ADJUDICATION AND ORDER

ISSUED BY THE UTILITIES REGULATION AND COMPETITION AUTHORITY TO:

BAHAMAS TELECOMMUNICATIONS COMPANY LIMITED

IN THE MATTER OF A COMPLAINT BY SYSTEMS RESOURCE GROUP LIMITED ALLEGING:

(i) anti-competitive agreement; and
(ii) alleged abuse of dominant position

Issue Date: July 29, 2014

UTILITIES REGULATION & COMPETITION AUTHORITY
UBS Annex Bldg., East Bay Street | P.O. Box N-4860 Nassau, Bahamas | T 242.393.0234 | F 242.393.0153 | F 242.393.0237
www.urcabahamas.bs

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1. Introduction

1.1 Background

In this document the Utilities Regulation and Competition Authority ("URCA") issues an Adjudication in accordance with the procedures set out in URCA's Guidance Note "How to make a competition complaint – guidance on URCA's investigation procedure" (ECS COMP. 9). This Adjudication is issued to the **Bahamas Telecommunications Company Ltd ("BTC")** consequential to an investigation of allegations by Systems Resource Group Limited ("SRG") that restrictive clauses in BTC's agreements with its Master Distributors infringe section 67 and/or section 69 of the Communication Act, 2009 ("Comms Act").

1.2 The Regulatory Framework

The Comms Act came into force on September 1, 2009 and gives URCA powers of regulation and of oversight of the electronic communications sector in The Bahamas.

Section 103 of the Comms Act provides for URCA to make adjudications in accordance with the process in section 104 of Comms Act in respect of any contravention of the competition provisions under Part XI of the Comms Act. URCA may *"impose behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the contravention to an end"*. Section 104 of the Comms Act requires URCA to establish procedures for making adjudications.

URCA has also issued competition guidelines ("the Guidelines")[1] as to the matters it would consider in investigating such competition related complaints. The Guidelines include "How to make a Competition Complaint – Guidance on Investigation Procedures" (ECS COMP. 9), which contains details of the procedures URCA will use in assessing complaints about anti-competitive behaviour under section 67 (which relates to anti-competitive agreements) and section 69 (which relates to abuses of a dominant position) of the Comms Act.

Section 95 of the Comms Act provides, *inter alia*, for URCA to issue an Order concurrently with an Adjudication under section 103:

(i) ordering the licensee that contravenes any provision of the Comms Act or licence condition to do or refrain from doing such things as are specified in the Order to remedy, prevent or rectify the breach or anticipated breach which is the subject of the adjudication;

(ii) imposing an objectively justified and non-discriminatory fine on the licensee; and

1 URCA Competition Guidelines ECS COMP. 4 to ECS COMP. 9, published March 17, 2010.

(iii) notifying the licensee that the licence may be revoked if the licensee fails to comply with such Order and/or pay the fine.

1.3 Structure of the Remainder of this Adjudication

The remainder of this Adjudication is set out as follows:

Section 2: provides the background to URCA's Adjudication. It summarises the complaint, describes URCA's interactions with the parties, and sets out URCA's approach to the investigation it conducted prior to issuing this Adjudication;

Section 3: defines the markets relevant to this case;

Section 4: assesses market power in the markets under investigation;

Section 5: assesses whether BTC's conduct in the markets infringes section 67 and/or section 69 of the Comms Act;

Section 6: presents a summary of URCA's Adjudication in this case; and

Section 7: sets out the Order consequential to URCA's Adjudication.

2 Background to URCA's Adjudication

In this Section, URCA firstly summarises the complaint made by SRG and then describes the framework it has applied in conducting the investigation leading to the issuance of this Adjudication.

2.1 The Complaint

2.1.1 Factual Description of Complaint

On April 2, 2012, SRG submitted a competition complaint to URCA in accordance with the Guidelines. In its complaint, SRG alleged BTC had engaged in business practices which contravened section 67 and section 69 of the Comms Act. According to SRG's complaint, BTC's supply agreements for its calling cards have prevented SRG from entering and expanding in the market for two-stage Long Distance (LD) dialling. The particulars of the complaint note that:

(i) SRG had approached several (wholesale) businesses with a view to them displaying and selling SRG's "IndiGo calling cards". These calling cards are used by members of the public to make long distance calls using pre-paid credit;

(ii) SRG and BTC supply the long distance calling cards to wholesalers, who in turn supply the cards to retailers (and may also sell them directly to consumers). Retailers approach the wholesalers to acquire the phone cards to be sold in their premises. According to SRG, retailers are either street vendors and/or "mom & pop" stores who supply the cards to consumers; and

(iii) The wholesale businesses indicated that they had exclusive supply agreements with BTC prohibiting them from selling the SRG calling cards.

According to SRG, prior to January 2012, its wholesalers distributed calling cards from both BTC and SRG. However, since March 2012, SRG has been unable to distribute its cards via some wholesalers as a result of the exclusivity agreements the wholesalers have with BTC[2].

2.1.2 Interactions between URCA and licensees regarding complaint

To inform this Adjudication, URCA had a number of interactions with each party to the case. For transparency, the nature and scope of the interactions are set out below:

(i) On April 5, 2012, URCA advised SRG that it was minded to open an adjudication investigation to consider whether BTC's conduct had contravened the Comms Act;

(ii) On June 6, 2012, URCA sent an information request to SRG. URCA followed up on September 25, 2012, with a reminder to SRG to provide URCA with the requested information;

(iii) On October 9, 2012, SRG responded to the information request sent by URCA;

(iv) On December 10, 2012, URCA requested comments from BTC regarding the allegation that its conduct had infringed the Comms Act;

(v) On January 30, 2013, BTC responded to the competition complaint filed by SRG;

(vi) On February 19, 2013, URCA sent a further information request to SRG regarding its view of the market definition, the downstream retailers of calling cards, and SRG's own supply arrangements;

(vii) On March 5, 2013, SRG responded to URCA's information request of February 19, 2013;

(viii) On March 14, 2013, URCA met with SRG to discuss the complaint;

[2] Letter from SRG to URCA of October 8, 2012.

(ix) On March 25, 2013, URCA sent a letter to BTC asking for details of, *inter alia*, the "Master Distributors" of BTC's calling cards, copies of the agreements between BTC and the distributors and for details of the Franchise agreements;
(x) On March 26 2013, SRG/IndiGo responded to URCA's request for information in its meeting of 14 March 2013;
(xi) On April 4 2013, BTC responded to the information request of 25 March 2013;
(xii) On November 7, 2013, URCA sent a further information request to SRG and to BTC;
(xiii) On November 20, 2013, BTC responded to URCA's request for information of November 7, 2013;
(xiv) On December 9, 2013, SRG responded to URCA's request for information of November 7 2013;
(xv) On December 16, 2013 URCA asked for clarification of the responses of BTC and SRG of November 20, 2013 and December 9, 2013, respectively;
(xvi) On December 18, 2013, SRG responded to URCA's request for information of November 7, 2013 and December 16, 2013;
(xvii) On January 6, 2014, BTC responded to URCA's request for information of December 16, 2013;
(xviii) On February 12, 2014 URCA issued a confidential Statement of Objection (SO) to BTC and afforded it an opportunity to respond. Simultaneously, URCA also provided a confidential version of the SO to SRG as an interested party to afford it the opportunity to comment on the contents;
(xix) On March 21, 2014 SRG commented on the SO in a submission to URCA; and
(xx) On March 24, 2014 BTC responded in a submission to URCA to the objections addressed to it in the SO.

2.2 URCA's Approach to Investigating the Complaint and consequently issuing this Adjudication

URCA has considered whether the conduct referred to by SRG infringes section 67 and/or section 69 of the Comms Act. The framework for assessing whether a licensee has infringed the competition sections of the Comms Act is set out in the Guidelines ECS COMP. 4-9. The key analytical steps in assessing the complaints are summarised in turn below:

2.2.1 Market definition

The analysis begins by formally defining the relevant market(s). The precise market to be defined will depend on the specific economic context of the investigation but will usually include the markets in which the conduct took place and where the effects were felt; and may also include any related market where a licensee is dominant or any relevant market up-stream or downstream of the effects or the conduct. Market definition is not an end in itself but

provides an analytical framework which can be used to understand the structure and nature of competition in the market.

Typically, the market definition defines the smallest group of products which compete with each other. Market definition focuses on the rivalry between suppliers in different markets and identifies those products and services which most closely are rivals to the focal product. Market definitions are generally specific to the conduct under consideration. Markets are defined around a focal product which is the focus of the investigation. The analysis then examines which other products are sufficiently close substitutes to the focal product to fall into the same economic market.

2.2.2 Assessment of market power

Once markets have been defined, it is necessary to consider the market position of suppliers and the nature of competition in those markets. Most markets are characterised by competition in which a large number of suppliers provide goods and/or services to a large number of buyers. In such markets, firms compete with each other to win customers by offering lower prices, by differentiating their products or by investing in new or innovative products or production processes. In this way competition enables efficient and welfare maximizing outcomes for consumers. However, in some markets, suppliers may have market power to act in a way that is independent from their customers or competitors. For example, suppliers may be able to set prices higher than would be the case had they faced greater competition.

There are various indicators that have been developed to assess whether suppliers can act independently of competitors, customers and ultimately consumers. These include assessing market concentration (for example, using measures of market shares of suppliers) and assessing the likelihood that potential competition might constrain competitors (for example, through barriers to entry or countervailing buyer power). As noted in the Guidelines, the possession of a dominant position is in no way prohibited by the Comms Act and dominant suppliers should be able to compete in markets where they are present[3]. However, the possession of a dominant position imposes a "special responsibility" on the dominant supplier not to allow its conduct to impair or distort competition.

2.2.3 Assessment of the effects

Assessment of whether the conduct is likely to contravene section 67 and/or section 69 of the Comms Act usually involves analysis of the effects of the conduct on competition[4]. Analysis of the effect of the conduct is usually done by comparing the nature of competition that could

[3] The Guidelines ECS COMP. 7 paragraph 38

[4] Agreements which by their object restrict, or distort competition may not require an analysis of the effects.

have arisen absent the conduct with that which actually arose. The Guidelines describe the circumstances where conduct might contravene section 67 and/or section 69 of the Comms Act, and the evidence that URCA will consider in making its assessment. In its assessment of the effects of the conduct, an assessment of the market shares of the suppliers on the markets can be an important consideration.

2.2.4 Consideration of whether an exemption applies or whether there is an objective justification

In some cases, conduct which might lead to anti-competitive effects might be exempted from the provisions of section 67 of the Comms Act if the operator can demonstrate that there are off-setting efficiency effects of the conduct, or if there is an objective justification of the conduct (in the case of a potential section 69 infringement).

3 Market definition

3.1 Introduction

This Section defines the economic markets which are relevant to the complaint. In assessing the competitive conditions in the market, URCA has identified two distinct services which are relevant to the investigation: (i) the supply of calling cards; and (ii) the supply of the LD two stage dialling service. The two services are supplied as a pure bundle[5] however, for the purposes of this investigation, URCA has separately defined the markets for each distinct service. URCA notes that demand for calling cards is directly derived from demand for LD two stage dialling services.

URCA concludes that the relevant markets are:

(i) **The retail supply of pre-pay two stage LD dialling in The Bahamas**. URCA considers that other ways to call LD (such as calling directly from a fixed or mobile connection, or calling using an internet based Voice over Internet Protocol (VoIP) service) lie outside the relevant market. This is because existing calling card users are unlikely to have access to alternative approaches to LD dialling (such as from a fixed connection, mobile, or VoIP service).

BTC and SRG are the only suppliers of pre-pay two-stage LD dialling in The Bahamas.

[5] A "pure bundle" is a bundle of two products (in this case pre-pay calling credit and pre-pay long distance calling), where neither product can be purchased independently and both products are consumed together.

(ii) **The upstream supply of prepay calling cards** (which enable the user to make LD calls from The Bahamas) by the call service providers to wholesale distributors in The Bahamas. BTC and SRG are the only suppliers of such cards.

This Section firstly provides a factual overview of the calling card service. Then, URCA summarises its approach to defining the markets. Finally, URCA presents its analysis and conclusions on the relevant markets.

