



**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

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1. Introduction

The Bahamas Telecommunications Company Ltd. (BTC), under section 116 and Schedule 4 of the Communications Act, 2009 (the “Comms Act”), was presumed to have significant market power (SMP) in the markets of fixed voice telephony and mobile voice and mobile data services. As part of the same section and Schedule, Cable Bahamas Ltd. (CBL) was presumed to have SMP in the markets for high speed data services and connectivity, and pay TV services.

As a result of these SMP designations, the Utilities Regulation and Competition Authority (“URCA”) imposed *ex-ante* remedies on BTC and CBL (after consultation) to help achieve the policy objectives of the electronic communications sector.^{1,2} As part of its 2010 Final Decision on the SMP obligations, URCA imposed, amongst others, a requirement for BTC’s fixed voice and mobile services and CBL’s SuperBasic TV services to comply with a set of Retail Pricing Rules, set out in the “Regulation of Retail Prices for SMP Operators – Rules” (ECS 06/2014)³ (“the Retail Pricing Rules” or “Rules” or “RPR”).

The Retail Pricing Rules constitute an *ex-ante* tariff approval and pre-notification scheme which is designed to protect consumers from the potential anti-competitive behaviour of SMP operators. More specifically, the framework describes the application, review and approval processes, alongside details on the information that must be submitted to URCA by an SMP operator in respect of a price change application and the timeframes within which URCA will judge an application.⁴

In 2014, URCA published its Final Determination on the “*Assessment of Significant Market Power (SMP) in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009*” (ECS 14/2014).⁵ This Determination largely reiterated the presumed findings of SMP set out in the Comms Act against BTC and CBL mentioned above, specifically finding the operators to have market power as follows:

BTC in the markets for:

- fixed access and call services;
- fixed (DSL) broadband services (Geographic Market 2); and
- business data connectivity services (Geographic Market 2).

And CBL in the markets for:

- access to pay TV content provided over a cable TV and terrestrial network infrastructure; and
- fixed (cable-based) broadband services (Geographic Market 1).

¹ ECS policy is available at <http://www.urbahamas.bs/download/090781500.pdf>.

² ECS 11/2010 can be found at <http://www.urbahamas.bs/download/065805100.pdf>.

³ ECS 06/2014 is available at <http://www.urbahamas.bs/download/091501900.pdf>.

⁴ Note that further to the Retail Pricing Rules, there are also the standard (i.e., non-market specific) non-discretionary obligations under conditions 34, 35, and 36 of the Individual Operator Licences and section 40(40) of the Comms Act.

⁵ ECS 14/2014 is available at <http://www.urbahamas.bs/download/094452600.pdf>.

When undertaking the 2014 SMP Assessment, URCA concluded that it was not necessary to review BTC's existing SMP designation in retail mobile voice and mobile data services because of its statutory exclusivity as the sole provider of cellular mobile services in The Bahamas. The 2010 designation of BTC as a SMP provider in mobile voice and mobile data is therefore still in place today, with BTC's provision of these services being required to comply with the latest or 2014 version of the Retail Pricing Rules (ECS 06/2014).

As part of the 2014 SMP Assessment, URCA chose to maintain many of the ex-ante remedies imposed on BTC and CBL in 2010. However, it also imposed new SMP remedies on BTC and CBL in the form of:

- Price cap regulation on BTC's fixed voice services and CBL's pay TV services and retail broadband services, with the price cap replacing the requirement for tariff changes on services subject to pre-approval by URCA.
- Enhanced replicability requirements for new retail product bundles introduced by BTC or CBL that include SMP products.

The price cap regime will cover many services which are regulated currently through the Rules, but it will not fully replace the Rules. This is because some services (e.g., cellular mobile services) will continue to be price regulated but will not be subject to a price cap. In this document, URCA is canvassing the views of respondents on the appropriate level of retail price regulation that URCA should maintain with respect to SMP providers of price regulated services that are not subject to price cap regulation. These services are referred to as Non Price Capped Services. For now, the only Non Price Capped Services will be BTC's mobile voice and mobile data services. However, in the future, Non Price Capped Services could also include other retail services which URCA determines to be Price Regulated Services that fall outside the scope of the price cap regimes for BTC and CBL. Thus in the context of this review, URCA is also seeking to ensure that the Pricing rules for Non Price Capped Services are future-proof and adaptable to changes in market dynamics.

This preliminary determination supports the goals URCA has espoused in its 2016 Draft Annual Plan 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"*.⁶ URCA is therefore urging licensees and other interested third parties to let their positions be known on URCA's proposals set forth in this document.

1.1 Purpose of this Preliminary Determination

Broadly, the determination's objectives are to:

- highlight any actual and/or potential competition concerns and customer harm that may arise in the provision of Non Price Capped Services;
- examine the advantages and disadvantages of the regulatory options available to address these potential competition concerns;
- outline URCA's proposals for addressing the identified competition concerns; and
- invite comments from stakeholders on URCA's proposals.

⁶ "URCA 2016 Draft Annual Plan" (ECS xx/201513/2054 issued 31 December 2015) and available at <http://www.urbahamas.bs/download/038195400.pdf>.

1.2 Legal and Policy Framework for this Preliminary Determination

The Bahamas' electronic communications industry is governed by the Comms Act, which regulates the supply of electronic communications services. URCA's role is to implement, monitor and enforce this legislation. URCA has wide-ranging powers, especially as it relates to SMP licensees, to enforce the provisions of the Comms Act.

URCA's power to conduct this review is derived from section 5(d) of the Comms Act, requiring URCA to “... *introduce or amend a significant regulatory measure*”. As this preliminary determination constitutes amendments to a significant regulatory measure (i.e., ECS 06/2014), URCA must adhere to all relevant principles of the Comms Act, in particular:

- The objectives of the electronic communications sector policy as specified under section 4 of the Comms Act; and
- Guidelines for regulation and other measures as per section 5(a), (b), (c) and (d) of the said Act.

