

The Bahamas Telecommunications Company Ltd.

P.O. Box N-3048

Nassau, The Bahamas

Tel: (242) 302-7000

Fax: (242) 326-0880



July 8, 2016

Mr. Stephen Bereaux
Director of Policy and Regulation
Utilities Regulation and Competition Authority
Frederick House
Frederick Street
Nassau, The Bahamas

Dear Mr. Bereaux,

Re: Consultation of the Proposed Revision of the Retail Pricing Rules for Price Regulated Services not subject to Price Cap Regulation (Non Price Capped Services). – ECS 16/2016

The Bahamas Telecommunications Company Ltd. (BTC) hereby responds to the Preliminary Determination on the captioned consultation.

Should you have any questions, please feel free to contact the undersigned.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Nicole M. Watkins".

Nicole M. Watkins
VP, Legal Regulatory and Carrier Services
and Company Secretary

Enclosed

BTC
Everyday.



The Bahamas Telecommunications Company Limited

Response To:

Preliminary Determination

**Consultation on the Proposed Revision of the Retail Pricing
Rules for Price Regulated Services not subject to Price Cap
Regulation (Non Price Capped Services)**

**Consultation Document
ECS 16/2016**

**Legal, Regulatory and
Carrier Services Division
July 8, 2016**

Contents

1	Introduction	1
1.1	Background.....	1
1.2	Overview of BTC's Submission	1
2	Rationale for the Preliminary Determination	2
3	Competitive Market Concerns and Regulatory Options	3
3.1	Excessive Pricing	4
3.2	Predatory Pricing.....	4
3.3	Margin Squeeze	5
3.4	Undue Discrimination.....	6
3.5	Bundling of Services.....	7
3.6	URCA's Proposed Regulatory Options.....	10
4	Proposed Modifications to the Retail Pricing Rules	11
4.1	Ex Ante v Ex Post Competition Tests	11
4.2	Notification Requirements	13
4.3	Pre-Approval Requirements	14
4.4	Notification Timeframe	16
4.5	Bi-Annual Margin Squeeze Test for NPC Services	16
5	Proposed Modifications to the Retail Price Rules.....	17

1 Introduction

1.1 Background

Bahamas Telecommunications Company Ltd. (BTC) herein provides its comments on the *Consultation on the Proposed Revision of the Retail Pricing Rules for Price Regulated Services not subject to Price Cap Regulation (Non Price Capped Services) Preliminary Determination*, ECS 16/2016, issued by the Utilities Regulation and Competition Authority (URCA) on 26 May 2016 (the "Consultation Document" or "Preliminary Determination") and the corresponding proposed amendments to the existing Retail Pricing Rules (RPR)¹ provided in Annex 1 to the Consultation Document, the "modified" *Regulation of Retail Prices for SMP Operators of Non Price Capped Services – Rules* (MRPR).

As noted in the Consultation Document, while URCA intends to introduce a price cap regime for many Price Regulated Services which are currently subject to the existing RPR, all other Price Regulated Services would continue to be price regulated but would not be subject to price caps. These services are referred to as Non Price Capped (NPC) services. URCA stated that the purpose of this consultation is to canvas interested parties' views on the appropriate level of retail price regulation that should apply to NPC services. At this point in time, BTC's cellular mobile services are the only NPC services; however, URCA noted that in the future other retail services could also be categorised as NPC services. Therefore, in the context of this consultation, URCA stated that it is also seeking to ensure that the pricing rules for NPC services are future-proof and adaptable to changes in market dynamics.

In total, there are 12 Consultation Questions in the Consultation Document relating to URCA's preliminary findings and proposals in relation to these matters. In what follows, BTC provides its responses to the Consultation Questions and also comments on certain aspects of the Preliminary Determination and the MRPR.

1.2 Overview of BTC's Submission

In view of the imminent advent of mobile services competition in The Bahamas, BTC supports URCA's timely proposals to implement a more flexible and relatively more light-handed regulatory regime for BTC's mobile services. In this regard, BTC offers the following high-level summary of its comments on the Preliminary Determination:

- In other jurisdictions where mobile service markets have been liberalised, competition developed very rapidly. The same will happen in The Bahamas. However, to ensure that consumers fully benefit from such mobile competition, URCA must adopt a regulatory regime for the mobile services market that provides competitors with the opportunity and ability to compete on a level playing field.
- Therefore, BTC supports URCA's specific proposals to move from the existing *ex ante* (pre-approval-based) to an *ex post* (notification-based) regulatory regime for BTC's

¹ URCA, *Regulation of Retail Prices for SMP Operators – Rules*, ECS 06/2014, 16 April 2014.

mobile services. This is the same approach adopted by regulatory authorities in other jurisdictions where mobile service markets were liberalised.

- However, there are several areas where BTC considers that URCA has unnecessarily and inappropriately proposed to retain certain *ex ante* regulatory measures – i.e., in the case of (i) changes in non-price terms and conditions of BTC's mobile services and bundles, (ii) the introduction or changes in the prices bundles including mobile services and non-mobile services, and (iii) the withdrawal or discontinuation of mobile services or bundles. BTC considers that these types of matters should also be subject to *ex post* regulation.
- BTC notes that URCA concluded in the Consultation Document that there is no significant margin squeeze concern relating to BTC mobile services and bundles going forward, yet it nevertheless proposed to introduce a sweeping and onerous new bi-annual margin squeeze test to for all of BTC's mobile services and bundles. BTC considers this proposal to be entirely unjustified and unnecessary and, further, out of step with international practice. Therefore, BTC submits that the proposal should be dropped.
- While BTC has a variety of concerns with URCA's draft MRPR, one key concern relates to URCA's proposed notification process. Under an *ex post* regulatory regime, URCA would normally rely on its *ex post* investigative powers to review and evaluate any specific concerns or complaints that may arise in the future. The purpose of a notification process is to ensure URCA is fully aware of all mobile service changes that are introduced by BTC. However, as proposed, URCA has designed a "streamlined" pre-approval process instead. URCA must allow an *ex post* regulatory regime to operate as intended, otherwise it will undermine the competitive process and ultimately limit the benefits of competition for consumers in The Bahamas.

