorship and cross-subsidization by the Licensees. The specific mix of funding will vary depending on the specific Licensee. LIME notes that the cross-subsidisation is presently driven by a regulatory mandate by the Authority, and not by the commercial considerations of the TV Licensees. This is inappropriate and that regulatory mandate should be removed, as Local TV ought to be funded privately based on Local TV market factors.

62. The Authority presents for discussion various alternatives of television license fees, Government support, and a “consortium” funded by Licensees. In LIME’s view, the television licence fee model would be unworkable here and would meet with considerable public resistance. It would also require the development of an organization to monitor the public and collect the fees, which itself needs to be funded. Given the likely public resistance to paying a “TV tax” and the costs to enforce such a tax, it is not obvious that sufficient funds would be collected in any event. As for the Government support model, it is not clear that the funds exist for such a subsidy, given the budgetary constraints faced by the Government. In any event, the

country would be better served if Local TV is funded privately, and not through Government intervention.

63. The “consortium” model does not solve any problems either, as it still requires a subsidy. The difference would be that the subsidy would come from Licensees, as is currently the case, instead of from Government. However, it would also add an intractable layer of complexity of how the “consortium” would share the programming in a fair and pro-competitive manner, and the regulatory oversight necessary to enforce those rules. The public interest would not be well served if one Licensee could monopolize the “good” programming and the others are left with the undesirable programming. LIME also notes the effect on competition in the market highlighted by the Authority, which seems inconsistent with the Authority’s statutory mandate to promote competition.

64. Notwithstanding the foregoing, a “consortium” or buyers’ club could be an interesting model for the acquisition of programming from outside of the Cayman Islands. Pooling local demand for programs could increase the country’s market power vis-à-vis the foreign content owners, and reduce overall costs of providing a Local TV service. However, the issues of ensuring fair sharing and adequate funding would remain to be resolved.

65. LIME believes that, ultimately, the problem of the funding of Local TV is driven by two factors: (1) the small size of the market and consequently the limited advertising and sponsorship revenues available and (2) the requirement that every STV Licensee also provide Local TV, which results in unviable and uneconomic market entry. The Authority cannot change the first factor, but it can change the second, as LIME recommended in its answer to the Authority’s first question.

VIII. Should Licensees be obligated to commission a certain percentage of their Local Content from local producers?

66. LIME submits that obligating Local TV Licensees to commission a certain percentage of their Local Content from local producers would be an unwarranted intervention in and distortion of market for Local Content programming. Similar to what might occur in any competitive market, Local TV Licensees will in the normal course buy programming from external sources if the cost and/or quality is more favourable than what the Licensee could do in-house. Leaving Licensees the flexibility to choose the source of their Local Content would then allow Licensees to maximize the quality of their programming – without requiring any regulatory intervention.

67. If the Authority were to mandate the acquisition of a certain amount of Local Content from independent local producers, the market would be skewed to favour local producers. Licensees might be forced to spend more for programming of lesser quality than they could produce in-house, simply because the local producer knows the Licensee must buy externally and sources of content will be limited. This would be an inappropriate allocation of the limited resources of the Licensees, and ultimately would not be in the best interests of the country.

IX. How should Local Television be provided to customers?

68. LIME recommends the continued use of flexible approach adopted by the Authority to date. Each Licensee should have the flexibility to best determine how best to reach its audience given its specific circumstances.

X. Do you have any other inputs on this topic?

69. Unfortunately, as noted at the top of this document, the Authority has chosen not to address the major problems in the market. There is clearly an uneven application of the licensing rules, for example, e.g. some STV distribution companies appear to be openly evading the requirement for a licence, and some television broadcasters are not subject to local content obligations. This and the blatant misuse of copyrighted materials is creating unfair competition in the STV and Local TV markets.

70. This is why LIME had urged the Authority in its letter of 27 November 2013 to undertake a more comprehensive review of the television market, instead of the piecemeal approach it seems to be taking. For convenience, the request for action is reproduced below:

If the Authority is minded to take a more structured and comprehensive approach than it has to date, it needs to conduct a public consultation on all content-related matters generally. In particular, it is not sufficient, or indeed appropriate, to review public service television broadcasting content policy separately from subscription television content policy, as the two are inextricably linked.

While the list below is by no means exhaustive, issues to be reviewed include:

1. Should subscription television providers be required to hold broadcast television licences?
2. If so, is there a policy justification for exempting any subscription television providers from that requirement?

3. Is there a policy justification for exempting any subscription television providers from ICT licensing obligations?
4. Should subscription television providers be permitted to retransmit any television channels, local or overseas, without the express written consent of the owners of those channels? Should they be forbidden as a matter of Cayman ICT law or policy from doing so without that express written consent? What are the effects on competition of allowing or forbidding retransmission of television channels without the consent of the channel owners?
5. Should there be a local "must-carry" obligation imposed on subscription television providers, such that they must carry all local television channels? Should subscription television providers pay the television broadcaster for carriage of those local television channels, if there is a "must-carry" rule?
6. Should television broadcasters be required to include a minimum level of "local content" in their broadcast schedules?
7. If so, what should that level be? Should the incumbent television broadcaster(s) be required to produce a greater level of local content than new entrants? Is there a policy justification for exempting any television broadcaster from such obligations?
8. How should "local content" be defined?
9. Is the objective of the above rules and policies the promotion of the production of local television content? Are there other ways of achieving that goal?