3.2 Overview of the calling card service

To begin its analysis, URCA presents an overview of the market which:

(i) describes the key characteristics of calling cards;
(ii) identifies the key suppliers and available substitutes for calling card services; and
(iii) describes the arrangements used to supply the cards.

3.2.1 Description of calling cards

LD calling cards are pre-paid vouchers used by customers to make LD calls. The customers call LD by using a two stage dialling process which involves the customer undertaking the following steps:

- dialling a local number;
- entering a code which is specific to the purchased calling card voucher; and
- dialling the LD number.

The cards can be used in three ways:

(i) Calling from a fixed line connection where there is no charge to access a BTC service (i.e. the call to the local Bahamas access number is free);
(ii) Calling from a mobile connection where the user may pay a charge to access the service if the call to the access number falls outside their call plan (in addition to the pre-pay credit to make the LD call); and
(iii) Calling from a public pay phone where there is no charge to access the BTC calling card service, but there is a $0.25 connection charge to access the SRG calling card service.

The calling rates that customers pay for the LD call are in some cases lower than customers would face if they made a standard direct dial call from a standard fixed or mobile connection. Customers can use the calling card until the pre-paid credit associated with each card transaction is exhausted. The cards themselves do not have any significant intrinsic value;

rather, the consumer buys the ability to make a certain amount of calls to LD numbers up to the value of the voucher, using the procedure outlined above.

3.2.2 Description of market: key suppliers and alternative products

There are currently only two suppliers of pre-pay two stage LD calling services: SRG[6] and BTC. In order to enable consumers to access their pre-pay services, BTC and SRG need to supply calling cards which enable consumers to purchase the pre-pay credit necessary to make the calls. There are a number of alternative ways that consumers could call LD numbers from The Bahamas:

- **Direct dial from fixed or mobile connections** – Fixed and mobile providers enable LD calls (however, the retail prices are in some cases higher than with calling cards).

- **Internet based unmanaged VoIP** – This requires that callers have an internet connection and requires that users have an account. The service uses Voice over Internet Protocol (VoIP) to route calls over the public internet, rather than via public switched telephone networks. Depending on their account, consumers using VoIP may be able to call the same LD numbers as they can with a calling card. Alternatively, users can place a VoIP call to another internet connection (for example using networks such as Skype). However, there may be quality of service issues with the call (such as drop off, voice quality, etc.) which would depend on the end-to-end quality of the internet connections.

- **Direct dial from managed VoIP services.** BTC and SRG provide managed VoIP services (ViBe and OnePhone respectively) which enable subscribers to dial LD numbers directly. Both these services require a fixed broadband connection, and require that subscribers have specific hardware and software to use the service.

3.2.3 The supply arrangements for calling cards and pre-paid two stage LD dialling services

The supply arrangements of LD pre-pay calling cards differ from other types of calling services. In the case of fixed connections or of mobile post-pay connections, the service providers (such as BTC and SRG) contract directly with consumers. Consumers are then billed by their service provider for the calls that they have made in the previous period. However, in the case of pre-pay two stage LD call services, consumers need to be able to top up their credit in a convenient, accessible way. Therefore, the suppliers need a wide network of distributors of their "cards"

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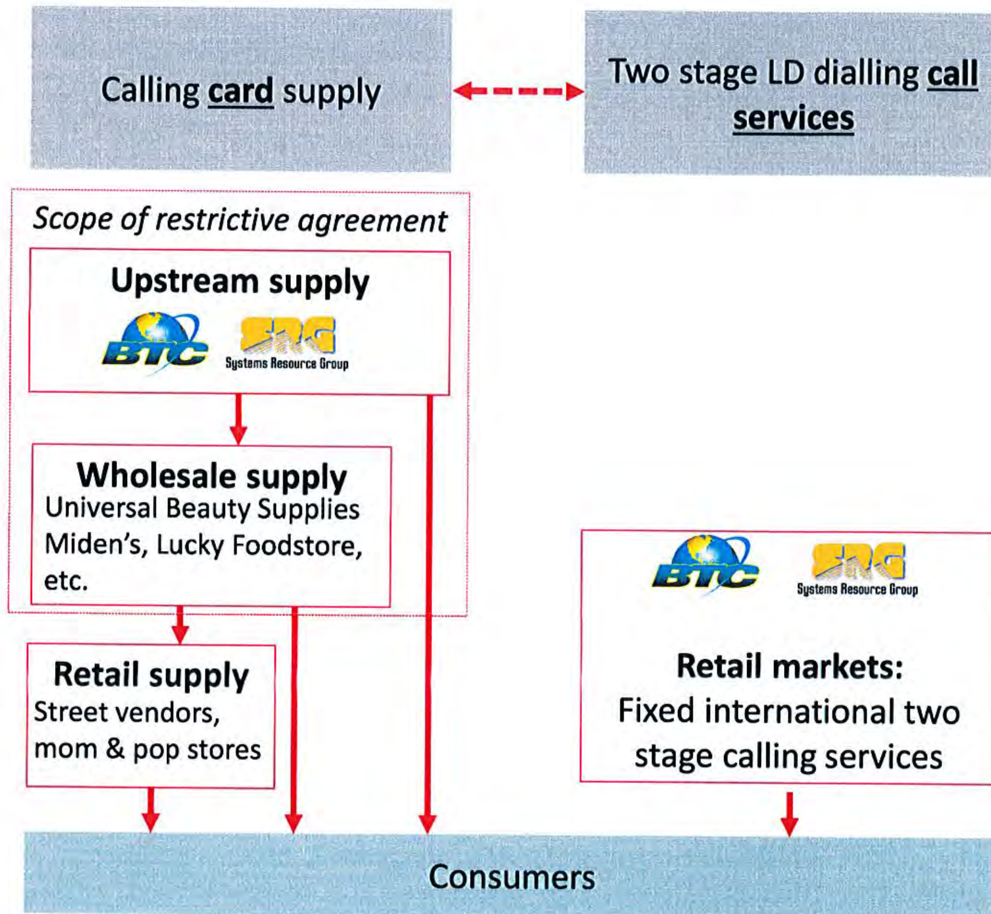
[6] SRG and CBL merged in 2011.

which consumers can access in order to be able to make use of pre-pay two stage dialling LD call services.

For the purpose of this investigation, URCA considers the supply of the calling cards **to be a distinct service** from the supply of pre-pay two stage dialling LD call services. While the two services are clearly interlinked and can only be used with each other, URCA considers that they can be considered as two distinct services ultimately supplied to consumers via different supply routes. The service which enables consumers to buy pre-pay credit is supplied via a network of wholesalers and retailers; whereas the calling service is supplied directly by calling providers to consumers. **Figure 1** below describes the supply relationships for the supply of pre-pay cards, and the supply of two stage LD dialling services.

The call service providers (BTC and SRG) supply their "calling cards" to a small number of wholesalers, who in turn supply to a large number of retailers. The subject of the complaint was the supply agreements that BTC has with its "Master Distributors" who are labelled as "Wholesale supply" in **Figure 1** below:

Figure 1. The Calling Card Supply Chain



BTC has agreements with less than twenty Master Distributors. The agreements prohibit these distributors from selling pre-paid airtime for another carrier that originates in The Bahamas. The Master Distributor agreement has minimum volume requirements.

The contracts between SRG and its distributors do not prohibit distributors from selling calling cards from other suppliers. SRG's contract has minimum volume requirements.

3.3 Approach to market definition

URCA's approach to market definition is set out in ECS COMP. 5 of the Guidelines. The Guidelines note that markets are defined in order to assess the scope for an agreement to

affect competition. In the context of an investigation into an alleged abuse of a dominant position, market definition is a step required to assess whether a firm is dominant and hence whether it could have been in a position to engage in an abuse of such a dominant position

3.3.1 Product and geographic markets

Markets are typically defined by the product and geographic area in which competition takes place. The Guidelines note that the "Hypothetical Monopolist Test" (HMT) can be used to assess the scope of markets. The HMT is an analytical thought experiment which defines a market by considering the smallest possible group of products including the product under investigation (the "focal product") over which a monopolist supplier could profitably sustain a price above competitive levels.

An assessment of the product market begins by considering a small group of products including the focal product and positing what would be the response of suppliers of other products to an increase in the price of those goods from the competitive level. The price increase may cause some consumers to switch to alternative products (demand side substitution), or it may induce suppliers of alternative products in adjacent markets to start supplying the group of products under consideration without incurring investment costs in a short space of time (supply side substitution). If the level of switching is sufficient to render the price increase unprofitable, then the thought experiment is iteratively repeated, each time including the next closest substitutes for the focal products. The experiment is repeated until the smallest group of products is identified over which a hypothetical monopolist could sustain the price increase. This group of products is thus defined as the relevant market.

The geographic market is defined in the same way. It considers the smallest geographic area over which a hypothetical monopolist could sustain a price increase without consumers switching to products in adjacent areas. Typically, it is reasonable to consider the retail market before defining markets further upstream. That is because the demand for products upstream (wholesale) is a derived demand (based on the retail markets). Additionally, retail constraints can place indirect constraints on markets further upstream.

3.4 Market Definition – Supply of LD Calling Cards

3.4.1 Framework for assessing market definition in retail markets for LD calling cards and pre-pay two stage LD dialling

The calling cards which are the subject of this investigation enable consumers to access two stage LD dialling. The market for the supply of pre-pay calling cards for two stage dialling to LD numbers can be thought of as two distinct services supplied in a bundle:

(i) the supply of the two stage LD calling service; and
(ii) the supply of calling cards to enable the calling service.

The two services are complementary and are sold as a pure bundle (i.e. it is not possible to buy the two stage dialling LD call service without first buying a pre-pay card, and the pre-paid voucher cannot be used for another service). Nonetheless, for the purpose of this investigation, URCA has separately considered markets for the supply of pre-pay calling cards (which provide consumers with the ability to access the service) and for the supply of pre-pay two stage LD dialling. This is because the "conduct" that is the subject of URCA's investigation relates to the supply of calling cards to wholesalers. Therefore, the focal product for URCA's investigation is the supply of pre-paid LD calling cards by BTC and SRG to wholesalers.

In order to define upstream markets, it is necessary to define retail markets.
Figure 1 in Section 3.2.3 above notes, *inter alia*, that:

- BTC supplies pre-pay two stage LD dialling services direct to consumers via its franchisees; and
- distributors and retailers supply the calling cards to consumers.

URCA therefore begins its analysis by defining retail markets for the supply of pre-pay two stage LD dialling. The demand for calling cards (considered as a distinct product) is derived from the demand for pre pay two stage LD dialling. Finally, the market for the supply of calling cards further upstream is defined.

URCA notes that its approach in this case is different to the approach taken in its 2011 SO issued to BTC in a previous investigation regarding calling cards[7]. In that SO, which examined alleged anti-competitive behaviour by BTC, URCA found the following market definition:

- the relevant service is that of two-stage dialled Long Distance (LD) voice services;
- the relevant geographic market is that of The Bahamas given that the two-stage dialled LD services as facilitated by BTC's and SRG's value repositories ("Talk it Up", "Hello", and "IndiGO"), were available throughout the country; and
- the relevant economic market ("the relevant market") is therefore that of two-stage dialled LD voice services offered to consumers within The Bahamas.

In that investigation, URCA did not separately define the markets for LD two stage calling services and calling cards. URCA does not believe, however, that this creates a precedent for its current investigation. Rather, whilst previous findings can be relevant, each market definition exercise must be done afresh. As noted in the Guidelines, *"The market definition process,*

[7] URCA ECS 14/2011 Statement of objections – alleged anti-competitive behaviour by the Bahamas Telecommunications Company Limited.

however, might lead to different results depending on the nature of the issue being examined by URCA"[8].

In particular, URCA considers the context of the current case merits a different approach. In the 2011 SO, URCA was considering whether the pricing practices of BTC amounted to predatory pricing, whereas this investigation concerns the arrangements of the supply of the calling cards (rather than the calling service). As such, URCA's approach in this case is not inconsistent with its approach in the 2011 SO. In particular, the application of the HMT in the 2011 SO is the same as the application of the HMT to the supply of two-stage LD calling services in the current case.