2 Rationale for the Preliminary Determination

The Consultation Document acknowledges that the liberalisation of the mobile sector will impact the mobile market, but that it would be difficult to predict precisely how the market will evolve and how the licensees will compete with each other. Therefore, URCA suggested that while it may be premature to conduct a full market or significant market power (SMP) review at this time, it is nevertheless necessary and appropriate to review how the existing RPRs should be revised in the case of mobile services given the imminent change in the structure of the mobile market. Moreover, URCA stated that this review is also necessary because the concerns that could arise in a competitive mobile market differ significantly from those identified at the time URCA's last SMP assessment was undertaken in 2014 (during BTC's period of exclusivity in the mobile market).²

URCA also indicated that any changes to the existing RPR applicable to BTC's mobile services would be "interim" in nature until URCA conducts a full market or SMP review of mobile services in the near future.

² URCA, *Assessment of Significant Market Power (SMP) in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009*, Final Determination, ECS 14/2014, 2 December 2014.

With this in mind, URCA asked parties to comment on the following question:

Q1. Do you agree with URCA's rationale for performing this review of the Retail Pricing Rules for Non Price Capped Services? If not, why?

BTC is in agreement with URCA's rationale for performing the present review of the existing RPR for BTC's mobile services.

BTC notes that URCA indicated that the Preliminary Determination and the MRPR are intended to support the goals espoused in URCA's 2016 Draft Annual Plan – i.e., to “ensure that all participants in the market have a level playing field while being guided by high level principles of fairness, non-discrimination and transparency”.³ BTC agrees that these are indeed important goals that should be kept first and foremost in mind when considering the need for and nature of any *ex ante* regulation that may be applied to BTC's mobile services in a competitive cellular mobile market.

The existing RPR is simply incompatible with a competitive mobile marketplace. For consumers in The Bahamas to reap the full benefits of mobile competition, mobile operators must be allowed to compete on a level playing field. This means that both BTC and the second mobile network operator (NewCo2015 Ltd or "NewCo") must have equal mobile service pricing flexibility and equal ability to introduce innovative new mobile services, features and promotional offers (be they short or long term in nature).

BTC supports URCA's plan to introduce new, more light-handed and flexible retail pricing rules for NPC services, specifically including mobile services. In this regard, BTC requests that the MRPR, once finalized based on the comments received in the course of the present consultation, come into effect no later than NewCo's forthcoming commercial launch date.

3 Competitive Market Concerns and Regulatory Options

The Consultation Document includes a discussion of a number of potential competition concerns in the context of the mobile services market: (i) excessive pricing, (ii) predatory pricing, (iii) margin squeeze, (iv) undue discrimination, and (v) abusive product bundling of services. In addition, the Consultation Document also discusses alternative regulatory options that could be used to address any significant competition concerns that may exist in the mobile services market going forward.

Before addressing each of these noted competition concerns, however, BTC notes that it is concerned that the choice of wording in URCA's Consultation Questions appears to establish different standards for the assessment of certain competitive concerns and, consequently, for the establishment of any corresponding remedies. For the first three competition issues, URCA's Consultation Questions ask whether these potential competition concerns may or may not be "significant" in nature. Therefore, in these three cases the question turns on the existence or non-

³ Consultation Document, page 4.

existence of a “significant competition concern”. On the other hand, in the case of items (iv) and (v), URCA's Consultation Questions drop reference to “significant” and simply ask whether there is or is not a competition concern. BTC considers that the wording in the first three cases is a more appropriate standard for the assessment of competitive concern. One could consider that a “significant concern” is one in which the probability of the practice and the level and duration of competitive harm are high and, therefore, *ex ante* regulation may be appropriate. In contrast, an unqualified “concern” or equally an “insignificant concern” is one that exists in theory, but the probability of its existence, extent or duration are not high and, therefore, *ex ante* regulation is not likely to be necessary or appropriate.

Bearing this general concern in mind, BTC provides its comments on each of the five identified potential competition concerns, along with URCA's proposed regulatory options.

3.1 Excessive Pricing

The Consultation Document noted that during BTC's period of exclusivity in the mobile market, it considered excessive pricing to be a potential risk due to the absence of competition. However, the Consultation Document stated that BTC would have limited ability to set excessive prices once NewCo launches because BTC's customers would likely switch to NewCo if BTC raised prices excessively. As a result, the Consultation Document concluded that the risk of excessive pricing would not be a significant concern going forward. Therefore, on a preliminary basis, the URCA concluded that *ex ante* regulation is no longer needed to protect consumers from excessive or monopolistic pricing in the mobile market. URCA added that this thinking is in line with the approach taken by regulators around the world when competition is introduced in mobile markets.

In this respect, URCA asked parties to respond to the following question:

Q2. Do you agree that excessive pricing is not a significant concern going forward? If not, why?

Once mobile competition begins, BTC agrees that it would have no ability to raise prices above competitive levels without incurring major market share losses to NewCo. Therefore, BTC agrees that excessive pricing is not a significant concern going forward. BTC also agrees that the majority of regulatory authorities in other jurisdictions do not impose any *ex ante* regulations related to excessive pricing in competitive mobile markets and, therefore, BTC fully supports the Preliminary Determination to follow this same approach in The Bahamas.

3.2 Predatory Pricing

The Consultation Document noted that with the advent of competition in the mobile market, predatory pricing would not likely be a significant concern. URCA explained that it was of this view because NewCo should be well-placed to compete with BTC on price and, given its investment, would unlikely be forced from the market. The Consultation Document thus stated that any potential predatory behaviour would be unlikely to be profitable for BTC in the short or long term.