71. The Call for Inputs is addressing only some of these issues. LIME submits that all of these issues need to be addressed, if there is to be a level playing field and fair and sustainable competition in both the STV and Local TV Markets, and LIME continues to urge the Authority to undertake that comprehensive review of the market.

VII. Closing Remarks

70. Kindly send any communication in relation to this consultation to:

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ATTACHMENT

Broadcast Station Programming Policy Statement

Programmer agrees to cooperate with Licensee in the broadcasting of programs of the highest possible standard of excellence and for this purpose to observe the following regulations in the preparation, writing and broadcasting of its programs.

- I. No Plugola or Payola. Except for commercial messages aired in compliance with clause 5.6 (Payola) above, Programmer shall not receive any consideration in money, goods, services, or otherwise, directly or indirectly (including to relatives) from any persons or company for the presentation of any programming over the Station without reporting the same to Licensee's general manager. The commercial mention of any business activity or "plug" for any commercial, professional, or other related endeavor, except where contained in the actual commercial message of a sponsor, is prohibited.
- II. Required Announcements. Programmer shall broadcast any announcements that may be required by law, regulation, or Licensee policy.
- III. No Illegal Announcements. No announcements prohibited by law or regulation shall be made over the Station. Any game, contest, or promotion relating to or to be presented over the Station must be fully stated and explained in advance to Licensee, which reserves the right in its sole discretion to reject any game, contest, or promotion.
- IV. General Program Content Standards. All program content must comply with the laws of the Cayman Islands. Program content which reflects a particular religious or political viewpoint must pay due regard to the sensibilities of those who may reasonably be expected to hold differing religious beliefs or political opinions.

Program content that:

- (a) advocates or expresses racial and/or sexual discrimination;
- (b) is grossly offensive, of an indecent character and/or is classified as "obscene" (or similar) by the laws of the Cayman Islands;
- (c) is of an explicit or implicit sexual nature which is likely to cause grave or widespread offence by reason of its sexual content;
- (d) suggests, encourages or incites any person to use harmful substances or engage in dangerous practices;

- (e) could give grounds for action for defamation, misrepresentation, breach of confidence or which otherwise infringes the rights of any person;
- (f) criticize or denigrate or prejudice the sale or supply of any of the products or services offered by Licensee;
- (g) is unreasonably prolonged or delayed;
- (h) promotes or incites terrorism, misuse of weapons or encourages or incites a person to commit a criminal offence; and/or
- (i) induces an unacceptable sense of fear or anxiety;

is not permitted.

Programmer shall ensure that all programs are provided subject to all proprietary interests, rights, authorizations, licenses, consents and permissions including intellectual property rights having been obtained and any such requirement of law complied with as may be necessary to enable the programming to be made available to viewers.

Any program content the purpose of which directly or indirectly is to promote the sales of goods and/or services shall contain a notice to viewers stating that the program content is an advertisement. The advertisement content shall comply with the advertising standards, if any, of the Cayman Islands.

Program content must be accurate, to the reasonable satisfaction of the Programmer, and must not be designed to mislead or misrepresent. Topical messages shall be kept up to date.

The prior written permission of Licensee and any relevant authorities or organizations concerned must be obtained to deliver any messages for the purpose of fund raising for charity. The percentage of funds raised for charity must be stated clearly in all relevant advertisements by Programmer.

- V. Professional Program Content Standards. Program content containing professional advice or opinion (for example, Medical/Dental/Legal/Financial services) must comply with the appropriate regulations or government regulations of the Cayman Islands. Where messages have been advertised as containing professional advice, whether expressly or implicitly, they should state the source of the information and the professional standing of the source, and the advice must be applicable to the Cayman Islands.
- VI. Underage and Other Dependent Persons Program Content Standards. Programs designed for, either wholly or in part, and aimed at an audience of children or young persons must not include:-
 - (i) references to sexual practices of which reasonable parents would not wish their child to know;

- (ii) language/text/images that reasonable parents would not wish their child to hear or see;
- (iii) materials that are offensive or of an indecent or obscene character;
- (iv) words which suggest, encourage or incite the use of harmful substances or engagement in dangerous practices.

Program content must not involve any information, noise, visual or sound effect or image reasonably likely to alarm any person under the age of 18, mentally disordered or mentally handicapped person or any other dependent person, having regard to special protection for such dependent persons. For the avoidance of doubt, program content targeting any child, young person, mentally disordered or mentally handicapped person or any other dependent person must comply with all other terms and conditions of this Broadcast Station Programming Policy Statement.

- VII. Licensee Discretion Paramount. In accordance with the Licensee's responsibility under the *Information and Communications Technology Authority Law*, as amended, the rules and regulations of the ICTA, and the Licensee's ICT Licence, Licensee reserves the right to reject or terminate any advertising or programming proposed to be presented or being presented over the Station which is in conflict with Station policy in Licensee's or its general manager's sole reasonable judgment.

Licensee may waive any of the foregoing regulations in specific instances, if, in Licensee's sole opinion, the Station will remain in compliance with all applicable laws, rules, regulations and policies and broadcasting in the public interest is served. In any case where questions of policy or interpretation arise, Programmer should submit the same to Licensee for decision before making any commitments in connection therewith.

END DOCUMENT