3.4.2 Views of parties

URCA sought the views of the parties on the likely relevant markets. SRG in its complaint noted that the market was the "wholesale phone market"[9]. In response to the SO SRG supported URCA's conclusion to the relevant markets[10]. In turn, BTC noted that the calling card is not a communications service, but is a value repository[11] hence it believes that calling cards are excluded from the definition of the *"communications matters"* under section 65 of the Comms Act.

In response to the SO BTC additionally argued that Digicel pre-pay services originating in either Haiti or Jamaica were part of the relevant market as they were effectively a substitute for pre-pay two stage dialling in The Bahamas. BTC argued that a call originated in another country to The Bahamas, using pre-pay mobile credit which was purchased in The Bahamas, provides a sufficient substitute for pre-pay two stage LD dialling originated from The Bahamas[12]. BTC noted that a Bahamian resident could purchase credit in The Bahamas for either Digicel's Jamaica or Digicel Haiti pre-pay mobile accounts. Then the Jamaican or Haitian Digicel customer could call LD from their country to any number (including to the person in The Bahamas who topped up the customer's credit). BTC argued that a call from the Haitian or Jamaican Digicel customer to the Bahamian resident who topped up the pre-pay mobile credit could substitute for LD calls made by the Bahamian resident to the same Haitian or Jamaican customer.

3.4.3 Market definition – pre-pay two stage LD dialling

This Section considers whether other means of making LD calls from either fixed or mobile lines are likely to be part of the same economic market as calls from pre-pay calling cards, or

[8] The Guidelines ECS COMP. 5 paragraph 9.
[9] Letter from Indigo to URCA of March 26, 2013.
[10] SRG response to SO of 21 March 2014 page 2.
[11] Letter from BTC of January 30, 2013 and BTC response to the SO 21 March 2014 page 4.
[12] BTC response to the SO March 21, 2014 @ page 5.

whether receiving LD calls using a pre-pay mobile service from another country where credit to make the call has been purchased in The Bahamas.

If a monopolist supplier of calling cards for two stage dialling for LD calls increased the price by a small amount (for example 5-10%), the analysis considers whether consumers would switch to alternative suppliers of phone services such as internet based VoIP, direct dial from a fixed line, or direct dial from a mobile connection. The analysis begins by examining price and product characteristics of the different demand side substitutes. It then considers in turn:

(i) Demand preferences of users of calling cards;
(ii) Demand side substitution to direct dialling from a fixed line;
(iii) Demand side substitution to direct dialling from a mobile connection;
(iv) Demand side substitution to internet based VoIP;
(v) Demand side substitution to calls originated in other jurisdictions and terminated in The Bahamas, using credit purchased by consumers based in The Bahamas;
(vi) Supply side substitution; and
(vii) Geographic markets.

Demand preferences of users of pre-pay LD calling cards

URCA recognises that there are a number of reasons why customers may choose to make a LD call using calling cards, rather than alternative approaches such as direct dial from fixed, or mobile connections, or using a VOIP service. For example, SRG[13] noted the following factors influence demand for long distance calling cards:

- they have lower priced tariffs than direct dial alternatives;
- calling card customers often do not have a fixed line because:
  (a) they do not qualify for a fixed line (because they cannot afford a fixed line or do not pass the credit constraints); and/or
  (b) the customers are renters and do not want the long term commitment or set up costs of connecting a fixed line (and more generally calling card customers tend to be more transient and are less likely to have a permanent fixed address, and likely to have less disposable income);
- calling card customers tend to have a mobile connection instead of a fixed connection (so the calling card enables them to make long distance calls at cheaper rates than is possible via their mobile connection – for example, by using the calling card with a public pay phone where the access fee is free or low); and

[13] SRG letter to URCA of December 9, 2013

- pre-pay calling cards enable consumers to control their spending on long distance calls (which is important to lower income groups).

Similarly, BTC posited that customers chose calling cards as opposed to alternative products to call long distance as it was cheaper than other forms of calling. BTC also noted that calling cards may be attractive to customers with limited access to fixed and mobile networks[14]. Therefore, while there are a number of ways that can be used to make LD calls, not all of these could be accessed by users of calling cards.

Characteristics

Table 2 below summarises the key characteristics of different ways to make LD calls.

Typically, the customers of calling cards might dial LD numbers using their fixed or mobile handsets or may use a pay phone toll free (the only cost being the prepay credit). The key differences between the different ways to make LD calls are:

(i) whether existing fixed or mobile subscriptions are required;
(ii) whether direct or two stage dialling is used; and
(iii) whether any specific hardware or software is required.

Other than the additional inconvenience of having to dial the access number and enter the code (i.e. two-stage dialling), the characteristics of direct dialling calling LD numbers from fixed connection and mobile connection are similar to the two stage dialling.

Fixed line services are generally only available as a post-pay service, whereas mobile is available as a pre-pay or post pay service.

An internet connection with suitable hardware would be required in order to use the internet options such as Skype.

Table 2: Characteristics of Different Options to Dial LD

	REQUIRED EQUIPMENT/SUBSCRIPTION	DIRECT OR TWO STAGE DIALING	OTHER
BTC calling card	Access costs: Call via fixed (free), mobile (additional local call cost), public phone (free)	Two stage	

[14] BTC letter to URCA of November 20, 2013.

SRG calling card	Access costs: Call via fixed (free), mobile (additional local call cost), public phone (25ct connection charge)	Two stage	
IndiGo (OnePhone)	Broadband subscription and specific hardware and software	Direct	Potential quality of service issues, depending on broadband connections
ViBe	Broadband subscription and specific hardware	Direct	Potential quality of service issues, depending on broadband connections
BTC fixed	Fixed line subscription	Direct	
SRG fixed	Fixed line subscription	Direct	
Mobile	Mobile subscription or pre pay	Direct	Potential quality of service issues, depending on mobile connections
Skype (unmanaged VOIP)	Broadband subscription	Direct	Potential quality of service issues, depending on broadband connections

Price differences

URCA has examined the prices of calls made using the different methods presented in Table 2 above. The analysis firstly considers the retail prices for customers in The Bahamas to make outgoing international calls to three of the most popular international call destinations in The Bahamas. Table 3 below compares the retail prices for calling LD using a fixed line, a mobile line and using the calling cards. There is a significant difference between the prices of BTC's fixed LD calling and the calling cards. However, the price of SRG's fixed LD calling and calling cards is similar (and is in some cases cheaper than direct dial fixed services).

Table 3: Retail prices of calling most popular destinations (cents per minute)

	JAMACIA	HAITI	US
BTC calling card [i]	29	29	19
SRG (CLB REVoice calling card) [ii]	33	33	25
BTC fixed [iv]	66	66	47
SRG fixed [v]	19	29	17
Indigo OnePhone VOI [iii]	29	24	15
Mobile (pre- or post-pay) [vi]	66	66	47
Skype [vii]	13.2	26.8	2.3

Notes prices as of January 14, 2014

Source: (i) http://www2.btcbahamas.com/support/category/26-how-much-does-this-cost/faqs
(ii) http://www.cablebahamas.com/?p=n§id=2&catid=105&pgid=160
(iii) http://www.cablebahamas.com/indigo_downloads/OnePhone-rates.pdf
(iv) BTC Initial Tariff Filing. BTC also offers bundled packages which contain bundled minutes to Family Islands and to USA, UK and Canada.
(v) http://www.cablebahamas.com/?p=n§id=2&catid=68&pgid=131
(vi) BTC Initial Tariff Filing.
(vii) http://www.skype.com/en/rates/

Demand side substitution – direct dialling from a fixed line

URCA has considered whether a small but significant non-transitory increase in price (SSNIP) would incentivise calling card users to switch to a direct dial fixed service. URCA notes that the price of BTC's fixed service is considerably higher than the calling cards and users would be unlikely to switch to this service in the event of a SSNIP. URCA considers that it is therefore not part of the same market as calling cards.

URCA notes that the price of SRG's fixed service is the same price of the BTC calling card for calling Haiti; the price of calling Jamaica using its IndiGo OnePhone VOI service is the same as BTC's calling card, and for other countries the price of SRG's fixed services and IndiGo OnePhone services is lower than that of calling cards. Therefore, it is likely that existing SRG fixed and IndiGo OnePhone subscribers would already use the fixed service for calling those

countries where the calling card price is similar or cheaper. Hence, a SSNIP on the calling card service would not lead to existing SRG users switching to its fixed service.

Users without an existing SRG service would be unlikely to switch as it would require them to sign up for a monthly subscription service (starting at $14.99 per month[15]). The switch would entail some switching costs whilst for most users (i.e. except for those who make an exceptionally high volume of calls) only generating a relative small saving.

For these reasons, URCA does not believe existing fixed line services are in the same market as calling card services.

Demand side substitution – direct dialling from a mobile

URCA has considered whether a SSNIP would incentivise calling card users to switch to a direct dial mobile service. URCA notes that the retail prices for LD calling using BTC's mobile service are considerably higher than the calling cards. Therefore, users would be unlikely to switch to this service in the event of a SSNIP. URCA considers that direct dialling from a mobile number is therefore not part of the same market as calling cards.

Demand side substitution – calling LD from an internet based, unmanaged VoIP service (e.g. Skype)

URCA has also considered whether a SSNIP on calling card services would incentivise a switch to an unmanaged internet based VoIP service such as Skype. For calling many countries, services such as Skype offer a much cheaper alternative than calling cards. However, this requires that consumers are able to access a broadband service. Given that the prices to call many countries (though not Haiti) is much lower than for using a calling card, it could be reasonably inferred that many existing calling card customers do not have access to a broadband based service.

URCA does not consider that calling card consumers would be incentivised to take out a new broadband service if the price of dialling via a calling card increased by a small amount as this would entail a significant increase in broadband connection and subscription costs. URCA therefore does not consider that calling using an internet based VoIP service is likely to be within the same market as calling cards. URCA's reasoning in this regard is that: (i) for calling most countries, internet based VoIP is much cheaper and therefore consumers that can readily access internet based VoIP are likely to do so; and (ii) for calling card users without an existing broadband there would be additional cost and inconvenience associated with setting up an internet connection.

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[15] See http://www.cablebahamas.com/?p=n§id=2&catid=68&pgid=159

Demand side substitution – receiving calls from a Digicel service from Jamaica or Haiti

Digicel Jamaica and Digicel Haiti top-up cards are available for purchase in The Bahamas. This enables members of the Jamaican and Haitian diaspora (and others) to purchase such top-up cards for use by family or friends based in Jamaica and/or Haiti. Those residents of Jamaica and Haiti receiving this credit can then use this for the range of mobile services offered by Digicel in those markets including, but not limited to, making outgoing international calls to The Bahamas. .

BTC has argued in its response to the SO that this practice in effect makes in-bound calls from residents of Haiti and Jamaica who have received credit from Bahamas-based consumers part of the same relevant market as outgoing LD two-stage dialling calls. It argues that the ability of Bahamian residents to: (i) supply top up payments to Digicel subscribers in Haiti and Jamaica; and (ii) to receive calls from those same Digicel subscribers, provide a substitute for two stage LD dialling. This appears to be based on the belief that a sufficient number of consumers in The Bahamas are locally buying Digicel top-up cards for friends/relatives in Haiti and Jamaica, specifically for those friends or relatives to be able to call them, rather than the Bahamian consumer placing such calls (i.e. that some consumers are actively deciding to purchase Digicel top-up cards instead of BTC and SRG pre-pay calling cards and would be inclined to do so more, if the price of calling with pre-pay calling cards increased).

In support of its claim, BTC argues in its SO response its decline in revenues from two-stage LD calls is a direct result of two-stage LD calling card customers choosing to receive calls from Haiti and Jamaica, instead of originating calls using two-stage LD calling cards.

In order for calls originated in Haiti or Jamaica using a pre-pay mobile service to be included within the relevant market, a proportion of existing calling card users would have to switch to receiving these calls, rather than making outgoing calls, in the event that prices of all two-stage LD calling card services increased by a small but significant amount.

However, having considered the evidence, including most notably the characteristics of each service, URCA does not consider that a SSNIP in relation to calling cards would lead to consumers switching to receive calls from Haiti and Jamaica (instead of making them to Haiti and Jamaica from The Bahamas). This is for the following reasons.