In this respect, URCA asked parties to respond to the following question:

Q3. Do you agree that predatory pricing is not a significant concern going forward? If not, why?

BTC is in agreement with the Preliminary Determination on this matter. NewCo, which is affiliated with Cable Bahamas Ltd. (CBL), will be a very well-established and well-financed competitor with a significant presence in all telecommunications markets in The Bahamas – including pay TV, broadband Internet, fixed telephony, business data connectivity and now mobile services. A predatory pricing strategy under the circumstances would be irrational and, as pointed out by URCA, destined to fail. Therefore, BTC agrees that predatory pricing is not a significant concern going forward. BTC also agrees that the majority of regulatory authorities in other jurisdictions do not impose any *ex ante* regulations related to predatory pricing in competitive mobile markets and, therefore, BTC supports the Preliminary Determination to follow this same approach in The Bahamas.

3.3 Margin Squeeze

The Consultation Document noted that in a competitive mobile market BTC would be required to provide NewCo with wholesale call and mobile messaging termination services and may also be required to provide a wholesale national roaming service. NewCo's reliance on these wholesale inputs, according to URCA, could provide a potential risk for a margin squeeze. However, the Consultation Document also noted that URCA intends to regulate mobile and messaging termination rates (MTRs) and wholesale national roaming rates, thereby providing a practical constraint on BTC's ability to use margin squeeze to harm competition. As a consequence, URCA concluded that it does not consider margin squeeze to be a significant concern going forward.

In this respect, URCA asked parties to respond to the following question:

Q4. Do you agree that margin squeeze is not a significant concern going forward? If not, why?

BTC is in agreement with the Preliminary Determination on this matter. Margin squeeze concerns would not be a significant concern with respect to mobile services given that NewCo is entering the market as a mobile network operator – i.e., relying on its own facilities to provide mobile services (with the possible exception of its interim reliance on a national roaming service). Therefore, BTC agrees that margin squeeze is not a significant concern going forward. BTC also agrees that the majority of regulatory authorities in other jurisdictions do not impose any *ex ante* regulations related to margin squeeze in competitive mobile markets and, therefore, BTC supports the Preliminary Determination to follow this same approach in The Bahamas.

It is also important to recognize specifically with respect to wholesale call and messaging termination services, that both BTC and NewCo are equally dependent on each other to terminate calls and messages on the other operator's network. It is not just BTC's MTRs that must be regulated, but also the NewCo's MTRs, since it too possesses SMP in the provision of call and message termination services on its own network. Indeed, as argued in BTC's

submissions in the context of the recent consultation on BTC's Reference Access and Interconnection Offer (RAIO), BTC considers that all operators' call and messaging termination rates should be regulated and set on a symmetric basis.

In addition, if BTC is ordered to provide national roaming service to NewCo, the prices of the service would be regulated by URCA and set on a full cost recovery basis. The provision of a wholesale national roaming service would be a short term, interim obligation to assist NewCo in the early phases of its network rollout in more remote and less populated areas of The Bahamas. This obligation would be removed once NewCo is able to provide service to the vast majority of the population of The Bahamas using its own network facilities. In other words, NewCo's reliance on national roaming would be limited in scope, coverage and duration and, as a result, not a potential source of any significant margin squeeze risk.

3.4 Undue Discrimination

The Consultation Document acknowledged that differential pricing is a common practice in competitive mobile service markets. URCA provided the example of on-net/off-net pricing differentials, which it noted is a pricing practice often adopted by mobile operators. At the same time, URCA noted that such pricing practices could raise undue discrimination concerns if, for instance, the extent of any such pricing differentials were not justified by the underlying costs of providing the services. In this respect, URCA noted that it is aware of several instances where investigations into such practices have been conducted by regulators and competition authorities in foreign jurisdictions.

In this respect, URCA asked parties to respond to the following question:

Q5. Do you agree that undue discrimination is a concern going forward? If not, why?

BTC notes that this Consultation Question simply asks whether undue discrimination may be a concern going forward, but not whether it may or may not be a "significant" competition concern. As discussed above, only the latter question should be relevant to this consultation.

That said, BTC does not consider the potential for undue discrimination in the mobile services market to be a significant concern going forward.

The Consultation Document readily acknowledges that differential pricing practices are commonly found in many if not most competitive mobile markets around the world. For the most part, such pricing practices raise no significant concerns regarding potential undue discrimination and, in that context, the majority of regulatory authorities in other jurisdictions do not impose any *ex ante* regulations related to undue discrimination in competitive mobile markets.

The Consultation Document does cite a handful of jurisdictions where concerns over such practices are or have seemingly been investigated by regulators or competition authorities to one degree or another. However, URCA did not enumerate how many of these investigations were

undertaken on an *ex ante* versus *ex post*⁴ basis or, for that matter, whether any, some or all of the *ex ante* investigations resulted in the imposition of *ex ante* obligations.

For example, Bermuda is the only regional country included in the list provided in the Consultation Document. BTC is not aware of any other jurisdiction in the Caribbean that applies *ex ante* regulation to mobile services. The Company understands that the Regulatory Authority of Bermuda (RAB) did look into this issue in 2013 in the context of numerous matters in relation to obligations of operators with SMP. For this specific issue the RAB considered the following four regulatory options: (a) regulatory forbearance; (b) tariff filing requirements; (c) monitoring of on-net/off-net traffic flows (quarterly submission by the two affected operators of the respective traffic flows and customer connections) and (d) a ban on on-net/off-net price discrimination. The RAB ultimately selected option (c) because it “is a light handed measure which would not impose a significant burden on mobile operators. The RAB considers that this approach is proportionate.”⁵ The RAB concluded that it would monitor the data provided and if it became apparent that on-net/off-net price discrimination was having a negative impact on market competitiveness, then it would either conduct an *ex post* investigation or revisit the matter and consider whether any *ex ante* remedies may be required. To date, BTC understands that the RAB has neither initiated an *ex post* investigation nor imposed any *ex ante* remedies.