Section 99 of the Comms Act sets out the procedures for issuing this Preliminary Determination. In particular, sections 99(1)(a) and (b) of the Comms Act collectively prescribe that if, on its own motion, URCA has reason to believe that a determination is necessary, it may make determinations relating to (amongst other things):

- any obligations on a licensee regarding the terms or conditions of any licence, including obligations in licence conditions and regulations;
- any activity set out in the Comms Act; and
- where the Comms Act provides for URCA to “determine” or “to make determinations” as is the case under sections 39(1) and 116(2).

Pursuant to section 99(2) of the Comms Act, in making any determination, URCA has to consult persons with sufficient interest under section 11 of the Comms Act and provide written reasons for its determination. Section 11(2) of the Comms Act prescribes that regulatory instruments referred to in section 13(2) of the Comms Act, shall be considered regulatory measures of public significance and under section 11(1), URCA shall afford persons with sufficient interest a reasonable opportunity to comment on URCA's proposals. Under section 13(1) of the Comms Act:

“A regulatory and other measure is likely to be of public significance if it relates to electronic communications services or networks and can lead to one or more of the following —

- (a) involve a major change in the activities carried on by URCA under this Act;*
- (b) a significant impact on persons carrying on activities in those areas where URCA has functions under this Act; and*
- (c) a significant impact on the general public in The Bahamas.*

URCA is satisfied that its review and proposed amendments to the Retail Pricing Rules for Non Price Capped Services relate to electronic communications services or networks and are likely to involve a major

change in the activities carried on by URCA under the Act and have a significant impact on the general public in The Bahamas.

As the amendments outlined in this document are matters of public significance, URCA is therefore issuing this Preliminary Determination under the terms of section 100, section 8(1)(d), (e) and (m) and section 5 of the Comms Act. This document constitutes URCA's formal notice to major stakeholders of URCA's intention to amend the current RPR for Non Price Capped Services.

1.3 How to Respond to this Preliminary Determination

Responses to this Preliminary determination should be submitted to URCA by 5:00 p.m. on 8 July, 2016. Interested parties will then have the opportunity to further comment on responses made by other respondents by 5 p.m. on 29 July, 2016.

Persons may send their written responses or comments to the Director of Policy and Regulation, either:

- By hand, to URCA's office at Frederick House, Frederick Street, Nassau; or
- By mail to P.O. Box N-4860, Nassau, Bahamas; or
- By fax, to (242) 393-0153; or
- By email, to info@urcabahamas.bs.

URCA reserves the right to make all responses available to the public by posting responses on its website at www.urcabahamas.bs. If a response is marked confidential, reasons should be given to facilitate evaluation by URCA of the request for confidentiality. URCA may publish or refrain from publishing any document or submission, at its sole discretion.

1.4 Remainder of this Document

The remainder of this document is structured as follows:

- Section 2 – URCA's Preliminary Determination;
- Section 3 -- Background to this Preliminary Determination;
- Section 4 -- Potential Market Failures and Regulatory Options Available;
- Section 5 – Proposed Modifications to Rules for Non Price Capped Services; and
- Section 6 – Conclusion and Next Steps.

2. URCA's Preliminary Determination

This Section sets out the Determination which URCA proposes to make, subject to URCA's consideration and review of any representations and objections made by interested parties. URCA's Determination will be addressed to, and will be binding upon, the licensees referred to in the Determination:

"WHEREAS,

(i) section 5 of the Communications Act, 2009 mandates that "All policy measures, decisions and ... to take effect in the electronic communications sector in The Bahamas shall be made with a view to implementing the electronic policy objectives ...";

(ii) the overall objectives of the Electronic Communications Sector Policy as specified at section 4 of the Communications Act, 2009 are to further "the interests of consumers by promoting competition" and "the interests of persons in The Bahamas in relation to the electronic communications sector";

(iii) section 99(1)(a) and (b) of the Communications Act, 2009 empowers URCA to make determinations;

(iv) the Government at Paragraph 89 of the Electronic Communications Sector Policy (or the ECS Policy) has directed URCA "to ensure that all regulatory measures necessary for cellular liberalisation, are met and fulfilled in accordance with the timetable set for such liberalisation", and;

(v) pursuant to section 116 and sections 4, 5 and 40 of the Comms Act, URCA issued respectively:

- ECS 11/2010, on "Obligations Imposed on Operators with Significant Market Power (SMP) Final Decision", in which URCA set out its list of retail products that are found to be in the high-level SMP markets and the list of specific *ex ante* obligations to which the SMP operators must adhere; and

- ECS 15/2010 "Regulation of Retail Prices for SMP Operators – Rules", in which URCA detailed the rules by which SMP operators must abide by in order to remain compliant with any retail price obligation. These Rules were later revised and superseded by ECS 06/2014 "Regulation of Retail Prices for SMP Operators – Rules".

(vi) URCA, having conducted a review of the regulatory options available to address potential market failures that may occur relating to Non Price Capped Services in a competitive environment at Section 4 below, considered that it is appropriate and proportionate to make certain amendments to the Retail Pricing Rules (ECS 06/2014).

URCA hereby determines as follows:

Table 1 below summarises URCA's proposal for how the scope of the Retail Pricing Rules (ECS 06/2014) should be amended for Non Price Capped Services, following the introduction of cellular mobile competition. This shows that:

- URCA proposes to only require pre-approval for the withdrawal/discontinuation of all Price Regulated Services, changes to non-price terms and conditions of all Price Regulated Services and permanent price changes to Multi-product Bundles.
- Multi-product Bundles will remain subject to the current replicability requirement.
- All remaining changes to Non Price Capped Services will only require prior notification by the SMP operator to URCA.
- The SMP operator has to submit a bi-annual margin squeeze test if the SMP operator is required to offer a wholesale product for a service.