- **While a resident of The Bahamas could buy a Digicel mobile pre-pay top-up voucher for an account in Haiti or Jamaica, they would have no way of ensuring that pre-pay credit is used to call the Bahamian resident.** In practice this limits how a pre-pay Digicel credit could be used to substitute for two stage LD calling from The Bahamas and makes it more likely that members of the Haitian and Jamaican diaspora in The Bahamas are purchasing Digicel top-up credit as a general way of supporting relatives and friends in

those countries, rather than specifically to enable them to receive international calls from such relatives and friends.

- **While Jamaica and Haiti are popular calling destinations, they are by no means the only destination to which users of two stage LD services place calls.** Callers to other destinations (such as the US) would not have the same facility.

- **There is no strong evidence that Digicel has been a substitute for two stage LD calls in The Bahamas.** Though the volume of calls from The Bahamas to Haiti and Jamaica has declined, URCA notices that this decline is not out of line with the declines seen for two stage LD calls to other destinations. Indeed, this was shown by the evidence provided by BTC in its response to the SO. If incoming calls from Digicel customers in Haiti and Jamaica were a substitute for two stage LD calls to those countries, it would be reasonable for URCA to expect to see a different pattern in call volumes to those particular destinations.

- **The functionality of the service would in most cases be very different to two-stage LD calling.** To have a similar functionality as an outgoing call, callers in The Bahamas would have to first arrange a time that a caller in either Jamaica or Haiti could call them. They would be unable to make impromptu calls from The Bahamas to either Jamaica or Haiti. In this way the characteristics of the incoming service is very different from the point of view of a Bahamian caller.

- **Callers from The Bahamas would only be able to call Haitian or Jamaican customers with a Digicel account. The Bahamian resident would have to buy mobile pre-pay top up cards on behalf of each person in Haiti or Jamaica that they wished to contact.** In practice this would mean that where callers wish to contact any more than a handful of contacts in either Jamaica or Haiti, they would incur significant inconvenience in arranging top-up for each of their contacts.

For these reasons, URCA has concluded that calls to The Bahamas from Digicel subscribers in Haiti and Jamaica, using a pre-pay mobile service with credit that has been topped up in The Bahamas, is not an effective demand side substitute for two stage LD calls originated in The Bahamas and therefore is not in the same relevant market.

Supply side substitution

There are currently only two providers of calling cards to facilitate two-stage LD calls originated in The Bahamas. Entry into the market would require investment in brand and retail distribution. The market is not characterised by frequent entry and exit. Therefore, URCA considers it is unlikely that a small increase in the price of calling cards would incentivise entrants into the market. As such, markets should not be defined by supply side substitution.

Geographic market

In terms of the geographic market, BTC's and SRG's calling cards are generally available throughout The Bahamas. Therefore, if prices increased in one location customers could switch to buying cards in neighbouring locations within The Bahamas. There may be some geographic differences in the availability of calling cards in The Bahamas. This is because SRG's cards may not be available on all islands. However, for the purposes of this investigation, URCA does not consider it necessary to consider whether there are specific sub-national markets as this would not affect URCA's conclusions on market power and dominance.

Further, calling cards bought from outside The Bahamas could not be used without incurring the costs of direct LD dialling (to dial the first stage of the two stage access number). Thus, cards from outside The Bahamas would not be in the same market as cards supplied within The Bahamas. Therefore, the geographic market is defined as The Bahamas.

Conclusion – pre-pay two stage LD dialling

For the reasons set out above, URCA concludes that the relevant retail market is the retail supply of pre-pay two stage LD dialling in The Bahamas. URCA considers that other ways to call LD (such as calling directly from a fixed or mobile connection, or calling using an internet based VoIP service) lie outside the relevant market. For the avoidance of doubt, URCA has also concluded that calling The Bahamas from a Digicel service originated in Haiti and Jamaica, using a pre-pay mobile service with credit that has been topped up in The Bahamas lies outside the relevant market.

BTC and SRG are the only retail suppliers in The Bahamas of pre-pay two stage LD dialling.

3.4.4 Market definition – supply of pre-pay pre pay calling cards

As set out in Section 3.4.3 above, the supply of pre-pay calling cards is linked to the supply of pre-pay two stage LD dialling as the two services are supplied as a type of pure bundle. Where products are supplied as a pure bundle it can often be helpful to define a single market for the product bundle. However, in this case, the supply arrangements of the different elements of the bundle are different and it is the supply arrangements of the calling card element of the bundle that are of interest in this investigation. Therefore, URCA has defined a distinct market for calling cards.

The demand for calling cards is a derived from demand for two stage LD calling services. As such, the same retail demand and supply side constraints apply across both markets.

As set out in Section 3.4.3 above, consumers would be unwilling to switch to alternative forms of calling if the prices of pre-pay calling increased non-transitorily by a small but significant

amount. **Therefore, URCA concludes that the retail market is the retail supply of pre-pay calling cards.**

At the **retail level,** there are many retailers of cards. BTC estimates that it has access to 2,000 points of presence by way of its agreements with Master Distributors.

At the wholesale level, the market is defined as the **wholesale supply of pre-pay calling cards to retailers in The Bahamas** (which enable the user to make LD calls from The Bahamas). BTC contracts with less than twenty Master Distributors and SRG contracts with less than six Master Wholesalers[16].

At the upstream level the market is defined as the upstream supply of pre-pay calling cards (which enable the user to make LD calls from The Bahamas) **by the call service providers to wholesale distributors** in The Bahamas. BTC and SRG are the only suppliers of such cards.

4 Market Power Analysis

In this Section, URCA considers the structure and nature of competition in the relevant market as defined in Section 3 above (for the retail supply of pre-pay two stage LD dialling, and the related market for the upstream supply of calling cards). URCA has assessed whether any suppliers have market power in those markets and found that BTC is dominant in the markets for:

(i) the upstream supply of pre-pay calling cards for two stage dialling LD to wholesalers; and

(ii) (ii) the retail supply of pre-pay two stage LD dialling.

4.1 Framework for Assessing Market Power

Analysis of market power considers whether market participants can act unilaterally without reference to competitors or customers. Such a finding is a necessary condition to be able to find that an undertaking has abused a dominant position in a market in contravention of section 69 of the Comms Act. It is also important in considering the scope for alleged anti-competitive conduct to have a significant anti-competitive effect on a market.

Under the instant complaint, URCA is considering the agreements between BTC and its wholesalers to supply calling cards. URCA has therefore considered whether BTC has market

[16] SRG letter to URCA of October 8, 2012

power in its supply relationships. URCA has also considered whether BTC is dominant in the retail market for the supply of two stage dialling LD calling services.

The Guidelines explain the framework for considering market power which is to consider:

(i) existing competition;
(ii) barriers to entry/potential competition; and
(iii) countervailing buyer power.

4.1.1 Existing competition

The structure of competition in the market can be an indicator of market power. In some markets, the concentration of supply in a small number of suppliers can indicate market power such that the largest firms are able to behave independently of competitors and rivals. The Guidelines state that:

> *"dominance can be presumed in the absence of evidence to the contrary if a licensee has a market share persistently above 40 to 50 per cent. In practice, international precedent suggests that it is unlikely that a licensee will be individually dominant if its market share is below 40 per cent."*[17]

4.1.2 Barriers to entry/potential competition

It is also necessary to examine the features of the market under consideration including whether there are barriers to entry or whether potential competition is likely. Where barriers to entry are low, even suppliers with high market shares may be prevented from acting in an anti-competitive way by potential competition. In assessing whether there are barriers to entry in a market, it is relevant to consider the history of entry, the costs of entry, whether any regulatory or legal restrictions exist, and whether the market is growing (and therefore profitable entry is likely).[18]

4.1.3 Countervailing Buyer Power

Firms may also be prevented from acting independently of competitors and consumers by the existence of customers with strong bargaining positions, either due to the customer's size or commercial significance[19].

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[17] The Guidelines ECS COMP. 7 at page 47.
[18] Guidelines ECS COMP. 7 Section 4.1.2.
[19] Note a large share of the purchase market does not necessarily imply that there could be countervailing buyer power. In each case, it would be necessary to examine the specific bargaining dynamics.

4.2 Assessment of Upstream Market for Supply of Calling Cards

This Section assesses the competition in the markets as defined above, beginning with the supply of calling cards.

4.2.1 Existing competition

At the upstream level, BTC and SRG are the only suppliers of calling card services. In this Section, URCA assesses the scope for market power in the upstream supply of calling cards to wholesalers. As set out above, the supply of calling cards is linked to the supply of LD two stage dialling, such that a calling card is required in order to make a LD two stage dialling call and calling cards can only be used to make LD two stage dialling calls. This means that the assessment of market shares in the upstream supply of calling cards is the same as the assessment of market shares for the retail supply of LD two stage dialling services.

Tables 4 and 5 below set out URCA's assessment of the retail market share of both BTC and SRG for LD two stage dialling services and the upstream supply of calling cards to wholesalers.

Table 4 sets out the gross retail revenues (before payment of commission) earned by each of BTC and SRG.

Table 4: Gross revenues for two stage LD calling cards and implied shares ($)

	2011	2012	2013
BTC	2,009,955	1,314,385	1,021,625
SRG	369,549	750,873	347,696
Total	2,379,504	2,065,258	1,369,321
BTC – implied share	84%	64%	75%
SRG – implied share	16%	36%	25%

Note for SRG 2013 data was incomplete - therefore November - December 2013 were assumed to be prorated by average monthly revenues for the period April - October 2013 to make it comparable with BTC's data.

Table 5 below sets out the volume of minutes made using these cards.

Table 5: Volume of minutes for two stage LD calling cards and implied shares

	2011	2012	2013
BTC	8,027,124	4,501,802	3,887,768
SRG	1,125,199	2,567,624	1,082,043
	9,152,323	7,069,426	4,969,811 1
BTC – implied share	88%	64%	78%
SRG – implied share	12%	36%	22%

Note for SRG 2013 data was incomplete - therefore November 2013 was assumed to be pro-rated by average monthly revenues for the period April - October 2013 to make it comparable with BTC's data.

The high market shares, whether measured by revenues or volumes, is strongly indicative of dominance. BTC has a market share of more than 64% in all of the last three years. There is some fluctuation in its market share; however, for the last three years it has been significantly above the threshold where there is a rebuttable presumption of dominance.

4.2.2 Economic characteristics of the market

URCA has considered whether the characteristics of the market imply that entry would be difficult. Where entry is relatively easy, suppliers with high market shares might be constrained from exercising market power due to threat of entry.

Barriers to entry

In order to enter the market for pre-pay LD calling a supplier needs, *inter alia,* to:

(i) buy wholesale minutes from the call supplier (BTC);
(ii) purchasing software for accounting and tracking minutes; and
(iii) set up the pre-pay service by printing cards.

While there are not significant technical barriers to entry, operators would have to establish a distribution network to distribute the pre-pay cards. URCA considers that there is a low likelihood of entry for the following reasons:

(i) entrants would have to make investments in advertising and in its supply arrangements to start supplying calling cards;

(ii) there has been no entry into the market in the last three years, and there is no evidence that entry is imminent[20]; and

(iii) the overall size of the market is declining (as can be seen in Table 4 and Table 5, which may suggest that market entry is becoming less attractive).

Further, even if the technical barriers to entry were low, it is possible that the single branding agreements that BTC has with its Master Distributors might imply that entrants would find it difficult to find suitable supply channels for their two stage LD calling cards.

Vertical integration

BTC's vertically integrated structure may provide an advantage to BTC over other providers. BTC is the incumbent fixed provider. Therefore, any entrant wishing to provide a pre-pay calling card service for two stage LD dialling would need to contract with BTC to buy wholesale services from BTC.

Brand

BTC as the domestic fixed incumbent has a strong telecommunications brand which it can potentially leverage into related markets such as two stage LD dialling.

URCA's conclusion

The above analysis indicates that there are barriers to entry which means that timely entry is unlikely. There has not been a history of frequent entry in the market over the period analysed. BTC may have a number of advantages over its competitors related to the fact that it is integrated with the wholesale LD calling services required by an entrant to provide two stage LD dialling and it has a long established brand which is associated with retail electronic communications services that it can leverage.