Further, BTC considers URCA's reference to *ex post* investigations in foreign jurisdictions solely in the context of potential undue discrimination concerns to be inconsistent with URCA's assessment of the significance of other competitive concerns (e.g., excessive pricing, predation, margin squeeze and bundling). Virtually all regulators rely on *ex post* rather than *ex ante* regulatory measures in the case of competitive mobile services. The fact that there may be examples of *ex post* investigations in some foreign jurisdictions with respect to any one of these competitive concerns does not in of itself provide any useful guidance as to whether there may be significant competitive concerns in The Bahamas warranting *ex ante* regulation in a competitive mobile services market. In fact, it supports the exact opposite – i.e., the *ex post* measures are sufficient to address any competitive concerns that may arise.

In BTC's view, for the full benefits of mobile competition to be realized, both BTC and NewCo should have equal pricing flexibility, which may include differential pricing. BTC considers that undue discrimination is not a significant concern going forward and, therefore, only *ex post* regulation is necessary and appropriate in this respect. BTC also considers that such approach is consistent with the majority of regulatory authorities in other jurisdictions.

3.5 Bundling of Services

The Consultation Document provides a brief review of the existing RPR provisions pertaining to bundles including Price Regulated Services (which include, among other things, technical and

⁴ BTC notes that the case in Chile was indeed an *ex post* investigation completed in 2012 by the country's competition agency, the “TRIBUNAL DE DEFENSA DE LA LIBRE COMPETENCIA”. See: http://www.fne.gob.cl/wp-content/uploads/2012/12/inst_02_2012.pdf.

⁵ Regulatory Authority of Bermuda, *Obligations for Operators with Significant Market Power: Consultation Summary, Final Decision, Order, and General Determination*, Matter: RM01/13-1040. Date: 7 August 2013. <http://www.rab.bm/index.php/determinations/1035-remedies-order-vfinal-8-7-13/file>

economic replicability test requirements). URCA stated that it is of preliminary view that the potential for BTC to use its SMP position in the mobile services market to engage in anti-competitive bundling could be a concern going forward, given the range of product markets in which BTC operates. Therefore, on a preliminary basis, URCA concluded that *ex ante* bundling regulation should remain in some form.

In this respect, URCA distinguished between two types of product bundles containing mobile services:

- i) *Mobile-only product bundles* which only contain mobile services; and
- ii) *Multi-product bundles* which contain both mobile and non-mobile services offered by BTC.

In the first case, URCA indicated that since all retail services included in the bundle would fall into the same product market (i.e., the mobile services market), it did not consider this to be a product bundle which would allow BTC to leverage SMP between markets. Therefore, it was of the preliminary view that the existing bundling rules need not apply to mobile-only bundles.

In the second case, however, URCA indicated that it considers there could be a risk of BTC leveraging its SMP in the mobile services market into markets for the other services included in the bundle. Therefore, URCA was of the preliminary view that the existing *ex ante* bundling rules should continue to apply in the case of multi-product bundles.

In this respect, URCA asked parties to respond to the following question:

Q6. Do you agree that abusive bundling is a concern going forward? If not, why?

BTC notes once again that this Consultation Question simply asks whether abusive product bundling may be a concern going forward, but not whether it may or may not be a "significant" competition concern. As discussed above, only the latter question should be relevant to this consultation.

BTC does not consider that a significant competition concern would exist going forward with respect to either mobile-only or multi-product bundles. BTC addresses each bundling category below:

Mobile-only Product Bundles

BTC is in agreement with the Preliminary Determination that abusive bundling related to mobile-only product bundles is not a significant concern going forward. The main theoretical competitive concern related to abusive bundling (leveraging of market power from an SMP market to a non-SMP market) simply does not apply in this instance. For the most part, mobile services are offered in packages or bundles in any event and, therefore, it would be an entirely inappropriate to impose *ex ante* regulation mobile-only bundles. BTC also notes that the majority of regulatory authorities in other jurisdictions do not impose any *ex ante* regulations on either individual mobile services or for mobile-only product bundles in competitive mobile

markets. Therefore, BTC supports the Preliminary Determination to follow this same approach in The Bahamas.

Multi-product Bundles

BTC also does not consider that potential abusive bundling in the case of multi-product bundles is a significant concern going forward. URCA is well aware that one of the single biggest developments in the competitive landscape around the world is the growth of bundling via “double-play”, “triple-play” and “quad-play” packages. Such bundles provide a level of convenience and savings that consumers demand. In this context, the majority of regulatory authorities in other jurisdictions do not impose any *ex ante* regulations related to bundling for multi-product bundles that include mobile services in competitive mobile markets. In this context, BTC is in strong disagreement with the Preliminary Determination that proposes that the existing *ex ante* bundling regulations remain in this instance. Rather than protect consumers or the competitive process, the perpetuation of such *ex ante* regulation would only serve delay or even block the introduction of new service bundles that would otherwise benefit consumers.

BTC notes that URCA provided no evidence or analysis in support of its assertion that BTC could leverage its market power in the mobile services in other markets. For one, BTC's market power in the mobile market will very quickly evaporate once NewCo enters the market, which is a position that URCA appears to have adopted based its Preliminary Determinations regarding the absence of significant excessive pricing, predation and margin squeeze concerns in the mobile services market going forward. Secondly, CBL/NewCo are well established in all other major electronic communications markets in The Bahamas – i.e., pay TV, fixed telephony, broadband Internet and business data services. It would be impossible for BTC to leverage or exercise market power (assuming it possessed some residual degree of SMP going forward) in these other markets through a bundling strategy as alleged by URCA. Consequently, BTC considers that there is no significant abusive bundling concern with respect to multi-product bundles as in the case for mobile-only bundles and, therefore, also no need to maintain *ex ante* regulation in either case.