Table 1: Proposed pre-approval and notification requirements for Non Price Capped Services

	Proposed Amended Rules
Permanent offers	
Permanent price changes (increase/decrease) to a standalone Non Price Capped Service	Notification*
Introduction of new standalone Non Price Capped Service	Notification*
Introduction of new product bundle containing Non Price Capped Services only (“Price Capped Bundles”)	Notification*
Permanent price change to a Non Price Capped Bundle	Notification*
Withdrawal/discontinuation of all Price Regulated Services	Pre-approval
Introduction of a new bundle containing at least one but not exclusively Non Price Capped Services (“Multi-product Bundle”)	Pre-approval (Replicability requirement)
Permanent price change to a Multi-product Bundle	Pre-approval (Replicability requirement)
Promotions	
Short term Promotions of (standalone or bundled) Non Price Capped Services and Multi-product Bundles	Notification*
Full Length Promotions of (standalone or bundled) Non Price Capped Services and Multi-product Bundles	Notification*
Non-price terms	
Changes to non-price terms and conditions of a (single or bundled) Non Price Capped Service and Multi-product Bundles	Pre-approval

*As part of the notification process, the SMP operator must make a declaration that the proposed price change is not predatory or that it does not result in a margin squeeze.

3. Background to this Preliminary Determination

URCA's Initial 2010 SMP Assessment

Under the terms of section 116 of the Comms Act, BTC has been presumed to be an SMP provider in the high level markets for mobile (voice and data) and fixed voice telephony services.⁷ Consequentially, in 2010, URCA (after consultation) imposed specific *ex-ante* or preventative obligations on BTC.⁸ The specific *ex-ante* obligations imposed on BTC were:⁹

- the removal of all charging on incoming international calls to mobile customers (by 30 June 2010);
- to allow for the resale of all of BTC's retail broadband products on a white-label basis, including access to the transmission network and access to the internet on reasonable commercial terms;
- geographic averaging of prices for BTC's retail broadband product;
- the annual submission of audited regulatory financial statements and cost accounting information to URCA;¹⁰
- the publication of a Reference Access Interconnection Offer, inclusive of cost based charging for call termination and other access products; and
- a requirement to comply with a new retail price regulation ("*Regulation of Retail Prices for SMP Operators – Rules*" (RPR) - ECS 06/2014 formerly ECS 10/2010¹¹).

The same section of the Comms Act also applies a presumption of SMP against CBL in the high level markets for data and high speed connectivity and Pay TV services. As part of the same process in which URCA imposed the above obligations on BTC, it also imposed a number of obligations on CBL. These included a requirement for CBL's SuperBasic service to comply with the same RPR.

URCA undertook an extensive review of the Retail Pricing Rules in 2013, including a public consultation. This resulted in amendments to the Rules being adopted in a new version of the RPR (ECS 06/2014). These form the basis of this determination.

⁷ Section 116(1) and Schedule 4 of the Comms Act.

⁸See URCA's Final Decision on "*Obligations Imposed on Operators with SMP*" (ECS 11/2010) available at <http://www.urcabahamas.bs/download/065805100.pdf>.

⁹These obligations are supplemental to the non-discriminatory obligations of the Communications Act, 2009 (section 40(4)(a)) and BTC's IOL, in particular Condition 34. Note that section 40(4)(a) along with Condition 34 are non-discretionary obligations in that once an operator is designated or presumed SMP, that operator must remain compliant with these non-discretionary requirements on an ongoing basis.

¹⁰Based on guidelines established by URCA in "*Final Guidelines - Accounting Separation and Cost Accounting Guidelines for BTC*" (ECS 12/2010) available at <http://www.urcabahamas.bs/download/071386200.pdf>. The obligation covers other services provided by BTC including fixed access and voice telephony.

¹¹ECS 06/2014 is available at <http://www.urcabahamas.bs/download/072527200.pdf>.

As noted earlier, the RPR constitutes an *ex-ante* tariff approval and pre-notification regime designed to protect consumers from monopolistic or excessive pricing, and to also prevent SMP licensees engaging in anti-competitive pricing. The scheme sets out, amongst others, the informational requirements and approval processes and timeframes relating to:

- Permanent Price Changes (increases/decreases) for “Single Price Regulated Services”¹² and “Price Regulated Bundles”¹³;
- Temporary Price Changes, also known as special offers or discounts (“Special Promotions”);
- the introduction of new Single Price Regulated Services or new Price Regulated Bundles;
- changes to non-price terms and conditions for Single Price Regulated Services or Price Regulated Bundles;
- the withdrawal and discontinuation of Single Price Regulated Services or Price Regulated Bundles; and
- price changes for Price Regulated Services which form part of the Universal Service Obligations (USO).

As such, BTC’s retail mobile services have been regulated under these Rules, as have its retail fixed telephony products and CBL’s SuperBasic TV service.

2014 SMP Assessment and Resulting Remedies

On 2 December 2014, URCA published its Final Determination on the “*Assessment of Significant Market Power (SMP) in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009*” (ECS 14/2014). As a result of this market review, one of the remedies imposed by URCA was price cap regulation on BTC’s fixed voice services and CBL’s pay TV services and retail broadband services. This price cap regime will replace the obligation of the aforementioned services being subject to an *ex-ante* approval process (including compliance with relevant economic tests) of the current Rules, with a notification requirement instead being imposed for certain categories of price changes.¹⁴¹⁵ For this reason, URCA must update the current Retail Pricing Rules (ECS 06/2014) in light of this new pricing regime. URCA is therefore intending to hold in the near future a separate consultation on the design and implementation of the price cap regime and the associated changes to the Retail Pricing Rules for Price-capped Services.

¹² Price Regulated Services offered on a standalone basis.

¹³ Any bundle, tied product or package that includes at least one Price Regulated Service.

¹⁴ Full Length Promotions, permanent single price changes, the introduction of new (single price) services, and the introduction of new bundled services offerings that consist exclusively of price-capped services.

¹⁵ URCA notes that CBL’s broadband services are currently not subject to the retail pricing rules.

The impact of mobile liberalisation and a need for a further review of the Rules for Non Price Capped Services

Without any further changes to the Rules for Non Price Capped Services, the existing Rules in ECS 06/2014 would continue to apply to BTC's mobile voice and mobile data services (and any future Non Price Capped Services).