4.2.3 Countervailing Buyer Power (CBP)

The Guidelines note that buyer power can, in some circumstances, constrain the market power of a licensee[21]. For instance, *"buyer power might result from the customer's size or its commercial significance, for example its ability to switch to competing suppliers or to threaten*

[20] See for example BTC letter to URCA of 6 January 2014 page 3.

[21] However, even if BTC did not have a dominant position as a result of the existence of buyer power, the agreements may still be prohibited by section 67 of the Comms Act.

credibly to do so."[22] If certain buyers were so important to BTC such that they were able to influence the price, quality, and terms of supply, then a high market share may not necessarily be indicative of significant market power or dominance.

BTC argued in its response to the SO that the Master Wholesalers had buyer power because:

(i) some Master Distributors carried competitors cards which is against the terms of the agreement; and
(ii) sales of Digicel's cards are more significant to Master Distributors.

In this case, BTC was not able to provide information on the revenues or volumes of sales earned by it in the supply of calling cards to each of its suppliers. Therefore, URCA has not been able to assess the buyer share of the largest suppliers on the market for the supply of calling cards. Notwithstanding, the information examined by URCA is not consistent with a small number of larger buyers having buyer power for the following reasons:

(i) BTC does not individually negotiate with its buyers, instead it makes a standard terms offer to all its suppliers regardless of the volume of sales. Where a small number of important buyers were able to exert buyer power it could be expected that BTC might negotiate directly with this group;
(ii) BTC has steadily reduced the commission that it pays to all its Master Distributors since 2011[23]. This reduction is not consistent with certain buyers possessing a significant degree of buyer power;
(iii) Approximately between a fifth and a third of BTC's pre-pay calling card revenues are earned through distribution by BTC's franchisees (or sold directly by BTC). This direct retail channel might limit the ability of wholesalers to exert countervailing buyer power, as BTC could instead meet demand via its direct and franchise distribution channels; and
(iv) BTC's retail competitor (SRG) is much smaller in volume of sales. This suggests that wholesale buyers of calling cards would be less able to credibly threaten to switch as this could be unprofitable.

URCA does not agree with the reasoning put forward by BTC for suggesting that Master Distributors had buyer power.

In relation to BTC's first claim, the fact that that Master Distributors break the terms of their agreements with BTC is not evidence of buyer power[24]. First, there may be other explanations

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[22] Guidelines ECS COMP. 7, Section 4.1.3.
[23] See BTC response of January 6, 2014 at page 2.
[24] BTC response to the SO page 6.

for the fact that some Master Distributors stock rivals calling cards, or Digicel's mobile pre-pay top up. For example, this may be because BTC does not enforce the terms of the agreement in all its Master Distributors. Furthermore, the evidence put forward by SRG suggests that the restriction is enforced in a significant number of Master Distributors. Countervailing buyer power will only be considered a constraint on the ability of a dominant firm to exercise market power where the buyer power protects all buyers on the market.

In relation to BTC's second claim, the fact that Digicel mobile pre-pay top up calling cards may be popular with Master Distributors does not imply that they have buyer power in relation to two stage LD calling cards. This is because Digicel's cards are not part of the relevant market.

4.2.4 Conclusions on market power and dominance

URCA therefore concludes that BTC is dominant in the markets for the upstream supply of pre-pay calling cards for two stage LD dialling to wholesalers and the retail supply of pre-pay two stage LD dialling, for the following reasons:

(i) it has a market share of **64-88%** measured by volume of minutes and **66-84%** measured by gross revenues over the period 2011 – 2013;

(ii) barriers to entry appear to be high as there have been no recent entrants to the market in The Bahamas in recent years other than the existing suppliers;

(iii) BTC is able to leverage advantages over alternative providers such as vertical integration. Alternative providers have to buy inputs from BTC in order to enter the market and compete with BTC;

(iv) BTC has a strong brand for the provision of calling services as it is the incumbent fixed line operator; and

(v) wholesalers are unlikely to be able to exercise countervailing buyer.

5 Analysis of whether BTC's alleged conduct is prohibited by section 67 and section 69 of the Comms Act

BTC's conduct (i.e. the restrictive terms in its agreements with Master Distributors) can be considered as either potentially infringing section 67 or section 69 of the Comms Act. Section 67 of the Comms Act prohibits agreements which restrict competition (although section 68 provides an exemption of the prohibition in some circumstances). Section 69 of the Comms Act prohibits abuses of a dominant position.

The economic analysis of the effect of the conduct is similar whether it is assessed from the point of view of an anti-competitive agreement or an abuse of a dominant position. Therefore,

this Section firstly considers the effect of the agreement in the context of an anti-competitive agreement or an abuse of a dominant position. Then it considers, in the event that the conduct infringes section 67 or section 69 of the Comms Act, whether there is any justification for the conduct or section 68 exemption.

5.1 Framework for Analysis

As set out below, URCA considers that the analysis of the effects of the agreements is largely the same whether it is examined from the perspective of a section 67 prohibition of anticompetitive agreements or a section 69 prohibition of an abuse of a dominant position.

5.1.1 Framework for assessment of the section 67 prohibition of anti-competitive agreements

Section 67 (1) of the Comms Act provides that:

> *"Agreements between licensees, or between a licensee and another undertaking, decisions by associations (whether formal or informal) of undertakings or concerted practices which relate to communication matters and which —*
>
> *(a) may affect trade within The Bahamas; and*
>
> *(b) have as their object or effect the prevention, restriction or distortion of competition in markets in The Bahamas,*
>
> *are prohibited unless they are exempt in accordance with the provisions of this Part."*

Therefore, the section 67 prohibition applies where:

(i) There is **an agreement (or concerted practice) between undertakings including a licensee;**

(ii) The agreement must be the **subject of "communication matters"**. This is defined in section 65 of the Comms Act and described in the Guidelines[25].

(iii) The agreement must have the **object**[26] **or effect of preventing, restricting or distorting competition and the** agreement must have an **appreciable effect on trade** within The Bahamas.

The agreement between BTC and its wholesale suppliers is a vertical agreement (in that it is an agreement between two undertakings operating at different levels of the distribution chain). URCA notes of vertical agreements that:

[25] Guidelines Section 4.2 of ECS Comp 6.

[26] The "object" of an agreement is the meaning and purpose of the agreement. See: Paragraph 32 of ECS Comp 6.

"In general, vertical agreements are less likely than horizontal agreements to prompt competition concerns. However, they can also contain anticompetitive provisions. For example, price fixing issues are not limited to horizontal agreements between competing undertakings, but can also arise between undertakings operating at different levels in the supply chain, where a supplier directly or indirectly restricts a buyer's ability to determine its resale price."[27]

The Guidelines note that single branding agreements are not by their object likely to prevent, restrict or distort competition. But they may have that effect. The Guidelines list the types of vertical agreements that *may* attract the application of section 67 of the Comms Act. It notes that a "single branding agreement" may infringe section 67:

"A single branding agreement is one where the buyer is induced to concentrate its orders for a particular product on one supplier. An agreement not to purchase competing products or to purchase all or most of the purchaser's requirements for the products from one supplier fall within this category. Such agreements ***may foreclose access to the market at the supplier level,*** *facilitate collusion and* ***restrict inter-brand competition*** *and are therefore likely to contravene section 67."*[28][emphasis added]

URCA considers that the restrictive terms in the agreement that BTC has with its Master Distributors mean that such agreements could operate as single branding agreements. Therefore BTC's agreement will be examined in the context of whether it is a single branding agreement which has the effect of appreciably restricting, preventing or distorting competition in the way described by the Guidelines. In assessing the effect of the agreement, the key elements to the analysis are to consider the following:

The supplier market shares

The effect of the policy will be more significant where suppliers (i.e. BTC) already have high market shares. A high market share may indicate a greater likelihood of anticompetitive effects. A low market share may indicate that the agreement is unlikely to have a harmful effect. It would be necessary to consider the share of the market that BTC and SRG each have.

Is the supplier an unavoidable trading partner?

Where BTC is an unavoidable trading partner, then the restrictive term may have a greater effect, as downstream suppliers may be less able to choose alternative suppliers.

[27] Paragraph 38 of ECS Comp. 6.
[28] Paragraph 64 of ECS Comp. 6.

Whether the agreement prevents access (by competitors to BTC) to important suppliers?

It is necessary to consider whether rivals could compete for the demand satisfied by BTC absent the restrictive terms of the agreement. In order to assess whether the agreement has the effect of preventing access, the analysis considers:

(i) the proportion of the downstream share of demand covered by the agreement;
(ii) the duration of the agreements; and
(iii) whether competitors to BTC have alternative routes to market and whether consumers can easily switch supplier.

5.1.2 Framework for assessment of the section 69 prohibition of abuse of a dominant position

The Guidelines note that exclusive purchasing may be an abuse of a dominant position which infringes section 69 of the Comms Act. It states:

> *"An exclusive purchasing obligation requires a customer to purchase exclusively or to a large extent from one supplier. This could lead to detrimental effects if the exclusive purchasing obligation has the effect of preventing the entry or expansion of competing licensees. This is particularly the case where a dominant licensee is an unavoidable trading partner for customers, the imposition of exclusive purchasing (or purchasing to a large extent) could result in competitors being unable to compete on equal terms for each customer's demand."*[29]

Given the similarities of the framework for assessing the effect of a section 67 anti-competitive agreement to the analysis of the effect of a section 69 abuse of a dominant position, URCA's subsequent analysis of the effects of the agreement covers both assessments.

5.2 The Agreements between BTC and its Master Distributors

SRG contends that the exclusivity terms in the agreements that BTC has with its Master Distributors has the effect of foreclosing SRG from the relevant market. Therefore, this investigation concerns the agreement that BTC has with its Master Distributors. The Agreement imposes an exclusivity obligation on Master Distributors and Dealers as the Agreement stated that *"The Master Distributor and Dealer agrees not to distribute products and services from any other carrier that offers phone service in The Bahamas that originates from the Bahamas."*[30]

[29] Guidelines ECS COMP. 7 paragraph 71
[30] The Agreement clause 6.2.

In this regard, URCA notes that the Agreement also defines a number of terms:

- Master Distributors mean *"a vendor of BTC that distributes and sells Prepay Vouchers to Dealers and Distributors"*[31];
- Dealer means *"an authorized agent of BTC who is permitted to resell BTC products and services"*[32].
- Distributor means *"a merchant that purchases vouchers and top-up from a Master Distributor and resells to consumers."*[33]

5.2.1 Is the agreement covered by section 67 of the Comms Act?

As set out in Section 5.1.1 above, the section 67 prohibition applies where:

- there is **an agreement (or concerted practice) between undertakings including a licensee;** and
- the agreement must be the **subject of "communication matters"** as defined in section 65 of the Coms Act and described in the Guidelines[34].

URCA considers each of these factors below:

The agreement is between a licensee and another undertaking

An undertaking is defined under section 2 of the Comms Act to mean (a) a body corporate or partnership; (b) an unincorporated association; or (c) any person carrying on a trade or business, with or without a view to profit. The agreement which is the subject of the complaint is between BTC (a licensee) and the Master Distributors (undertakings).

The agreement is the subject of "communication matters"

BTC argued that markets for the supply of calling cards were not a Communications Service as defined by the Comms Act although it did not provide evidence to support its view.

URCA notes that the term "communications matters" is defined in section 65 of the Comms Act as including:

> "[...] *(c) the provision or making available of services or facilities which are provided or made available —*

[31] The Agreement clause 1z.
[32] The Agreement clause 1m.
[33] The Agreement clause 1u.
[34] Guidelines Section 4.2 of ECS COMP. 6.

(i) by means of, or in association with the provision (by the same person or another) of a network or carriage service; or

(ii) ***for the purpose of facilitating the use of any network or carriage service (whether provided by the same person or another)...";*** [Emphasis added].

A network is defined under section 2 of the Comms Act as:

"(a) a transmission system for the conveyance, by the use of electrical, magnetic or electromagnetic energy, of signals of any description; and

(b) such of the following as are used by the person providing the network and in association with it, for the conveyance of the signals —

(i) apparatus, equipment or facilities comprised in the network;
(ii) apparatus, equipment or facilities used for the switching or routing of the signals; and
(iii) software and stored data".