BTC also notes that while it considers the MRPR should not include *ex ante* regulatory requirements in the case of both mobile-only and multi-product bundles, it acknowledges that there could be conflicting regulatory provisions in the MRPR applying to NPC services and the existing RPR applying to other Price Regulated Services which are intended to be “price capped” at some point in the future. More specifically, the bundling provision provided in Part G of both sets of pricing rules would be contradictory with respect to multi-product bundles including mobile services and other “to be price capped” Price Regulated Services. For this reason, BTC submits that the MRPR, once finalized, should take precedence with respect to any bundles including mobile services until such time that the existing RPR as applicable to “to be price capped” Price Regulated Services are also modified.

That said, if URCA insists on imposing *ex ante* regulation on multi-product bundles including mobile services, BTC offers the following suggestions:

- BTC considers that the existing *ex ante* bundling rules for Price Regulated Services to be unnecessarily onerous and time consuming. To reduce regulatory burden and streamline

the *ex ante* bundling pre-approval process, BTC suggests that the technical and economic replicability test requirements be eliminated. With two fully facilities-based licensed operators in the market – BTC and CBL/NewCo – such tests are unnecessary and, indeed, irrelevant.

- In addition, whether the bundling rules are streamlined or not, the principle of regulatory symmetry should apply in their application – i.e., any maintained *ex ante* bundling regulation should also equally apply to CBL/NewCo in view of their close affiliation. For example, CBL should have to comply with any maintained *ex ante* bundling rules if it proposes to its bundle pay TV and/or broadband Internet services (given that CBL possess SMP in these service markets) with any mobile services offered by NewCo.

3.6 URCA's Proposed Regulatory Options

The Consultation Document identified several regulatory options to address any competition concerns going forward in a competitive mobile market and presented its preliminary preferred choice from these options. The three identified regulatory Options included:

- i) Maintain the existing pre-approval process under the Retail Pricing Rules ("do nothing" option);
- ii) Modified Retail Pricing Rules (involving a shift to a notification rather pre-approval regime with greater reliance on *ex post* investigative powers); and
- iii) Complete Removal of the Retail Pricing Rules (i.e., light-touch approach or "no *ex ante* regulation").

URCA indicated that it considered that Option 1 (do nothing) would be unnecessarily burdensome and out of step with international norms. It also stated that it considered that Option 3 (light-touch approach) could pose significant regulatory and commercial risk given BTC's position in the broader communications markets for voice services and its current position in the mobile market, prior to the development of effective competition. Therefore, on a preliminary basis, URCA indicated that it considered Option 2 (Modified Retail Pricing Rules) to be its preferred approach. It suggested that adopting a MRPR would strike a reasonable balance between BTC's need for greater flexibility to make commercial decisions in a competitive environment and the need for URCA to maintain a minimum level of protection against potential anti-competitive behaviour.

In this respect, URCA asked parties to respond to the following question:

Q7. Do you agree with URCA's proposed interim measure of modifying the existing Retail Pricing Rules for Non Price Capped Services until it will undertake a full market review of retail mobile services? If not, why?

Based on market liberalisation experience in other jurisdictions, competition in the mobile market in The Bahamas can be expected to develop very rapidly once NewCo enters the market. Recognising this fact, BTC considers that URCA should, to the greatest extent possible, shift its

reliance from *ex ante* to *ex post* regulatory measures. More specifically, BTC submits that URCA should adopt a "light-touch", no *ex ante* regulation approach for mobile services going forward as contemplated under Option 3.

In the alternative, to the extent URCA nevertheless decides to retain some *ex ante* regulatory measures with respect to mobile services for an interim period (i.e., as per Option 2), then BTC submits that any such measures should be kept to an absolute minimum.

BTC provides further comments in this regard in response to the further related Consultation Questions below.

4 Proposed Modifications to the Retail Pricing Rules

4.1 Ex Ante v Ex Post Competition Tests

The Consultation Document indicated that in the context of mobile liberalisation it proposes to place greater reliance on *ex post* investigative powers to address potential anti-competitive concerns, as follows:

- i) *Predatory Pricing*: BTC would no longer be required to submit an *ex ante* predation test for price decreases as they relate to short term/full length promotions and permanent price changes for mobile services and bundles. URCA would instead rely on *ex post* competition powers to address any allegations of predation that may arise.
- ii) *Margin Squeeze*: BTC would no longer be required to submit an *ex ante* margin squeeze test for price reductions of retail mobile services, as they relate to permanent price changes and promotions for mobile services. However, BTC would be required to submit information relating to the prices of its mobile services and associated costs on a bi-annual basis (until effective competition has emerged in this market and BTC is no longer considered SMP).
- iii) *Undue Discrimination*: BTC would no longer be required to demonstrate on an *ex ante* basis that a price change or any new price for retail mobile services or bundles does not unduly discriminate against specific customers. However, BTC would still be expected to comply with its non-discrimination obligations by virtue of its licence and the Communications Act.
- iv) *Abusive Product Bundling of Services*: Current *ex ante* requirements set out in the existing RPR would remain for BTC multi-product bundles including mobile services and non-mobile services – i.e., BTC would continue to be required to submit to URCA an application to introduce or change the price of any multi product bundle including mobile services and any services from any other economic markets, demonstrating that it is both technically and economically feasible for others to replicate the bundle.

In this respect to these proposals, URCA asked parties to respond to the following question:

Q8. Do you agree with URCA's proposed amendments regarding competition tests as set out in Section 5.1 above? If not, why?

With the imminent advent of competition in mobile services market, BTC agrees with and supports a shift from *ex ante* to *ex post* competition tests for mobile services going forward. However, BTC considers that the Preliminary Determination does not go far enough in this regard, and as discussed above and further developed below, BTC is of the view that there should not be any remaining *ex ante* competition tests for mobile services or bundles.