However, URCA recognises that the liberalisation of the mobile sector could have an impact on the market. At the moment, it is unclear how the market will evolve and how the licensees will compete with each other. Therefore, URCA considers it premature to conduct a full review of the mobile market at this time and believes there will still be a need, at least for an interim period, for continued regulatory oversight of BTC's mobile service pricing. Nevertheless, URCA believes it is appropriate to now review how the existing Rules apply to Non Price Capped Services, including mobile services, to reflect the forthcoming change in the structure of the market. This is because URCA believes that the competitive concerns that could arise in the market now that a second licence has been issued differ from those identified at the time of ECS 06/2014.

Non Price Capped Services

Furthermore, while this consultation on the revisions to the current Retail Pricing Rules has been precipitated in part from the liberalization of the mobile sector, the revised Rules resulting from this consultation will, for the avoidance of doubt, also apply to all standalone Price Regulated Services and bundles that are not subject to price cap regulation (i.e., all Non Price Capped Services). However, presently, only BTC's mobile services fall under this category.

Given the above, this consultation focuses on the continued need to regulate Non Price Capped Services, with a specific focus on BTC's mobile services. Any proposed changes discussed here in relation to mobile services are intended to be an interim measure until URCA conducts a full market review of mobile services in the near future.

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?

4. Potential Market Failures and Regulatory Options Available

In this Section, URCA sets out the competition concerns that could arise in the provision of Non Price Capped Services and its review of the options available to remedy these concerns. In so doing, it focuses on the mobile sector, given that BTC's mobile services will initially be the only Non Price Capped Service.

4.1 Potential Market Failures

Due to BTC's position as the sole provider of mobile services, one of URCA's principal concern in its 2010 SMP Determination was BTC's ability to set excessive prices, through pricing significantly above the competitive level. However, with the advent of a second cellular mobile operator, URCA considers it appropriate to now review whether the framework of the current RPR relating to excessive pricing and anti-competitive behaviour is still relevant and fit for purpose for the regulation of BTC's mobile services.

Therefore in this Section URCA presents its views on the extent to which excessive pricing, predatory pricing, margin squeeze, undue discrimination, and abusive product bundling of services could arise as competition concerns as the second mobile operator enters the market.

Excessive Pricing

Excessive pricing refers to charging prices that are significantly higher than what would normally occur in a competitive market. During BTC's period of exclusivity in the mobile market, URCA considered excessive pricing to be a potential market failure due to the absence of competition in the market..

With the expiration of BTC's exclusivity and the imminent entry of a second mobile cellular operator, URCA considers that BTC may have limited ability to set excessive prices. This is because if it were to do so, its customers would likely switch to the alternative mobile cellular operator. International experience, in jurisdictions such as Jamaica and across Europe¹⁶, for example, has shown that the presence of competition can deter SMP operators from engaging in excessive pricing. For this reason, URCA considers that the risk of excessive pricing might not be a significant concern going forward. URCA therefore concludes, preliminarily, that *ex-ante* regulation is no longer needed to protect consumers from excessive or monopolistic pricing. URCA notes that this thinking is in line with the approach taken by regulators around the world when competition is introduced in mobile markets that were previously regulated.

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

Predatory Pricing

¹⁶ Republic of Albania Competition Authority (2007) Decision No. 61 "Some recommendations concerning the mobile telephony market". Albania. Available at: <http://www.caa.gov.al/uploads/decisions/English-Decision%2061.pdf>.

Predatory pricing (or predation) is the act of a firm with SMP pricing products at a level below cost with the ultimate goal of forcing existing competitors from the market or discouraging potential competitors from entering the market and so enabling it to make, in the long-term, greater returns. An SMP operator is in a position to engage in predatory pricing because its dominance would allow it to incur losses or forego profits in the short term while still being in a financial position to remain in the market. An SMP operator is likely to have sufficient funds (whether from capital reserves or from earning economic profits on other services) to sustain below-cost pricing for as long as necessary in order to defend its market share, increase its market share or cause market foreclosure. Once competition has exited the market or been weakened sufficiently, the SMP operator can then raise prices above a competitive level (i.e., engage in excessive pricing), so causing consumer harm.

During BTC's period of mobile exclusivity, the Rules required BTC to declare and demonstrate that temporary (Special Promotion) and permanent price changes would not foreclose the market to competitive entry. As such, the Rules required BTC to perform an *ex-ante* predation test for Full Length Promotions and permanent price changes in addition to providing a signed declaration from an authorized officer to confirm that the proposed price was not anti-competitive. URCA considered that this requirement was a necessary preventative measure to discourage BTC from engaging in predatory pricing ahead of a second cellular mobile operator's entry to the market.

With the advent of competition in the mobile market, URCA does not consider that predatory pricing will be a significant concern. This is because the second mobile cellular operator should become well-placed to compete with BTC on price and, given its investment, is unlikely to be forced from the market. As such, any potential predatory behaviour would be unlikely to be profitable for BTC in the short or long term.

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

Margin Squeeze

A margin squeeze can occur where a vertically integrated SMP operator with market power upstream provides a wholesale service to alternative operators which they use to compete against the SMP operator in the retail market.

In a margin squeeze, the SMP operator sets its retail and wholesale prices at levels which do not give sufficient margin for other downstream rivals to compete. That is, the downstream rival is unable to match the vertically integrated operator's retail pricing, given the charges it pays for the wholesale input and its own (equally efficient level of) retail costs. As such, this can result in the alternative operator being "squeezed" out of the market.

Prior to the expiration of BTC's mobile exclusivity, margin squeeze was not a major concern for URCA, because there were no downstream rivals in the retail mobile market who were reliant on an upstream BTC input. Although the Rules required BTC to perform a margin squeeze test on an *ex-ante* basis, it was not a central consideration to URCA's review of BTC's price changes in the mobile market.

In a liberalised mobile market, margin squeeze could be more of a concern. This is because BTC will now have to provide wholesale call and mobile messaging termination services to an alternative operator at a regulated price. The risk of margin squeeze is heightened when national roaming is used by the alternative operator, as this represents a further wholesale input that the alternative operator may need to purchase from BTC.¹⁷ Due to these risks among others, URCA will regulate both the mobile termination rate and the national roaming rate, thereby providing a practical constraint on BTC's ability to use margin squeeze to harm competition.