The agreement relates to the supply of pre-pay calling cards for two-stage LD dialling. The pre-pay calling cards for LD two-stage dialling enable consumers to call LD using BTC's network and is therefore a service as defined by section 65(c)(ii) of the Comms Act (i.e. the provision or making available of services or facilities which are provided or made available for the purpose of facilitating the use of any network).

5.3 Analysis of the Effect of the Agreement

The assessment as set out below suggests that, given the agreement, rivals will be unable to compete on equal terms with BTC to meet demand for LD pre-pay calling cards.

5.3.1 Market share

The effect of any anti-competitive behaviour is likely to be greater where the supplier has a high market share. As set out above, BTC has a high market share in the market for the retail supply of pre-pay two stage LD dialling in The Bahamas. It has a market share of **64-88%** measured by volume of minutes and **66-84%** measured by gross revenues over the period 2011 – 2013[35].

[35] See Section 4 above.

5.3.2 The agreements cover a very high share of sales of calling cards

Where the agreements only affected a small proportion of the available customer base, then, it is unlikely that the agreements could have a significant effect on competition. However, as set out above, the vast proportion of cards is sold via retailers whose wholesale suppliers are affected by the restrictive agreements.

URCA estimates that the agreements that BTC has with its Master Distributors could account for between [**45% and 60% of total market revenues**]. A further [**18% to 24% of total market revenues]** are supplied direct by BTC (including via its Franchisees). This means that the agreements with BTC's Master Distributors cover a significant proportion of the total demand from retailers. The single branding agreements are therefore capable of restricting competition for a significant proportion of the available demand.

When SRG approached many of these vendors they stated that they would be unwilling to supply SRG calling cards alongside BTC's as the terms of their agreements with BTC prevented them from doing so. [36]

5.3.3 BTC may be an unavoidable trading partner

BTC's high market share may indicate that it is an unavoidable trading partner. Wholesalers could lose a significant amount of sales if they switched to supplying SRG's cards for the following factors:

- (i) BTC is by far the largest supplier of calling cards;
- (ii) BTC has a strong brand; and
- (iii) the agreements cover other products supplied by BTC.

These factors are each described in more detail below:

BTC's market position

As set out above, BTC is by far the largest supplier of calling cards in the market, and it supplies the majority of its calling cards via its Master Distributors. This suggests to URCA that BTC is a very important supplier for distributors because despite the level of commission earned by distributors on the sale of each BTC card is lower than an equivalent SRG card, distributors are still willing to agree to exclusively sell BTC's cards.

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[36] Letter from SRG to URCA of October 8, 2012.

BTC's brand

BTC is the incumbent electronic communications operator in The Bahamas and may therefore have a brand which makes its cards an important item to stock.

The agreements cover other products

BTC supplies two types of cards: (i) long distance calling cards, and (ii) mobile pre-pay calling cards. The Master Distributor agreements cover the supply of both pre-pay LD calling cards and top up credit for prepay mobile services. If a wholesaler were considering supplying the LD calling cards of a BTC competitor it would also have to consider the potential lost revenues from not supplying both BTC's LD prepay calling cards and BTC's mobile top-up cards. In practice, this can mean that BTC is an unavoidable trading partner as:

- BTC is currently the only provider of pre-pay mobile calling services so suppliers would be unable to switch to an alternative source for those revenues; and
- The value of mobile top-up card revenues is significantly higher than the value of prepay LD calling card revenues.

BTC's enforcement of the agreement

BTC argues that the exclusivity agreement is not enforced, implying there is no anti-competitive effect. The evidence examined by URCA does not support BTC's claim of not generally enforcing the exclusivity agreement. BTC was only able to provide URCA with one example of a Master Distributor that stocked SRG calling cards[37]. Furthermore, just because one or two Master Distributors stock SRG cards does not imply that BTC does not enforce the exclusivity agreement with other Master Distributors. The evidence gathered by URCA and presented in the SO suggests that BTC does enforce the exclusivity agreement. The evidence presented by SRG suggests that BTC did enforce the exclusivity agreement with its Master Distributors.

Furthermore, the existence of the exclusivity clause in the agreement could have the effect of creating exclusivity even if BTC were not to enforce it. Master Distributors would be concerned that BTC could withdraw supply of its pre-pay mobile top up and two stage LD calling cards by stocking rival cards in breach of the terms of the agreement. BTC was therefore able to impose a credible threat that it would enforce the exclusivity clause with the Master Distributors.

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[37] BTC response to the SO of March 21, 2014 page 2.

BTC also argues that certain Master Distributors *"are currently the distributors of Digicel calling cards, a product that is a substitute for BTC's calling card"* and that *"[t]he actions of the Master Distributors and the inability and failure of BTC to enforce the exclusivity provision operated as a repudiation of the exclusivity provision"*[38]. In this regard, where the Master Distributor distributes products and services from any other carrier that does not offer phone services in The Bahamas and that does not originate from The Bahamas, BTC is precluded under Clause 6.2 in its Master Distributor Agreement from enforcing the Agreement. Regarding the Digicel calling card, the inference is that the Digicel calling card is specific to the services provided by Digicel (in Haiti or Jamaica) which clearly do not originate in The Bahamas and therefore buttresses URCA's position that the Digicel calling card is not part of the relevant market in The Bahamas.

Conclusion

For these reasons, URCA considers that BTC is likely to be an unavoidable trading partner for wholesalers who wish to stock BTC's LD pre-pay calling cards, and its mobile top-up cards. BTC's competitors may find it difficult to induce a wholesaler to switch supply, as competitors would have to compensate the wholesaler for the lost income from the sale of mobile top-up cards and LD pre-pay calling cards.

SRG noted that, despite offering a higher rate of commission, it was unable to induce wholesalers to switch supply.

5.3.4 Alternative strategies of competitors

URCA has considered whether rival suppliers of pre-paid calling cards can use alternative means to distribute their cards to retailers and consumers and hence whether rivals could frustrate any attempt to foreclose the market using single branding agreements.

BTC argues that there are potentially 7,000 - 8,000 points of presence and that its contracts affect only 2,000 of these. Furthermore, the retail points of presence are not themselves subject to an exclusive single branding agreement.

SRG argues that alternative strategies are much less effective than a wholesale distribution approach. In particular, it listed three alternative strategies that wholesalers or SRG could adopt to supply SRG's cards:

(i) **Taking a different name**. SRG noted that alternative wholesalers could take a different name to avoid contravening the restrictive term in the contract.

[38] BTC response to the SO of March 21, 2014 page 3.

However, these options required businesses to have two locations and the alternative location may not be well known to consumers. There also may be administrative burdens which act as barriers to businesses having two names (such as the inconvenience of having to register the alternative business);

(ii) **A Master Distributor could deliver calling cards directly to the retail customer (rather than selling in the wholesale outlet).** However, this entails risk on the part of the distributor (if discovered, BTC may terminate its contract) and imposes inconvenience on the retail customer. Furthermore, SRG noted that there was a reputational effect where SRG may be thought of engaging in illegal business; and

(iii) **Investing to generate interest from new suppliers who may wish to supply the calling cards**. SRG however noted that this approach was not successful as the businesses did not have previous experience in supplying the cards.

URCA concludes that a network of wholesale suppliers is necessary to distribute the calling cards. Attempts by SRG to supply their calling cards to wholesalers have not proved successful. This is at least partly as a result of the restrictions placed by BTC on wholesalers. While there may be other points of presence through which, in theory, a calling card could be sold, many of these would not prove profitable as consumers may not view them as being suitable for selling calling cards. Further, as noted above, the majority of calling cards are sold via the 2,000 points of presence which are supplied by wholesalers affected by the restrictive agreements.

5.3.5 Role of entrants

The market for pre-pay LD calling cards is not characterised by frequent entry and exit. URCA recognises that there has been no entrant to the market since the merger of SRG and CBL in 2011, meaning that since this point, there have only been two operators. Furthermore, for the reasons set out above, URCA considers further entry to be unlikely (there are costs of entry related to the brand and promotion as well as setting up a supply network, and the size of the market is declining). In considering the role of entrants, URCA notes that any entrant wishing to establish supply arrangements could be equally affected by BTC's agreements with its Master Distributors. Therefore, URCA concludes that entrants are unlikely to mitigate the harmful effects of the conduct.

5.3.6 Duration of any abuse

URCA has considered the duration of the abuse. BTC notes that it has always included the exclusivity clause in its contracts with Master Distributors[39]. However, according to SRG, the

[39] BTC letter to URCA of November 21, 2013.

effect of the abuse began in March 2012 and continues to the present day. Given that SRG noted that the effect of the exclusivity agreements only began in March 2012, URCA concludes that the abuse covers the period since March 2012 to the present day.

5.3.7 Conclusion on the effect of the Agreement

Consumers will benefit where firms are able to effectively compete for customers. However, the restraints imposed by BTC mean that alternative providers are limited in how they are able to compete in the retail market for the provision of pre-pay LD two stage dialling. Specifically, the restrictive terms in the contracts between BTC and wholesalers mean that competitors cannot compete for a significant proportion of demand currently met by BTC. Absent the exclusive agreements, SRG and other competitors would be able to supply their LD two stage calling cards to the BTC Master Distributors, who would then be able to sell them along-side BTC calling cards. Retailers would have greater choice when purchasing the calling cards for their business.

Therefore, URCA concludes that the exclusive contracts that BTC has with its Master Distributors are likely to have an appreciable effect on trade in the calling card market in The Bahamas by distorting, restricting or preventing inter-brand competition in the upstream market for the supply of calling cards and the related retail market for the supply of LD two stage dialling services. URCA provides further reasoning below:

BTC is dominant in the upstream supply of calling cards to wholesalers as a result of its high market share in the related retail market for LD two stage dialling. SRG is currently the only competitor and has a much smaller market share. This means that there is a greater chance that the agreements that BTC executes with its Master Distributors could potentially have a harmful effect on competition;

The **supply agreements** affect 45-60% of value of sales in the market. The agreements therefore affect a high proportion of sales in the market;

BTC may be an unavoidable trading partner which means that the effect of the restriction can be more significant. BTC has a strong brand and reputation in the markets for the supply of calling cards, and the supply of prepay two stage LD dialling. Furthermore, wholesalers may be unwilling not to agree a contract with BTC for the supply of LD two stage calling cards, in case BTC refuses to supply them with mobile top-up cards;

The Agreements (contracts) are for **a duration of three years** meaning that even if they were staggered uniformly over a three year period it would be difficult for alternative providers to

access suppliers to supply their cards to the most popular retailers[40]. Given that BTC may be an unavoidable trading partner for many wholesalers, a three year duration may prevent wholesalers from switching supply as they view their contract with BTC as important.

Alternative strategies to supply the cards to retailers are significantly less effective;

The Agreement **affects trade within The Bahamas** as it affects the supply of pre-pay calling cards for two stage LD dialling within The Bahamas, and therefore also affects the supply of two-stage LD dialling within The Bahamas; and

The effect of the conduct has been felt since March 2012 to the present day.

5.4 Potential for Section 68 of the Comms Act Exemption

In some cases, agreements which are capable of preventing, restricting or distorting competition may not lead URCA to issue a statement of objections for an infringement of either section 67 or section 69 of the Comms Act.

For example, section 68 of the Comms Act provides a possibility for exemptions to the prohibition of anti-competitive agreements where the conduct in question produces off-setting efficiency benefits.

In the case of section 69, the Guidelines note that while there are not exclusions or exemptions, *"where there exists a reasonable justification for the conduct in question, URCA may not treat such conduct as an abuse."*[41]

The specific details of and the framework for analysing the Section 68 exemption and the justifications for a potential abuse of a dominant position are summarised below in Sections 5.4.1 and 5.4.2 respectively. Section 5.4.3 then summarises BTC's view of the potential efficiencies that result from the agreements. Finally, Section 5.4.5 sets out URCA's assessment of the efficiencies put forward by BTC and concludes on whether this should lead to an exemption/justification for the conduct in question.