Each of URCA's above-noted proposals are discussed below:

Predatory Pricing, Margin Squeeze and Undue Discrimination Tests

BTC is in agreement with URCA's proposals to eliminate *ex ante* tests for predatory pricing, margin squeeze and undue discrimination for changes to mobile service and mobile-only bundle prices, short term and full length promotions, and new mobile service and mobile-only bundle introductions and, instead, rely on *ex post* investigative powers to address any potential anti-competitive concerns in these respects going forward.

Bi-Annual Margin Squeeze Test

On the other hand, BTC strongly disagrees with the Preliminary Determination that BTC submit a bi-annual margin squeeze test for all of its mobile services and mobile-only service bundles, including all related promotions. Such a requirement would be extremely onerous and, more importantly, unnecessary as URCA itself concluded in the Consultation Document. URCA stated several times in the Consultation Document that it "does not consider margin squeeze to be a significant concern"⁶ (emphasis added). Accordingly, URCA concluded that there is no need to file a margin squeeze test on an *ex ante* basis for price reductions to BTC's mobile services going forward. Therefore, URCA's proposed bi-annual margin squeeze test filing requirement is entirely inconsistent with and, indeed, contradicts its conclusions in this respect.

Moreover, URCA provided no rationale whatsoever for the introduction of this onerous new regulatory measure, which expands rather than lessens or streamlines the existing RPR in recognition of the liberalisation of the mobile market. As well, URCA provided no rationale as to why the use of *ex post* investigative powers would not be sufficient to address any potential anti-competitive margin squeeze concerns that may arise – especially in view of the fact that URCA concluded that it has no significant concerns in this regard. Consequently, the proposal for a bi-annual margin squeeze test for all of BTC's mobile services and mobile-only service bundles is not simply supported by URCA's own analysis and conclusions.

In addition, BTC notes that the proposed bi-annual margin squeeze information filing requirements would be extremely onerous. Under the existing RPR, were BTC to reduce the price of a mobile service or bundle it would be required to submit a margin squeeze test. Effectively the current test applies on a case-by-case basis, as necessary. Under this new proposal, as set out in the newly proposed Annex 4 of the MRPR, BTC would be required to file

⁶ Consultation Document, pages 14 and 15, page 23 and page 28.

a full set of margin squeeze tests every six months for every mobile service and mobile-only service bundle it offers – which could cover dozens of services and bundles. All short term and full length promotions would also have to be taken into account offered during the period in question. In addition, alternative six month and two year projection scenarios would have to be conducted in each and every case. In a competitive mobile services market the variety and number of services and service bundles can be expected to expand and change steadily. Such an extensive, onerous and broad-brush regulatory requirement cannot be justified as regulatory safeguard for a non-existent concern.

Further, it is important to reiterate that NewCo will be using its own network facilities to provide a competitive mobile service alternative. It will have to pay wholesale fees of course to terminate calls and messages from its customers to BTC customers. But the same applies to BTC as well. BTC will have to pay wholesale fees to terminate call and messages from its customers to the customers of the second mobile operator. The applicable mobile termination rates will be regulated by URCA, just as they are in the case of competitive fixed services today. Therefore, there is no need to conduct sweeping bi-annual margin squeeze tests in these markets.

As well, for an interim period, BTC may be required to provide a national roaming services to NewCo in designated geographic areas. This obligation would be limited in coverage, scope and duration. As well, wholesale national roaming rates would also be regulated by URCA. Here again, therefore, there is no need for the proposed bi-annual margin squeeze test requirement for this purpose.

BTC submits that the proposed bi-annual margin squeeze test for all of its mobile services and mobile-only service bundles requirement should be removed from the MPRP. URCA's existing *ex post* investigative powers would be sufficient to address any potential anti-competitive margin squeeze concerns that may arise in this respect.

Abusive Product Bundling of Services

For the reasons provided in Section 3.5 above, BTC also disagrees with the Preliminary Determination to maintain existing *ex ante* bundling pre-approval requirements for multi-product bundles including mobile services.

4.2 Notification Requirements

The Consultation Document proposed that where a relevant competition test is not required on an *ex ante* basis, the existing "pre-approval" process would be replaced by a "notification" requirement for price changes, promotions or the introduction of new services. URCA added that it would rely on its *ex post* competition powers if it believes the SMP operator's pricing, promotions or new service offerings may be anti-competitive.

As a result, in the context of its mobile services, URCA proposed that BTC would no longer be required to seek URCA's approval in respect of:

- i) permanent price changes (increases/decreases) for mobile services (as per Part E and Part G of the MRPR);

- ii) introducing new mobile services and mobile-only product bundles (as per Part F and Part G of the MRPR);
- iii) price changes for mobile-only product bundles (as per Part G of the MRPR); and
- iv) all forms of special promotions (i.e., short term and full length promotions) for mobile services and bundles, including multi-product bundles (as per Part H of the MRPR).

In this respect to these proposals, URCA asked parties to respond to the following question:

Q9. Do you agree with URCA's proposed notification requirements as set out in Section 5.2 above? If not, why?

BTC is in agreement with the Preliminary Determination in this respect.

4.3 Pre-Approval Requirements

In the Consultation Document, URCA also proposed that it would maintain existing *ex ante* pre-approval requirements in relation to:

- i) new multi-product bundles containing at least one mobile service (as per Part G of the MRPR);
- ii) price changes for multi-product bundles containing at least one mobile service (as per Part G of the MRPR);
- iii) changes in non-price terms and conditions of all NPC services where the effective price paid by customers is changed (as per Part I of the MRPR); and
- iv) the withdrawal/discontinuation of all NPC services and all bundles (as per Part J of the MRPR).

In this respect to these proposals, URCA asked parties to respond to the following question:

Q10. Do you agree with URCA's proposed continuation of the existing pre-approval requirements as set out in Section 5.3 above? If not, why?