For these reasons, URCA does not consider margin squeeze to be a significant concern going forward.

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

Undue Discrimination

Undue Discrimination refers to a situation where an SMP operator unduly treats customers differently in an unfair manner. A common form of discrimination as it pertains to mobile cellular operators is the practice of on-net/off-net pricing. This entails an SMP operator charging subscribers lower rates to make calls or send SMS messages on its own network than they are charged to make calls or send SMS messages to an alternative operator's network. Whilst lower prices may lead to consumer benefits, this practice could also reduce incentives for customers of a larger service provider to switch to an alternative, small provider (as, all else equal, the benefits from such price differentials are greatest when a customer is connected to a network with a large customer base).

URCA addressed this potential market failure in the pre-liberalisation era by requiring BTC to make a declaration and to demonstrate that its proposed price change did not result in undue discrimination, particularly any form of margin squeeze or anti-competitive on-net/off-net pricing. An analysis of potential undue discrimination required an assessment on a case-by-case basis taking due account of BTC's justifications when charging different prices to similar customers. In particular, the Rules considered that on-net/off-net price differentials were 'undue' if any differences in prices were not justified by the underlying costs of providing these services.

With the advent of competition, URCA still considers undue discrimination to be a potential market failure because of the prevalence of this practice (applying off-net/on-net pricing differentials) in other mobile markets. Indeed, experience in other jurisdictions shows this with, for example, investigations of such pricing behaviour conducted by regulators and competition authorities in New Zealand, Papua New Guinea, Chile, Peru, Bermuda, Colombia, Qatar and Kenya.

¹⁷ URCA is consulting separately on this matter in *"Provision of National Roaming Services on the Cellular Mobile Networks of The Bahamas Telecommunications Ltd. in The Bahamas to the Second Cellular Mobile Operator for an Interim Period - Preliminary Determination and Draft Order"* (ECS 10/2016) available at <http://www.urbahamas.bs/download/072284600.pdf>.

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

Abusive Product Bundling of Services

As an SMP operator, BTC may be incentivized to engage in a form of product bundling that could result in the foreclosure or distortion of the cellular mobile market. Product bundling is considered to be abusive when, among other factors:

- the bundle's components are not available separately to consumers (i.e., pure bundling); or
- the bundle cannot be replicated by an equally efficient alternative operators.

Presently, the Rules state that if an SMP operator wishes to offer a product bundle that includes at least one Price Regulated Service (i.e., a "Price Regulated Bundle") then it must demonstrate to URCA in its price application that the product bundle can be technically and economically replicated by an alternative operator. In general, "technically replicable" means that other licenced operators can offer the same product bundle either by using their own end-to-end network infrastructure or by purchasing regulated wholesale access to the SMP operator's network. The term "economically replicable" means that an alternative operator is able to offer the bundle at the same prices as the SMP operator and also the components of the bundle are not provided on anti-competitive terms, given the costs of providing the services individually. These replicability requirements aim to prevent BTC (or any other SMP licensee in the retail markets) from leveraging their market power from an SMP market into another market.

If the proposed bundle is technically replicable then BTC must demonstrate that the price of the bundle as a whole is at least equal to the cost of providing the bundle, including BTC's downstream costs of providing the retail services and the cost of the wholesale services that an alternative operator must purchase in order to provide the relevant retail services.

Where a proposed bundle cannot be technically replicated then BTC must demonstrate the bundle can be objectively justified so the benefits to consumers significantly outweigh any potential consumer harm that the proposed bundle can create. Furthermore, BTC must demonstrate that the 'incremental' price of each service in the bundle is at least equal to the incremental cost of that service, including its downstream costs of providing the retail services and the cost of the wholesale service that an alternative licensed operator must purchase in order to provide the relevant services. If a bundle is not demonstrated to be either technically or economically replicable, the bundle is not approved by URCA.

In URCA's view, the potential for BTC to use its SMP position to engage in anti-competitive bundling remains a significant concern going forward, given the range of product markets in which BTC operates. As such, it concludes that the rules on bundled products should remain in some form. In then determining the appropriate form, URCA has distinguished between two types of product bundles:

- **Mobile-only product bundles** which only contain BTC’s mobile services (i.e., a product bundle containing BTC’s mobile voice and mobile data services or mobile access and call services). As all retail mobile services fall into the same product market, URCA does not consider this to be a product bundle which would allow BTC to leverage SMP between markets. Thus whilst BTC will still have to comply with margin squeeze tests on mobile-only bundles / packages, it will not be required to meet additional “bundling tests” for these products.
- **Multi-product bundles** which contain both mobile and non-mobile services offered by BTC. These bundles include multi-product bundles that contain BTC’s mobile services and at least one Non Price Regulated service (i.e., a product bundle containing BTC’s mobile voice and/or mobile data services with its fixed broadband¹⁸ and/or Pay TV services, for example). For these bundles, there is a risk of BTC leveraging its market power from its SMP market (i.e., the mobile market) into the market for the other services included in the bundle. Multi-product bundles also include those that contain only mobile services and other Price Regulated services offered by BTC, such as BTC’s fixed voice services. These bundles are characterised by BTC having SMP in all markets relevant to the bundles. As such, there is no risk of it leveraging market power into any non-SMP markets based on these product bundles. However, it could use the bundles to unfairly strengthen its position in a market, particularly if competition is emerging in such a market. Given the risks involved with both types of multi-product bundles, URCA considers it appropriate to continue to apply the replicability tests to these bundles.

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

4.2 Review of Regulatory Options

To recap, URCA is of the view that margin squeeze, undue discrimination and abusive product bundling of services could give rise to competition concerns (or market failures) in the post-liberalisation era; at least in the initial years where the second mobile cellular operator is establishing itself in the market and BTC is likely to retain a position of market power.

Below, URCA identifies a range of regulatory options to address these concerns and presents its preferred choice from these options. URCA reiterates that the chosen option would, for mobile services, be an interim measure until a market review on mobile services is conducted. Should any other services subsequently fall into the category of Non Price Capped Services, URCA will consider at that time if the option chosen as part of this process remains relevant and whether the same competition concerns arise with the new Non Price Capped Services as have arisen with BTC’s mobile services. As such, this could lead to further changes to the Rules.