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[40] In the EU the Guidelines on Vertical restraints note that: *"The higher his tied market share, i.e. the part of his market share sold under a single branding obligation, the more significant foreclosure is likely to be. Similarly, the longer the duration of the single branding obligations, the more significant foreclosure is likely to be. Single branding obligations between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti- competitive effects* [....] *Single branding obligations are more likely to result in anti-competitive foreclosure when entered into by dominant companies."* Commission notice - Guidelines on Vertical Restraints Official Journal C 130, 19.05.2010, Paragraph 133.

[41] Guidelines ECS COMP. 7 paragraph 42.

5.4.1 The section 68 exemption - framework for analysis

For the agreement to benefit from the exemption provided by section 68 of the Comms Act, it would be necessary for BTC to demonstrate that each of the four following criteria is cumulatively met[42].:

(i) the agreement contributes to improving the production or distribution of electronic communication services or promoting technical or economic progress in The Bahamas;

(ii) consumers receive a fair share of the resulting benefit;

(iii) the restrictions in the agreement are indispensable to the attainment of these objectives; and

(iv) the agreement will not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the product or services in question.

Criteria (i): improving the production or distribution of electronic communication services or promoting technical or economic progress

Where the agreement is likely to improve the supply of electronic communications services, or to open markets to consumers who might not otherwise consume (for example because fixed line services are too expensive), then the agreement may have benefits. In considering if this is the case it is necessary to consider the nature of the benefits; the link between the benefit and the efficiency saving; the likelihood and magnitude of the saving; and how and when each claimed efficiency would be achieved. These benefits are weighed against the potential distortion to competition (that is the restriction should be **proportionate to the potential benefits)**.

BTC has outlined the benefits (such as improved training, better customer experience, potentially lower costs and prices). But these potential benefits will have to be weighed against the potential costs such as reduced competition at the wholesale level. BTC needs to demonstrate to URCA how the restrictive terms in the agreement lead to cost savings (i.e. that the savings would not arise absent the restrictions) in order to claim the agreement leads to cost savings which benefit consumers,.

The qualitative benefits (resulting from improved training and branding) should be significant enough to outweigh the costs of any distortion of competition. BTC should provide evidence on

[42] In EU Law, the burden of proof of demonstrating the conditions of the exemption is on the undertaking seeking to defend the agreement. See for example Guidelines on Vertical Restraints paragraph 96.

why training is required to wholesale or retail calling cards and how consumers benefit from such training.

Criteria (ii): consumers receive a fair share of the resulting benefit

BTC should demonstrate that the savings are likely to be passed on to consumers. It should be noted that savings in fixed costs (such as administration costs) are less likely to be passed on to consumers than savings in variable costs. Again, BTC should show that the benefits that will accrue to consumers will outweigh any incremental costs that they face as a result of the agreement.

Criteria (iii): restrictions in the agreement are indispensable

BTC should demonstrate why the efficiency savings could not have been achieved absent the restrictive agreement. Furthermore, it should demonstrate that absent the restrictions the benefits could not arise. At this stage, URCA is not clear why, in BTC's case, the restrictions are necessary to have as few vendors as possible.

Criteria (iv): the agreement will not eliminate competition.

The analysis will consider the extent to which the agreement has the potential to substantially eliminate competition in the market.

5.4.2 Justifications for conduct which could otherwise infringe section 69 of the Comms Act

The Guidelines note that while there are no exclusions or exemptions from section 69 of the Comms Act *"where there exists a reasonable justification for the conduct in question, URCA may not treat such conduct as an abuse."*[43] Potential justifications fall into two categories:

(i) **efficiency justification,** if the agreement *"produces efficiencies which outweigh the anticompetitive effects on the consumer. In assessing the net harm to consumers, URCA will consider whether the benefits arising from the efficiencies are passed onto consumers and whether it is likely that there would be consumer detriment in the long term through the elimination of effective competition. The conduct in question must be indispensable and proportionate to the aim allegedly pursued by the dominant licensee."*[44] (Given that the framework for analysis of efficiency justification is similar to the section 68 exemption, URCA analyses both issues at once in Section 5.4.3 below); and

[43] ECS COMP. 7 paragraph 42.
[44] Ibid.

(ii) **other objective justifications,** such as health and safety. There is no indication that other technical or health and safety justifications are relevant to this case, so they are not discussed further in this Adjudication.

5.4.3 BTC's view of the efficiency justification

BTC, in its submissions prior to the SO and in its response to the SO argues that consumers benefit as a result of the single branding agreement. Specifically, BTC argues that[45] there are benefits of the exclusive arrangements that it has with its wholesalers. These are:

(i) having a limited number of vendors lowers its costs, enabling it to make cost savings which are passed on to consumers[46];

(ii) BTC provides training which improve the customer experience (BTC notes that it provides 24 to 32 hours of training per year for its Master Distributors (two to three days per year)[47]; and

(iii) BTC provides promotional materials which improve the customer experience[48].

5.4.4 SRG's view of BTC's claimed efficiency justification

In response to the SO, SRG noted that it supported URCA's provisional conclusions. Specifically it noted that[49]:

- BTC's claim that the exclusivity clauses lowered costs was speculative, and that even if costs were lower there was no reason to believe that BTC would pass the cost reductions on to consumers;
- in relation to the claim that BTC imposed exclusivity in order to provide training to its distributors, SRG noted that it too provided training, but felt no need to do this on an exclusive basis; and
- BTC did not explain why exclusive terms were a necessary condition to be able to offer promotional materials for BTC's products.

Furthermore, SRG argued that BTC's conduct eliminated SRG from the market and therefore that even if efficiencies were present the section 68 exemption would not apply.

5.4.5 Assessment of the efficiency justification

This Section considers the potential for an efficiency justification to exempt the conduct from

[45] See BTC response of 30 January 2013 and BTC's response to the SO of 21 March 2014 page 10,
[46] See BTC letter to URCA of 30 January 2013 and BTC's response to the SO of 21 March 2014 page 10,
[47] See BTC letter to URCA of 20 November 2013 and BTC's response to the SO of 21 March 2014 page 9-10.
[48] See BTC letter to URCA of 30 January 2013 and BTC's response to the SO of 21 March 2014 page 10,
[49] SRG response to the SO of 21 March 2014 pages 8 and 9.

the infringements listed in the Comms Act. However, in presenting this, URCA notes that undermines its arguments that the clause produces material efficiency benefits by claiming that it does not enforce the clause. If the exclusivity clause did produce economic benefits, URCA would expect that BTC would attempt to enforce the clause. Nevertheless, BTC's three justifications against the criteria are considered in turn against the criteria.

Single branding agreements lower costs of distribution

BTC argues that the practice of having as few wholesale vendors as possible reduces its costs. URCA agrees with BTC that the practice of having a limited number of wholesale distributors to distribute calling cards may be an efficient and cost effective way to distribute the cards. The small number of specialised distributors will be able to distribute to a large number of retail distributors. BTC notes that its Master Distributors enable it to reach 2,000 points of presence. BTC costs could be significantly greater if it had to contract directly with each of the 2,000 points of presence. URCA agrees that reduced costs which result from a lower number of Master Distributors may be passed on to consumers.

However, BTC has not demonstrated that exclusive supply arrangements are necessary in order to contract with wholesalers who can onward supply to a large number of retailers. The exclusive clauses in BTC's agreements with wholesalers only seem to restrict inter-brand competition for the supply of calling cards. Therefore, URCA concludes that the exclusive clauses are not indispensable to calling card suppliers who wish to contract with wholesalers, and this efficiency will not enable BTC to claim a section 68 exemption to the section 67 prohibition.

Single branding enables BTC to offer training

BTC argues that single branding is required to enable it to offer training to improve consumer experience. BTC notes that it provides 24 to 32 hours of training to its Master Distributors per year (approximately 2-3 days per year)[50]. The training allows BTC to disseminate information to end users about promotions, changes to product features, or permanent price changes[51].

URCA considers that the training BTC provides to its Master Distributors could benefit consumers by making the suppliers more knowledgeable about the calling cards. If the skills that were taught in the training were generic and transferable to the supply of any product or service, then there could be a concern that, absent an exclusive agreement, there might be an inefficient amount of training offered as each upstream supplier (for example BTC or SRG) could be incentivised to free-ride on the training offered by other suppliers. Therefore, exclusivity could be a way to protect the investments that upstream suppliers make in training and

[50] See BTC letter to URCA of 20 November 2013.
[51] See BTC letter to URCA of 30 January 2013.

avoiding competitors free-riding on those investments. BTC argued that SRG was attempting to free-ride on the investments in training that BTC gives its staff.

However, URCA does not consider that in this case exclusive supply is indispensable to offer the training. BTC's training appears to focus on imparting information about specific product characteristics of its calling cards, or "answering specific questions or needs that might be unique to the distributor"[52] rather than on imparting more generic skills which could be used to sell calling cards. Therefore, there does not appear to be significant scope for free-riding.

Additionally, the impact of the exclusivity is to impede competition in downstream markets for the supply of LD pre-pay calling card services. Therefore, even if the exclusivity leads to a more efficient supply of training (which BTC has not demonstrated that it has) in order to benefit from the section 68 exemption, it would be necessary to show that the benefits of the training outweighed the cost of reduced competition downstream. URCA asked BTC to provide examples of its training materials to assess the degree to which the training was generic, or specific to BTC's products. However, BTC was unable to provide any examples or evidence to support its arguments that the value of its training could be appropriated by rivals.

For these reasons, URCA considers that BTC has not demonstrated that the provision of training is a sufficient justification to claim the section 68 exemption.

Single branding enables BTC to offer promotional materials

BTC argues that the single branding enables BTC to offer promotional materials to its suppliers that it would otherwise be unable to do. In response to the SO, BTC claimed that it promoted the Master Distributors[53]. BTC has not provided any justification as to why the exclusive agreement is necessary to be able to offer the promotional materials. BTC would still be able to offer the promotional materials even if it supplied its calling cards on a non-exclusive basis. In response to the SO, BTC did not provide any evidence of the nature of its promotional activities or how the exclusivity provision is indispensable in the provision of the promotional activities.

Further, even if there were a benefit to providing the promotional materials on an exclusive basis, this would have to be considered against the loss of competition resulting from the exclusivity clauses. Given the highly concentrated market for two stage LD calling cards, any loss of competition as a result of the exclusivity clauses could have material impact on the market.

For these reasons, URCA considers that BTC has not demonstrated that the provision of promotional materials is a sufficient justification to claim the section 68 exemption.

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[52] BTC response of January 6, 2014.

[53] BTC's response to the SO of 21 March 2014 page 9,

6 Summary of this Adjudication

6.1.1 Conclusion on whether the agreement infringes section 67 of the Comms Act

Based on the evidence set out above, URCA concludes that the agreement infringes section 67 of the Comms Act for the following reasons:

(i) The agreement is between a licensee (BTC) and other undertakings (the Master Distributors);

(ii) The agreement (which relates to the supply of calling cards) is the subject of electronic "*communications matters*" as defined by section 65 of the Comms Act, particularly when read in conjunction with section 65(c)(ii) which states that communications matters is defined as including: "*the provision or making available of services or facilities which are provided or made available* [...] *for the purpose of facilitating the use of any network or carriage service.* [...] ";

(iii) The exclusive supply term of the Agreement which obliges buyers not to distribute products and services from any other carrier that offers phone service in The Bahamas has the effect of preventing, restricting or distorting competition such that it appreciably affects trade within The Bahamas; and

(iv) There is no justification which satisfies the criteria as set out in section 68 of the Comms Act to exempt this agreement from the relevant provisions of the Act.

6.1.2 Conclusion on whether the agreement infringes section 69 of the Comms Act

Based on the evidence set out above, URCA also concludes that the agreement infringes section 69 of the Comms Act for the following reasons:

(i) BTC is a licensee who is dominant in the market for the upstream supply of calling cards for LD two stage dialling. BTC is also dominant in the market for the retail supply of LD two stage dialling services (to the extent that for the purpose of this investigation this market is considered distinct from the calling card market);

(ii) The conduct which is the subject of this Adjudication (i.e. the contractual requirement that Master Distributors commit to exclusively supply BTC's calling cards and not to supply the calling cards of competitors) is conduct which amounts to an abuse of a dominant position. This is because it is a single branding agreement which has the effect of preventing, restricting or distorting competition; and

(iii) There is no efficiency or other objective justification for the conduct.