New/price changes for multi-product bundles

For the reasons provided in Section 3.5 above, BTC disagrees with URCA's proposal to maintain existing *ex ante* pre-approval requirements for the introduction of new or changes to the prices of existing multi-product bundles including mobile services. BTC submits that URCA should rely on its *ex post* investigation powers in the case of multi-product bundles including mobile services.

Changes in non-price terms and conditions of mobile services

BTC strongly disagrees with URCA's proposal to retain *ex ante* pre-approval requirements for changes in non-price terms and conditions of all mobile services and mobile service bundles

where the effective price paid by customers is changed. In the context of mobile services this proposal could significantly delay many standard competitive service offer changes involving modifications to the standard elements of a mobile service or bundle – e.g., domestic or international call minute allowances, text message allowances, features, applications, and/or data volume allowances included with an existing mobile service or bundle. The proposal would also create considerable uncertainty as to what would constitute a new mobile service or bundle as opposed to a change in the non-price terms and conditions of an existing mobile service or bundle.

Moreover, URCA provided no rationale for its proposal to maintain this specific *ex ante* regulatory measure in terms of any potential "significant" concern or harm to competition or consumers that it is intended to guard against. Nor did URCA even identify one example of a specific type of change in the non-price terms and conditions of a mobile service or bundle that could potentially raise a concern in a competitive market. BTC notes that the examples of possible non-price terms and conditions listed in footnote 7 of the MRPR (which were copied from the existing RPR) have little to do with mobile services.

In BTC's view, the regulatory treatment of both price and non-price changes to mobile services and bundles should be treated equally under the MRPR for mobile services. Neither should be subject to continued pre-approval requirements. Therefore, BTC submits that changes to the non-price terms and conditions of mobile services and mobile service bundles should be subject to a notification rather than a pre-approval process requirement.

BTC notes that *ex post* regulation of changes in non-price terms and conditions would also be consistent with international practice.

Withdrawal/discontinuation of mobile services and bundles

BTC also disagrees with URCA's proposal to maintain existing *ex ante* pre-approval requirements in relation to the withdrawal or discontinuation of all NPC services and all bundles. Here again, no rationale for the proposal was provided, nor was any "significant concern" identified in support of this measure. There is clearly no concern in the case of bundles since the components of the bundles would typically be available on a standalone basis. When it comes to competitive mobile services more generally, it is unclear what services URCA would seek to prohibit withdrawal or discontinuation through this proposed *ex ante* provision.

Therefore, BTC submits that a notification process should also be adopted for the withdrawal or discontinuation of specific mobile services or bundles. In this respect, it is important to note that a notification to withdraw a specific mobile service would not mean that it would be withdrawn immediately, but rather that any remaining customers would be given advance notice of its pending withdrawal and they would be provided with sufficient time to make any necessary adjustments beforehand. As well, a notification to discontinue offering a specific mobile service would not imply that it would be discontinued immediately, but rather that customers would be given notice that the mobile service would shortly no longer be offered. Existing customers would still be able to continue using the service, but the service would no longer be offered to new customers. In a competitive mobile market place, competitors must be able to offer new and improved services, which in many cases may displace existing services resulting in their

discontinuation or withdrawal. In BTC's view there is no need or rationale for *ex ante* regulation of mobile services going forward in this respect.

4.4 Notification Timeframe

The Consultation Document proposed that the notification requirements set out in the existing RPR would continue to apply mobile service changes not requiring pre-approval, although with one minor adjustment. Under the existing RPR, the SMP operator must notify URCA in writing of a proposed service change at least 5 business days before the intended launch date. URCA must then confirm receipt of the notification at least 3 business days before the planned launch date (or, in other words, within 2 business days of the receipt of the notification). If URCA does not respond within this timescale, the SMP operator may proceed exactly as set out in its notification. URCA proposed to amend this process so that it would not be required to confirm receipt of the SMP operator's notification. The SMP operator could then proceed exactly as set out in its notification.

In this respect to these proposals, URCA asked parties to respond to the following question:

Q11. Do you agree with URCA's proposed amendment to the notification process as set out in Section 5.4 above? If not, why?

In a competitive market, competitors must be in a position to respond rapidly to market developments and customer demands. Consequently, BTC considers the contemplated notification process must be as efficient and prompt as reasonably possible. Any unnecessary delays would leave BTC at a significant competitive disadvantage.

Therefore, BTC proposes that the notification period be set at 3 business days. Confirmation of receipt from URCA could remain at 2 days; however, as noted by URCA, confirmation of receipt of individual notifications would not be necessary in any event.

4.5 Bi-Annual Margin Squeeze Test for NPC Services

Lastly, while URCA reiterated that it "is not significantly concerned about margin squeeze",⁷ it suggested that would nevertheless be important to monitor closely the market and identify any instances of anti-competitive behaviour. URCA proposed therefore that BTC be required to submit, every 6 months, information that enables URCA to assess whether any margin squeeze may be taking place for any mobile services and bundles services where:

- at least one alternative operator competes with the SMP operator using a wholesale product from the SMP operator; or
- the SMP operator is required to offer a wholesale product, even if there is currently no take-up for this wholesale product.

URCA noted that the filing requirements for the proposed bi-annual margin squeeze test are proposed in Annex 4 of the Proposed Modified Rules.

⁷ Consultation Document, page 28.

In this respect to this proposal, URCA asked parties to respond to the following question:

Q12. Do you agree with URCA's proposed requirement for a bi-annual margin squeeze test for Non Price Capped Service as set out in Section 5.5 above? If not, why?

For the reasons provided in response to Consultation Question 8 above (Section 4.1), BTC strongly disagrees with URCA's proposed requirement for a bi-annual margin squeeze test for BTC's mobile services and bundles.