Regulatory Options Considered

¹⁸ This relates to geographic market 1 (i.e., New Providence, Grand Bahama, Abaco and some parts of Eleuthera) where BTC does not have SMP in high-speed internet services.

Given the potential economic concerns identified, URCA has considered the following regulatory options:

- **Maintain the existing pre-approval process under the Retail Pricing Rules ('Do Nothing' Option)**
– As mentioned above, current Rules require BTC to either notify URCA (in the case of Short Term Promotions)¹⁹ or seek URCA's approval when introducing a Full Length Promotion²⁰, new price regulated products and bundles or when proposing to change (increase or decrease) prices for existing products and bundles. Under this option, URCA would maintain the existing Rules "as is". This means maintaining the current notification and pre-approval process along with the requirements for BTC to declare and demonstrate compliance with the relevant *ex-ante* competition tests set out in the Rules. These obligations supplement the standard/non-discretionary obligations under Conditions 34, 35, and 36 of BTC's IOL and section 40(4) of the Comms Act. However, URCA considers that maintaining the existing RPR might be outside the international norm and inconsistent with the section 5 principles of the Comms Act as the existing Rules were designed for a monopoly market and may not be suitable and proportionate with advent of competition.
- **Modified Retail Pricing Rules** - Instead of the current pre-approval process and requirements under the RPR, URCA could impose a modified form of the Rules. Under this option, URCA could relax some of the *ex-ante* obligations contained in the Rules by placing greater reliance on market forces and other means as a way of achieving the objectives of the Comms Act. This approach would reduce the regulatory burden on all parties and allow BTC greater pricing flexibility while maintaining an appropriate level of *ex-ante* intervention to prevent undesirable conduct by BTC. Such modifications could include:
 - URCA placing greater reliance on its *ex-post* investigative powers to address one or more of the anti-competitive concerns identified under Section 3.1 above.
 - A shift to a requirement for BTC to notify URCA of price changes, rather than seek its approval, for some or all types of price change.

URCA considers that this approach could be suitable as it would provide BTC more flexibility to make pricing decisions, while enabling URCA to closely monitor price changes and their impact on competition and customers. These obligations supplement the standard/non-discretionary obligations under Conditions 34, 35, and 36 of BTC's IOL and section 40(4) of the Comms Act.

- **Complete Removal of the Retail Pricing Rules (i.e., Light-touch approach or 'no *ex-ante* regulation')** – Under this option, BTC would have complete *ex-ante* commercial flexibility to change its prices and non-price terms and conditions for existing Non Price Capped Services (i.e., BTC mobile services) and bundles, introduce new price regulated services and bundles, and

¹⁹ With a duration of no more than seven consecutive calendar days or seven non-consecutive calendar days within a period of fourteen calendar days.

²⁰ With a duration of more than one calendar week or more than seven non-consecutive days within a period of fourteen calendar days.

discontinue/withdraw existing price regulated services and bundles, and introduce all forms of special promotions. No notification and/or pre-approval for price changes, including price regulated bundles and withdrawal and discontinuation of services and bundles, would be required. As a provider with SMP, however, BTC would have an obligation to ensure its pricing did not contravene URCA's Competition Guidelines.

Instead, URCA would then rely on:

- market forces as the means of achieving the electronic communications policy objectives;
- the standard (i.e., non-market specific) obligations in BTC's IOL (Conditions 34, 35 and 36) and section 40(4) of the Comms Act; and
- its *ex-post* investigative powers to address any anti-competitive concerns arising from BTC's dominance in the mobile market.

The table below summarizes the main advantages and disadvantages for each of the regulatory options discussed above.

Table 2: Main advantages and disadvantages of regulatory options considered

Option	Advantages	Disadvantages	Application
<p>Current Retail Pricing Rules (in addition to standard/non-discretionary obligations)</p>	<ul style="list-style-type: none"> Price approval requirements can be focused on market failure concerns only (i.e. price decreases in the case of margin squeeze or predation and/or bundled products in case of unfair tying), whilst SMP operator retains full pricing flexibility on all other price changes. Regulatory burden limited to price approval applications (i.e. no regular reporting requirements). 	<ul style="list-style-type: none"> Time & resource intensive approval process on both the SMP operator and the regulator. Price approval requirement restricts SMP operator’s ability to respond to a change in market conditions. Delays due to the potential need to consult publicly in the case of price increase. 	<p>Most suitable in areas where there is little to no competition and competition is not likely to emerge. The focus is on ensuring the SMP operator does not abuse its dominant position in the market by engaging in excessive pricing or predatory pricing /margin squeeze through price decreases (where competition may emerge).</p>
<p>Modified Pricing Rules (in addition to standard/non-discretionary obligations)</p>	<ul style="list-style-type: none"> Less restrictions on SMP operators than current RPR allowing SMP operator to respond to market conditions more quickly. Lower administrative requirements compared to current RPR. Some potential anticompetitive behaviour can be addressed more quickly than relying exclusively on ex-post powers. 	<ul style="list-style-type: none"> More time & resource intensive than a light-touch regulatory approach. Some restrictions on SMP operator’s ability to respond to a change in market conditions. 	<p>Most suitable in markets where competition is likely to emerge going forward (but is not yet sufficiently developed)</p>
<p>Complete Removal of Ex-ante Pricing Rules (i.e., Light-touch regulatory approach) (Standard/non-discriminatory obligations only).</p>	<ul style="list-style-type: none"> No set-up or compliance costs beyond those associated with standard/ non-discriminatory obligations. Full pricing flexibility for SMP operator(s), subject to non-discrimination requirements and ex-post competition requirements. Less time & resource intensive 	<ul style="list-style-type: none"> Takes significant amount of time to stop anti-competitive behaviour. Poses greater risk to burgeoning competition. 	<p>Most suitable in markets where competition is developed or competition is likely to emerge going forward (but is not yet sufficiently developed)</p>

URCA's Preferred Regulatory Option

Based on the relative merits of each regulatory option considered under Section 3.2 above, URCA is of the preliminary view that *ex-ante* regulation of Non-Price Capped Services through Option 2 (Modified Retail Pricing Rules) is the most appropriate and proportionate approach to take forward. Moreover, it is in line with the approach taken by regulators around the world when competition is introduced in mobile markets that were previously regulated. In URCA's view, this approach is the option that is most compatible with the statutory framework for regulation and competition in The Bahamas and in light of the current situation in the mobile market. Thus, URCA considers that this approach will help to promote the overall policy objectives specified in section 4 of the Comms Act, including inter alia to:

“further the interests of consumers by promoting competition [...] in particular [...] to encourage, promote and enforce sustainable competition.”

