

September 30, 2014



Mr. Stephen Bereaux
Director Policy & Regulation
Utilities Regulation & Competition Authority
UBS Annex Building
East Bay Street
Nassau, Bahamas

Dear Mr. Bereaux,

Re: Consultation Document ECS 10/2014: CBL's submission on the Preliminary Determination on the Assessment of the Significant Market Power in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009

Pursuant to the **Consultation Document ECS 10/2014: CBL's submission on the Preliminary Determination on the Assessment of the Significant Market Power in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009** issued by the Utilities Regulation & Competition Authority (URCA), The Bahamas Telecommunications Company Limited (BTC) hereby submits its response.

Yours sincerely,

A handwritten signature in black ink, appearing to read "P. Seymour", with a long horizontal flourish extending to the right.

Pauline E. Seymour
Vice President, Legal, Regulatory & Carrier Services
& Company Secretary

PES/ksw

Encl.



The Bahamas Telecommunications Company
Limited

BTC's Response To

**CBL's submission on the Preliminary
Determination on the Assessment of the
Significant Market Power in the Electronic
Communications Sector in The Bahamas
under Section 39(1) of the Communications
Act, 2009**

(ECS 10/2014)

Legal and Regulatory
September 30, 2014

Introduction

The Bahamas Telecommunications Company Limited (BTC) welcomes the opportunity to provide its observations on the responses to the Public Consultation on the Utilities Regulation and Competition Authority's (URCA) Preliminary Determination on the Assessment of Significant Market Power in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009 and to make further comments.

BTC has noted Cable Bahamas Limited's (CBL) response to URCA's Preliminary Determination. Which focuses on the two markets in which CBL has the greatest commercial interest – broadband and pay TV. URCA has proposed that in both of these markets CBL has significant market power (SMP) and should be subject to a number of regulatory remedies, including a price cap. CBL argues that the broadband market is competitive, and the pay TV market prospectively competitive, and hence that ex-ante regulation is not necessary.

CBL bases its arguments on a report compiled by Analysys Mason and on customer surveys. These documents form part of CBL's response, but have not been made publicly available. Hence BTC cannot comment on the validity or otherwise of data from the referenced sources, and URCA must make its own evaluation of such sources.

Three criteria test

CBL makes a considerable play that URCA should have undertaken the three criteria test at the start of the market definition process. BTC is surprised by this assertion, as there are a number of examples where this test follows the market definition process rather than precedes it¹. BTC considers that logically the test should be done once the market has been properly defined. However the outcome of the test should be the same whether it is carried out before or after

¹ For example, see OFCOM. Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30. Consultation paper, 25 September 2013.

the process of market definition. BTC does agree that URCA should give more consideration to the nature of competition and how it will develop in The Bahamas (hence BTC's comments in its Response on the nature of competition). However BTC comes to a different conclusion about the results of the three criteria test when applied to the retail broadband and pay TV markets to those set out by CBL.

Retail broadband

CBL argues that URCA has failed to apply the three criteria test to establish whether this market should be regulated. It considers that the barriers to entry are low, and that competition is already effective between CBL and BTC.

While BTC agrees that broadband services provided over fixed wireless access should be included in this market, it considers that barriers to entry are still significant. It is necessary to build a network of masts, develop a market presence and invest in operational and billing systems before a wireless service can be provided. Providing a broadband service over a fixed network needs even more upfront investment. BTC notes that Last Mile Communications, trading as Bahamas WiMax has recently entered the market with broadband services for residential and business customers, but that this has taken about three years since the formation of the venture. This demonstrates that CBL's assessment of the barriers to entry is optimistic.

CBL also argues that while the price of its broadband services have not changed over recent years, the speed provided to customers has increased substantially, hence the ability to provide a lower price per megabit per second. This, along with a comparison with other countries, is cited as evidence that the market is competitive. BTC does not believe that these points provide sufficient evidence that the broadband market is competitive. CBL's economies of scale and scope may mean that CBL should be cutting prices, not maintaining them, and CBL's pricing policy in the past does not guarantee that it will not raise prices in the future. Figures 10 and 11 (pages 63 and 64) in URCA's Preliminary

Determination suggest that CBL has a market share of around 70 – 80%, which is a dominant position by any measure. A price cap is an acceptable way of constraining CBL's SMP.