7 Remedies

Consequential to its Adjudication that BTC has breached sections 67 and 69 of the Comms Act, URCA now considers the following remedies/penalties which it believes are proportionate and appropriate:

(i) unenforceability of the anticompetitive agreement;
(ii) the imposition of behavioural and/or structural remedies;
(iii) an order to cease the breach/infringement; and
(iv) a fine.

7.1 Unenforceability of the anticompetitive agreement

An infringement of the section 67 prohibition on anticompetitive agreements results in the unenforceability of the BTC Master Distributor Agreement and is void and unenforceable without further need for URCA to intervene beyond the issuance of this Adjudication.

7.2 Behavioural and/or structural remedies

URCA may attach an order to its Adjudication imposing behavioural and structural remedies proportionate to the infringement committed and necessary to bring the infringement to an end. As such, URCA will, *inter alia*, require BTC to:

(i) amend the Master Distributors Agreement by the deletion of the violating provisions under the said Master Distributors Agreement;
(ii) submit to URCA for consideration a draft copy of the amended Master Distributors Agreement;
(iii) notify all existing Master Distributors in writing of the amendment to the existing Master Distributors Agreement consequential to the deletion of the violating provisions and the effect of such deletion on the Master Distributors Agreement as executed between the Licensee and such Master Distributors; and
(iv) include in the written notification: (a) a clear statement that the exclusivity provisions of the original Master Distributor Agreement are ineffectual, void and unenforceable; and (b) an offer to each Master Distributor to execute an amended Master Distributors Agreement.

7.3 Order to cease the breach/infringement

URCA may order a licensee to do or refrain from doing such things as are specified in an order to remedy, prevent or rectify the breach or anticipated breach which is the subject of the Adjudication. URCA will therefore order that BTC, as the infringing licensee immediately cease and desist from any practice, conduct or behaviour denying future market access to potential competitors in the relevant market for two stage LD calling cards by executing or renewing any

Master Distributors Agreement or any similar Agreement which include violating provisions as contained in BTC's existing Master Distributors Agreement.

7.4 Fine

In relation to fines, section 95(1)(b) of the Comms Act gives URCA powers to issue concurrently with its Adjudication an order imposing an objectively justified and non-discriminatory fine on the infringing licensee (BTC). Section 109 of the Comms Act provides that a fine cannot exceed ten percent (10%) of the licensee's relevant turnover.

Section 2 of the Comms Act defines "Relevant turnover" as:

> *"the gross receipts in money or money's worth of the licensee ... attributable to: (a) the provision of a network or carriage service or use of any radio spectrum under any licence or exemption determination; and (b) a content service, including associated advertising revenue and other ancillary revenue, but after the deduction of sales rebates in The Bahamas during the relevant financial year".*

Further, the Competition Guidelines ECS COMP. 8 set out the basis on which URCA calculates financial penalties for infringements of the competition provisions in Part XI of the Comms Act.

It is URCA's position that the breaches by BTC are sufficiently serious to warrant consideration of the imposition of a financial penalty to wit a fine. URCA 's objective for imposing financial penalties are to reflect the gravity of the infringement and to ensure that such fine would deter licensees from engaging in anti-competitive behaviour.

While the level of fine URCA may impose is at its discretion, it must be objectively justified and non-discriminatory. As such, URCA will:

(i) determine a basic amount based on:
   (a) the gravity of the infringement;
   (b) the relevant turnover of the business of the licensee for the relevant product (and relevant geographic markets) affected by the infringement; and

(ii) make adjustments to that amount upwards or downwards according to certain specific factors, namely:
   (a) the duration of the infringement;
   (b) any further aggravating or mitigating factors; and
   (c) other relevant (e.g. deterrent value)[54].

URCA considers each of these in turn below in Sections 7.4.1 to 7.4.5.

[54] Guidelines ECS COMP. 8 Section 5

Based on information submitted to URCA by BTC for the purpose of calculating the level of BTC's Communications and annual URCA Fees, BTC's relevant turnover for the period March 2012 to March 2013 (figures for April 2013 to December 2013 to be submitted) is approximately $338,294,252.01. Therefore, the maximum possible fine URCA may impose amounts to no less than $33,829,425.20.00.

However, URCA accepts the gross revenue earned by BTC for its International Calling Card between March 2012 and December 2013 is $2,116,945.00, as submitted to URCA by BTC under URCA's investigation into this competition complaint, and therefore believes the possible fine of 10% of BTC's relevant turnover would be disproportionate to the infringement. As such, URCA has determined that the appropriate starting point of the fine would be ten percent (10%) of the aggregate of the gross revenue for two stage LD calling cards earned by BTC over the infringing period March 2012 to December 2013 in the amount of $211,694.50.

7.4.1 Basic amount of the fine

The gravity of the infringement is the starting point in URCA's calculation of the fine. When gauging the gravity of the breach, URCA assessed a number of factors including the nature of the product, the structure of the market, the market shares of the parties involved, entry conditions and the effect on competitors and on third parties. Damage caused to consumers was also considered.

Having regard to the foregoing, URCA has determined that the appropriate starting point of the fine is ten percent (10%) of the aggregate of the gross revenue for two stage LD calling cards earned by BTC over the infringing period March 2012 to December 2013 in the amount of $211,694.50.

7.4.2 Adjustment to the basic amount

URCA has considered an adjustment to the basic amount to take into account the duration of the infringement, being cognizant that a fine for infringements which last more than a year may be multiplied by the number of years of the infringement. In this regard, URCA will make no adjustments to the basic amount as the complaint was submitted to URCA within approximately one month after SRG became aware of the BTC anti-competitive agreements.

7.4.3 Adjustment for aggravating circumstances

URCA may increase or decrease the basic amount where it finds that there are aggravating circumstances such as: (i) continuation of the infringement after URCA has initiated an

investigation; and (ii) refusal to co-operate with or obstruct URCA in conducting its investigation.

URCA will adjust the basic amount upward by ten percent (10%) of the basic amount in the amount of $21,166.45 for the continuation of the infringement after URCA initiated its investigation into the SRG complaint. URCA is satisfied with the level of co-operation it received from BTC throughout URCA's investigation into this matter and will therefore adjust the basic amount downward by five percent (5%) of the basic amount in the amount of $10,584.72.

7.4.4 Adjustment for mitigating circumstances

URCA may reduce the basic amount where it finds mitigating circumstances exist, such as but not limited to:

- (i) genuine uncertainty on the part of the infringing party as to whether the agreement constituted an infringement;
- (ii) evidence that the infringing party terminated the infringement as soon as URCA intervened; and
- (iii) where the infringing party has effectively co-operated with URCA beyond its legal obligation to do so, to enable the enforcement process to be concluded more effectively and speedily.

The submissions and representations by BTC under the URCA investigation do not demonstrate a genuine uncertainty on the part of BTC as to whether its Master Distributor Agreement constituted a section 67 infringement. URCA's Competition Guidelines ECS COMP. 4 provides that URCA has a statutory duty to review both existing and future agreements to ensure their compliance with the competition provisions. BTC could have submitted its Master Distributor Agreement to URCA prior to the investigation for review if BTC had genuine uncertainty as to whether the agreement constituted an infringement. Having failed to do so, BTC is unable to avail itself of a downward adjustment to the basic amount for mitigating circumstances. Therefore, URCA will make no adjustments to the basic amount for mitigating circumstances in this regard.

There is no evidence before URCA that BTC took reasonable steps to terminate its Master Distributor Agreements at any point after being notified of URCA's investigation into the SRG competition complaint. As such, URCA will not adjust the basic amount for mitigating circumstances in this regard.

URCA considers the level of BTC's co-operation to be satisfactory. BTC provided information, responses and representations as requested and required by URCA, within the scope of BTC's obligation under the Comms Act, licence conditions and the Competition Guidelines. However,

the level of co-operation by BTC did not go beyond its legal obligation to enable the enforcement investigation process to be concluded more timely and effectively. URCA will therefore make no adjustments to the basic amount for mitigating circumstances in this regard.

7.4.5 Adjustment for policy objectives

URCA has considered the policy objective of deterring licensees from engaging in anti-competitive behaviour prohibited under sections 67 and 69 of the Comms Act when determining what level of fine to impose. URCA believes that the availability of a wide range of electronic communications products and services create greater market efficiencies thus benefitting consumers and maximizing welfare. URCA also has a mandate under the Comms Act to further the interests of consumers by promoting competition to encourage, promote and enforce sustainable competition in the electronic communications sector in The Bahamas.

The material harm and financial loss to competition in the electronic communications sector in The Bahamas (and consumers) would potentially be significant should the breaches of the kind committed by the licensee (BTC) not be deterred. URCA considers that a significant financial penalty would represent an appropriate incentive to ensure future compliance and therefore believes that an upward adjustment of ten percent (10%) to the basic amount in the amount of $21,166.45 is appropriate.

7.4.6 Conclusion

Having regard to the foregoing, URCA considers the imposition of a fine in the amount of $243,442.76 on BTC for breach of section 67 and section 69 of the Comms Act is proportionate and appropriate.

Dated this 29th day of July, 2014

Kathleen Riviere-Smith
Chief Executive Officer

8 Order

This Order is issued by the Utilities Regulation and Competition Authority ("URCA") pursuant to Section 95 of the Communications Act, 2009 (Comms Act).

WHEREAS having regard to the representations submitted by the Bahamas Telecommunications Company Limited ("the Licensee") to the Statement of Objection issued by URCA on February 10, 2014;

WHEREAS having regard to the representations submitted by Systems Resource Group Limited (SRG) to the Statement of Objection issued by URCA on February 10, 2014;

AND WHEREAS by Adjudication issued to the Licensee on July 29, 2014, URCA has determined that the Licensee breached section 67 and section 69 of the Comms Act for the reasoning as set out in the said Final Adjudication and the reasons summarised in Section 6 therein;

IT IS HEREBY ORDERED that the Licensee shall:

(i) immediately cease and desist from any practice, conduct or behaviour denying future market access to potential competitors in the relevant market for two stage LD calling cards by executing or renewing any Master Distributors Agreement or any similar Agreement which include violating provisions as contained in the Licensee's existing Master Distributors Agreement;

(ii) immediately amend the Master Distributors Agreement by the deletion of the violating provisions under the said Master Distributors Agreement, particularly –

(a) Section 5.4(c);
(b) Section 5.4(d);
(c) Section 6.2; and
(d) Clause 1 under the sub-heading "Contract Commitments" as contained in the Master Distributor Schedule 7 – Distributor Registration Guidelines;

(iii) submit to URCA within fourteen (14) calendar days of the issuance of this Order a draft copy of the amended Master Distributors Agreement for consideration to which URCA shall either issue a "Statement of No Objection" or "Statement of Objection". Where URCA issues a "Statement of Objection" it will provide full reasons and directions to further guide the Licensee;

(iv) consequential upon URCA issuing a "Statement of No Objection", notify all existing Master Distributors in writing of the amendment to the existing Master Distributors

Agreement consequential to the deletion of the violating provisions as set out in (ii) above and the effect of such deletion on the Master Distributors Agreement as executed between the Licensee and such Master Distributors. A copy of the written notification shall be submitted to the Master Distributors and URCA within fourteen (14) calendar days of the issuance of URCA's "Statement of No Objection";

(v) include in the written notification at (iii) above:

(a) a clear statement that the exclusivity provisions of the original Master Distributor Agreement are ineffectual, void and unenforceable; and
(b) an offer to each Master Distributor to execute an amended Master Distributors Agreement;

(vi) submit to URCA within thirty (30) calendar days of the issuance of this Order a letter of compliance detailing all steps, efforts, actions and measures taken by the Licensee to fully comply with this Order; and

(vii) pay a fine to URCA under section 109 of the Comms Act in the amount of $243,442.76 no later than thirty (30) calendar days from the issuance of this Order.

Failure by the Licensee to comply with this Order or any part thereof may result in a fine not exceeding ten percent of the Licensee's relevant turnover or other penalty as determined by URCA in accordance with section 109 of the Comms Act.

Dated this 29th day of July, 2014

Kathleen Riviere-Smith
Chief Executive Officer