Furthermore, URCA must adhere to section 5 of the Comms Act which states that:

“all policy measures, decisions and laws to take effect in the electronic communications sector in The Bahamas shall be made with a view to implementing the electronic communications policy objectives” and “shall be efficient and proportionate to their purpose and introduced in a manner that is transparent, fair and non-discriminatory.”

In URCA's view, applying Modified Pricing Rules will comply with the section 5 principles of the Comms Act more than the other two approaches outlined in Table 2 above.

In particular, URCA considers that maintaining the existing Rules (i.e., the “do nothing” approach) would be unnecessarily burdensome on both URCA and market participants. Further, given the entry of competition into the mobile sector, maintaining the current Rules would be disproportionate, could stifle innovation in pricing and may not result in an efficient outcome for key stakeholders. On the other hand, a complete removal of the pricing Rules (i.e., the light-touch regulatory approach) would 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. Given this, URCA considers that applying a set of Modified Rules will strike a reasonable balance between BTC's urging for greater flexibility to make commercial decisions in a potentially dynamic environment and the need for URCA to maintain a minimum level of protection against anti-competitive behaviour.

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?

5. Proposed Modifications to Rules for Non Price Capped Services

This Section outlines the nature and scope of URCA's proposed modifications to the Rules for Non Price Capped Services, the specific changes URCA proposes to make to these Rules and URCA's rationale for adopting the Modified Retail Pricing Rules (presented in Annex 1).

5.1 Ex-Ante versus Ex-post Competition Tests

To recap, under the current Rules, relevant economic tests for Non Price Capped Services would be carried out on an *ex-ante* basis as part of the pre-approval process (except for Short Term Promotions). However, in the context of mobile liberalization, URCA proposes to place greater reliance on its *ex-post* investigative powers to address anti-competitive concerns. URCA sets out its arguments for such changes below.

Predatory Pricing

As set out in the preceding Section, URCA does not consider that there is likely to be a significant risk of BTC engaging in predatory pricing following mobile liberalisation. Therefore, URCA proposes to no longer require BTC to submit an *ex-ante* predation test for price decreases as they relate to Full Length Promotions and Permanent Price Changes for mobile services. Instead, URCA proposes to rely on its *ex-post* competition powers to address any allegations of predation that may arise.

Margin Squeeze

As set out in the preceding Section, URCA does not consider margin squeeze to be a significant concern. URCA therefore proposes that BTC no longer be required to submit an *ex-ante* margin squeeze test as part of any pre-approval process for price reductions of retail mobile services, as they relate to Permanent Price Changes and Special Promotions, for Single Price Regulated Services (i.e., are not multi-product bundles).

However, while URCA will not require BTC to perform a margin squeeze test as a part of each price reduction or new service application, URCA will require BTC to submit information relating to the prices of its mobile services and associated costs on a bi-annual basis. URCA envisages that this requirement will continue until effective competition has emerged in this market and BTC is no longer considered SMP. The exact details pertaining to the information that will be required from BTC is outlined in Section 5.5 and of this consultation and Annex 4 of the revised Rules.

Undue Discrimination

Preliminarily, URCA is satisfied that the non-discrimination obligations in section 40(4) of the Comms Act and Condition 34 in BTC's IOL are sufficient to prevent BTC engaging in such anti-competitive undue discrimination in the mobile market. Given this, URCA will no longer require BTC to demonstrate on an *ex-ante* basis that a price change or any new price for retail mobile services does not unduly discriminate against specific customers. However, BTC will still be expected to comply with its non-discrimination obligations by virtue of its licence and the Comms Act.

It is important to note that in Section 3.3.6 of URCA's 2014 SMP Assessment²¹, URCA determined that its *ex-post* competition powers would be sufficient to address any undue price discrimination for price capped services (e.g., BTC's retail fixed offerings). URCA's justification was that imposing such *ex-ante* obligations would unduly restrict BTC's commercial pricing decisions. In keeping with the principle of non-discrimination (section 5 of the Comms Act), URCA is adopting a similar approach with respect to Non Price Capped Services (e.g., BTC's retail mobile offerings) and will therefore rely on *ex-post* powers to address undue price discrimination.

Abusive Product Bundling of Services

URCA accepts that bundling of services can be welfare-enhancing for customers. However, URCA considers that bundling poses the greatest risk of an SMP mobile cellular operator engaging in anti-competitive conduct. Therefore, for the reasons stated in Section 4.1, URCA intends to maintain the current *ex-ante* requirements set out in the Rules as they pertain to the bundling of BTC's mobile services with non-mobile services. This means that BTC will still be required to submit to URCA an application to launch 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. For the avoidance of doubt, bundles consisting solely of BTC's mobile services will no longer require pre-approval by URCA and therefore will not be subject to a replicability test.

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

5.2 Notification Requirements for Non Price Capped Services

Further to the above, URCA proposes to make other amendments to the current Rules. In part these amendments are a consequence of the proposed treatment of *ex-ante* competition tests discussed above. In particular, with the removal of *ex-ante* testing the need for pre-approval is less important.

In the context of the foregoing, URCA proposes that where a relevant competition test is not required on an *ex-ante* basis, the pre-approval process would be replaced by a need for the SMP operator to only notify URCA of its intended price change or new service. URCA will then rely on its *ex-post* competition powers where it believes the SMP operator's pricing may be anti-competitive. Therefore, in the context of its mobile services, BTC is no longer required to seek URCA's approval in respect of:

- permanent price changes (increases/decreases) for mobile services (see Part E and Part G of the amended Rules);
- introducing new mobile services and mobile-only product bundles (see Part F and Part G of the amended Rules);

- price changes for mobile-only product bundles (see Part G of the amended Rules); and
- all forms of Special Promotions for mobile services and Bundles, including multi-product bundles (see Part H of the amended Rules).