BTC reminds URCA that it must have regard to the nature of competition in The Bahamas. As BTC stated in its response, competition for electronic communications services will be primarily between the providers of the PSTN and cable television networks competing for customers on packages rather than on individual services. Hence regulation needs to be broad and light touch, rather than detailed and intrusive, and this approach needs to be reflected in the design of the price caps.

BTC's response on URCA's proposals for the retail broadband market called for the market to be separated into business and residential markets. We expect that when URCA carries out such an analysis, the business market may be shown to have lower barriers to entry and to be more competitive than the residential market. If this is the case, the business market may not be subject to regulation, but the operator with SMP in the residential market should be subject to regulatory remedies, such as a price cap. In the future the residential broadband market may become competitive, depending on the success of alternative providers, such as Bahamas WiMax, but it is too soon to come to that conclusion. Hence BTC considers that CBL's call for the deregulation of the residential broadband market is premature, but that URCA should review the business broadband market carefully.

Pay TV

CBL argues that URCA should not extend regulation beyond the current management of its basic pay TV package on the grounds that there is no evidence that its pricing is excessive and that the market is prospectively competitive. We note that CBL produces evidence showing that it has added extra digital channels to its offerings while maintaining the price at the same level (Figure 13, page 49), but no other information, such as international

comparisons, to justify its contention that its pricing is reasonable (which is in contrast to the extensive international evidence produced for its case on retail broadband).

CBL's assertion that the pay TV market is trending towards competition is optimistic. Even if BTC does enter the IPTV market, it is unlikely to achieve a significant market share for some years. CBL's Figure 10 (page 26) demonstrates that none of the four countries shown on the graph had gained a market share greater than 10% two years after entry. Hence BTC sees no need for URCA to conduct another market review into the pay TV market within the next 18 months, as suggested by CBL (page 53). BTC considers that the suggestion that regulation should be removed on all pay TV services when CBL's market share is at 85% (page 54) to be self-serving and unjustifiable. BTC notes that in many jurisdictions a market share of 40% is evidence of SMP, and this should apply to the pay TV market as to any other electronic communications market.

Remedies

CBL argues that it would not be appropriate for URCA to introduce retail price caps for its broadband and pay TV services. However, CBL does not appear to object to the proposed price cap for BTC in its core fixed telephony market. This is not a logical position to hold given the similarities between these markets in terms of structure and competitive development. It is BTC's view that price caps provide a reasonable transition measure towards full deregulation in fixed retail markets, with the aim of providing protection to consumers against excessive pricing while providing predictability and incentives to improve efficiency to operators. This applies equally in the telephony, broadband and TV markets, and it would be an example of inconsistency of regulatory intervention if SMP in one of these markets would result in a price cap, and SMP in another market would not.

Consultation process

In paragraph 2.6.3 (pages 58 – 61) CBL calls for a more interactive consultation process in the next stages of this market review. BTC supports this request as it considers that there are fundamental divergences of views between the operators and URCA on how the markets under review should be regulated. In particular, BTC considers that the markets should be differentiated between business and residential customers, and CBL considers that the retail broadband and the pay TV markets should not be subject to additional regulation. BTC supports the proposal for a Position Paper from URCA that sets out its initial reactions to the operators' comments and, at the same time, its proposals for a price cap. Following further comments from the operators, URCA would be in a position to propose the future regulatory requirements with greater confidence and support from the operators. BTC considers that detailed discussions about the design of the price cap between URCA and the operators subject to a price cap would help to ensure that the eventual price cap mechanism is both workable and effective.

<u>Reservation of Rights</u>

BTC has addressed the issues presented by the preliminary determination and responses thereto and reserves the right to comment further on all issues and states categorically that the decision not to respond to any issue raised on this Consultation in whole or in part does not necessarily indicate agreement in whole or in part with URCA's position; nor does any position taken by BTC in this consultation mean a waiver of any of BTC's rights in any way. BTC expressly reserves all its rights.

Legal and Regulatory Division

The Bahamas Telecommunications Company Limited (BTC)

September 30, 2014