5 Proposed Modifications to the Retail Price Rules

The Consultation Document did not include any Consultation Questions specifically related to the preliminary draft MRPR included as Annex 1. BTC understands that its issue-specific responses to Consultation Questions 1 to 12 should be sufficient and that it should not be necessary for BTC to provide specific legal revisions or text as to how its views would or could be incorporated in the MRPR. Having said this however, BTC notes that it has a number of supplemental concerns as to how URCA is proposing to give legal effect to some of the issues raised in the Consultation Questions, as follows:

1. **Notification Process (Part C):** In BTC's view the notification process described in Paragraphs 17 to 21 in Part C of the MRPR should be revised to better reflect a true notification process, rather than what is currently proposed. BTC understands that a notification process is one that the operator notifies the regulatory authority of the relevant action. The notification could have a number of purposes, but its primary aim is so that the regulatory is made aware of the relevant action. The notification should not be mistaken for or comingled with a "light" pre-approval process, because it runs counter to the objective of the notification, which is to eliminate any form of *ex ante* regulation. What this means is that the regulatory authority agrees to forbear from exercising its *ex ante* pre-approval authority and thus agrees to rely exclusively on *ex post* provisions. It is in this context that BTC has serious concerns with certain provisions in Paragraphs 18 to 21:

- Paragraph 18 carries over from the existing RPR the prohibition of advertising or announcement of the action prior to notifying URCA. This is an unnecessary requirement that is not appropriate for the notification process and should be deleted.
- Paragraph 19 refers to Paragraph 23. BTC's concerns with Paragraph 23 are discussed below.
- There are a number of references in Paragraph 20 in relation to the suspension of the notified action. For instance, Paragraph 20.1 states that "Unless URCA has directed the SMP operator to suspend the proposed price or service change,...". As noted above, there should be no ambit to suspend or disallow a proposed action under a notification process. Therefore, Paragraph 21 should be amended to delete such a reference and make any consequential changes.

- Paragraph 21 also includes references to the suspension or disallowance of the notified action, including "nothing in these Rules prevents URCA from directing the SMP operator not to proceed or to withdraw a new service or...". BTC is not in disagreement with URCA's *ex post* authority to direct any licensed operator to withdraw a service or not undertake any action pursuant to the Comms Act and the other cited provisions. However, BTC has deep concerns with the provision that URCA continues to retain the authority to pre-approve an action that is supposedly only subject to a notification process and *ex post* regulation.
2. **Implementation Process (Part D):** The "Implementation Following Receipt of Notification" section in Paragraph 23 in Part D of the MRPR appears to be perhaps an inadvertent carry-over from the existing RPR. In any event, BTC is of the view that such provisions relating advertising and implementation timeframes are unnecessary under a notification process. Therefore, BTC suggests that paragraph 23 be deleted or otherwise substantially revised.
 3. **New Mobile Services (Part F):** Part F of the MRPR, which deals with the "Introduction of New Single Service NPC Services", is in BTC's view unnecessary. The proposed definition of what constitutes a new service is unclear and, indeed, is in large part redundant given Part I of the MRPR already covers changes in non price terms and conditions of an existing mobile service or bundle. BTC suggests that the definition of a new mobile service be defined in a meaningful way or, more preferably, Part F simply be deleted.
 4. **Bundles (Part G):** As explained in Section 3.5 above, BTC submits that the introduction of new or changes to the prices of existing mobile-only as well as multi-product bundles including mobile services should be subject to a notification process. In other words, they should both be subject to *ex post* rather than *ex ante* regulation. Therefore, in BTC's view Part G of the MRPR, which deals with "Introducing or Permanently Changing the Price of Bundles of Regulated Services", should be modified to reflect this proposed common approach for both bundle categories.
 5. **Promotions (Part H):** In a competitive mobile services market, it is common for competitors to modify service pricing, introduce new services and bundles, and launch short and longer term promotions, among other things. For consumers to reap the full benefits of competition, competitors should have equal ability and opportunity to engage in such competitive activities – in other words they should be allowed to compete on a "level playing field", which is stated goal of URCA's. However, Part H of the MRPR, as drafted, creates unnecessary uncertainty and unwarranted restrictions of BTC's ability to offer promotions in a competitive mobile services market. Under Paragraphs 61.6 and 65, BTC would be prohibited from offering "similar" short term promotions for a 30 day period or "similar" full length promotions for a 90 day period. BTC's first concern is with use of the qualifying term: "similar" promotion. This term is far too subjective in nature and can result in arbitrary and inconsistent determinations as to whether an individual promotion may or may not be "similar" to an earlier promotion. BTC considers that a more appropriate term would "identical" or "equivalent" promotion. BTC's second concern relates to the length of the "cooling-off" period – i.e., 30 and 90,

respectively. BTC considers that these cooling off periods should be reduced significantly to a least 15 and 30 days, respectively, so as to be more consistent with market conditions going forward.

6. **Non Price Terms and Conditions (Part I):** Part I of the MRPR, which deals with "Changes to non price terms and conditions for Price regulated Services and Price Regulated Bundles", is in BTC's view an unnecessary and unwarranted carry-over from the existing RPR. As explained in the Section 4.3 above, BTC considers that changes to both prices and non-price terms and conditions of mobile services and bundles should be treated equally and should both be subject to a notification rather than a pre-approval process. Therefore, BTC submits that Part I should be deleted and that notifications related to changes in non price terms and conditions of mobile service or bundle added to Parts E and G of the MRPR, respectively.
7. **Withdrawals/Discontinuations (Part J):** In BTC's view Part J of the MRPR, which deals with Withdrawals/Discontinuations, should be modified to reflect BTC's proposal that a notification process be adopted for withdrawals/discontinuations.
8. **Bi-Annual Margin Squeeze Test (Annex 4):** As explained by BTC in Section 4.1 above, BTC considers URCA's proposed bi-annual market squeeze test to be entirely unsupported and, indeed, contrary to URCA's own conclusion that there is no significant market squeeze concern going forward in a competitive mobile market. Therefore, BTC submits that this regulatory requirement should not be adopted and, consequently, Annex 4 of the MRPR should be removed.