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

5.3 Pre-Approval Requirements for Non Price Capped Services

Further to the notification requirements discussed above, URCA is proposing to maintain pre-approval in relation to:

- new Multi-Product Bundles containing at least one mobile service(see Part G of the amended Rules);
- price changes for Multi-Product Bundles containing at least one mobile service (see Part G of the amended Rules);
- changes in non-price terms and conditions of all Non Price Capped Services where the effective price paid by customers is changed (see Part I of the amended Rules); and
- the withdrawal/discontinuation of all Non Price Capped Services and all bundles (see Part J of the amended Rules).

This is because such changes still pose the biggest risk to competition and customers due to BTC’s dominance, despite mobile liberalization, and hence require continued *ex-ante* regulatory oversight.

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?

A summary of the URCA’s key proposed changes to treatment of retail mobile services under the Rules is outlined in Tables 3 and 4 below.

Table 3: Anti-Competitive Tests Before and After Amendments to the Rules – Mobile Services

	Current Rules	Proposed Modified Rules
Predation Test	Performed on an <i>ex-ante</i> basis and applies to all forms of price changes including Full Length Promotions	URCA will rely on <i>ex-post</i> competition powers but SMP operator must still make a declaration that the proposed

		price change is not predatory on an ex-ante basis.
Margin Squeeze Test	Performed as a part of each price change or new service application and applies to all forms of price changes including Full Length Promotions	URCA will rely on <i>ex post</i> competition powers but SMP operator still required to make a declaration on an ex-ante basis that proposed price change does not result in a margin squeeze. In addition, BTC must submit information to URCA every six months to demonstrate that it has not engaged in margin squeeze. URCA.
Abusive Bundling	<i>Ex-ante</i> replicability test	<i>Ex-ante</i> replicability test
Price Discrimination	SMP operator must demonstrate and declare non-discrimination on an ex-ante basis	URCA will rely on <i>ex-post</i> competition powers only. SMP operator must declare that the proposed price change does not result in undue discrimination.

Table 4: Pre-approval and Notification Requirements for Non Price Capped Services

	Current	Proposed
Short Term Promotion (Standalone Services and Bundles)	Notification	Notification
Full Length Promotion (Standalone Services and Bundles)	Pre-approval	Notification (90-day cool-off period still applies)
Withdrawal and Discontinuation (Standalone Services and Bundles)	Pre-approval	Pre-approval
Permanent Single Price Change (increase/decrease)	Pre-approval	Notification
Introduction of New Services (Standalone and Bundles)	Pre-approval	Notification

Introduction of New Mobile Only bundles	Pre-approval (i.e. replicability test)	Notification
Permanent Price Changes to Mobile Only Bundles	Pre-approval (i.e. replicability test)	Notification
Introduction of New Multi Product Bundles	Pre-approval (i.e. replicability test)	Pre-approval
Permanent Price Changes to Multi Product Bundles	Pre-approval (i.e. replicability test)	Pre-approval
Changes to non-price terms and conditions of any service or product bundle	Pre-approval	Pre-approval

5.4 Notification Timeframe

In view of the changes outlined above relating to services subject to notification, URCA further proposes to amend a part of the process for notification. In the current Rules, the SMP operator must notify URCA in writing of the proposed price change at least five (5) business days before the intended launch date. URCA must then confirm receipt of the SMP operator’s notification at least three (3) business days before the planned launch date. If URCA does not respond within this timescale, the SMP operator may proceed exactly as set out in its notification.

URCA now proposes to amend the process whereas URCA will not be required to confirm receipt of the SMP operator’s notification. The SMP operator can then proceed exactly as set out in its notification.

For the avoidance of doubt, if the SMP operator launches a new service or changes the price of an existing service covered by these Rules, but fails to notify URCA within the specified timeframe, then URCA will undertake enforcement action. Furthermore, nothing in these Rules prevents URCA from directing the SMP operator not to proceed or to withdraw a new service or price change as set out in the notification, if, in URCA’s view, the new service or price change runs counter to the Licensee’s obligations in the Comms Act, its Operating Licence or what is required of the SMP operator in the Rules.

The existing timeframes as it relates to services subject to pre-approval still apply.

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

5.5 Bi-annual Margin Squeeze Test for Non Price Capped Services

Although URCA is not significantly concerned about margin squeeze, URCA still considers that it is important to monitor closely the market and identify any instances of anti-competitive behaviour. It will therefore require the SMP operator to submit to it, every six months, information that enables URCA to assess whether any margin squeeze is taking place for Non Price Capped 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.

The requirements and process for the bi-annual margin squeeze test is detailed in Annex 4 of the Rules.

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?

5 Conclusion and Next Steps

This document sets out URCA's rationale on its proposed amendments to the Retail Pricing Rules as they pertain to Non Price Capped Services, following the liberalization of the mobile telephone market in The Bahamas. As price cap regulation applies to BTC's fixed telephony and CBL's broadband and Pay TV services, these proposals would apply to Price Regulated Services and bundles which are not subject to price cap regulation (i.e., predominantly BTC's mobile services). The amended Rules are presented in Annex 1.

URCA invites interested parties to comment on this first round of consultation by responding to the consultation questions set out in this document by 8 July, 2016. Interested parties will then have the opportunity to comment on submissions from the first round of consultation and any other matter pertaining to the preliminary determination by 29 July, 2016.

URCA will review all written responses to the determination and issue a Final Determination on the consultation as well as a revised version of the Retail Pricing Rules pertaining to Non Price Capped Services. The final revised version of the Rules will supersede ECS 06/2014 as it relates to non price-capped services and will come into force upon the commercial launch of the second mobile operator. Until such time, the existing Rules (ECS 06/2014) will apply.

URCA looks forward to comments on the consultation and draft revised Rules.