

The Bahamas Telecommunications Company Ltd.

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February 3, 2012

Mrs. Kathleen Riviere-Smith
Director of Policy and Regulation
Utilities Regulation and Competition Authority
UBS Annex Building
East Bay Street
Nassau, The Bahamas

Dear Mrs. Riviere-Smith,

Re: BTC's Response to URCA's Public Consultation Document on Proposals for Publication of Accounting Separation and Cost Accounting Information (ECS 21/2011)

BTC herein submits its response to the Consultation documents at caption.

BTC looks forward in due course to URCA's determination.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Felicity L. Johnson', followed by a long horizontal line extending to the right.

Felicity L. Johnson
Senior Vice President of Legal, Regulatory & Carrier Services
& Company Secretary

Enclosure: (1)



The Bahamas Telecommunications Company Limited:

Response To

Public Consultation on the Utilities Regulation and
Competition Authority (URCA) proposals for Publication of
Accounting Separation and Cost Accounting Information

Consultation Document
ECS 21/2011

Legal, Regulatory and
Carrier Services Division
February 3, 2012

Executive Summary

The Bahamas Telecommunications Company Limited (BTC) welcomes the opportunity to respond to this Public Consultation on the proposals of the Utilities Regulation and Competition Authority (URCA) on the publication of accounting separation and cost accounting information (hereafter referred to as regulatory (separated) accounts) by Licensees determined or presumed to have Significant Market Power (SMP) in relevant economic markets.

It is BTC's position that publication of its regulatory (separated) accounts will not achieve the result intended by URCA, which URCA has stated to be: ***"...enhancing the availability of relevant and reliable information on a timely basis that is understandable by all stakeholders and can be effectively used by interested parties to make informed decisions..."*** The publication has no significant merits for the industry or the public at large and moreover, publication of separated accounts in relation to BTC's mobile business will serve no regulatory purpose while BTC maintains a mobile monopoly.

Currently, URCA is able to adequately carry out its ex post investigations on a case by case basis in the absence of publication of data that BTC deems commercially sensitive. BTC is firmly of the view, that URCA's proposals for the Publication of Accounting Separation and Cost Accounting Information is disproportionate and not fit for purpose. Other Licensed Operators (OLOs) and interested parties cannot be expected to monitor for anti competitive behavior by way of the publication of BTC's separated accounts.

BTC also has serious reservations with the methodology and logic through which URCA has come to the preliminary conclusion that publication is merited. BTC is of the view that URCA's benchmarking exercise does not meet international standards of due care. Based on BTC's detailed evaluation of URCA's benchmarking sample (which is discussed in this Response), the company is of the opinion that the study rejects, or at best fails to support, URCA's preliminary

conclusion. If URCA were to act upon this conclusion, and require BTC to publish its regulatory (separated) accounts, such action would impose substantial costs without any significant benefits by way of the advancement and development of the Electronic Communications Sector.

BTC is of the view that, except for a flawed benchmarking study, URCA has not presented any arguments as to why publication would be merited in The Bahamas. In addition, URCA has ignored its own analysis presented in its 2010 Decision on Obligations imposed on Operators with Significant Market Power which concluded that publication would have limited value. BTC is of the opinion that URCA has not acted in accordance with its obligations under the Act, in particular Section 40(3) (a) which requires URCA to ensure that any mandated cost recovery mechanism or pricing methodology promotes efficiency, sustainable competition and maximizes consumer benefits.

BTC has concerns that any publication requirement would risk putting confidential information in the public domain with limited benefits associated with such publication. BTC is not satisfied that URCA has taken sufficiently into account its obligation under Section 40(2) of the Act, which requires URCA to consider the regulatory burden and the benefits to consumers and find an appropriate balance. Moreover, having regard to Section 40(3) of the Act, BTC submits that the publication of regulatory (separated) accounts will not promote efficiency and is disproportionate as the costs and other risks will outweigh the benefits.

It is for this reason that many regulators, including a large number in the EU, have decided not to require publication of regulatory accounts, but rather to rely on a system of audits by independent auditors, to ensure that the accounts are reliable and in line with relevant guidelines. Such a system, if properly executed, will install confidence in the robustness of the regulatory accounts while ensuring that detailed reviews of confidential information would be conducted by a

competent independent regulator and not by the direct competitors of SMP operators.

BTC proposes that URCA introduce an approach similar to that adopted in a number of EU countries whereby the review of an operator's confidential information is carried out by the regulator and not by competitors and BTC has set out the principles of such a system in this response. BTC would also like to highlight that the financial information in its regulatory accounts should be weighed relative to its universal service obligation, which is likely to put a significant burden on the company given the operational circumstances in The Bahamas. This is highly relevant because new entrants are likely to cherry pick entry into the more densely populated areas to provide service. Therefore, by using BTC's geographically averaged costs from its separated accounts, users would be presented with a misleading picture of BTC's cost base in these competitive and prospectively competitive areas. BTC therefore urges URCA to look into this issue again to ensure that the company's regulatory (separated) accounts are used in a proper manner. BTC will now set out its answers to the questions posed by URCA.

BTC's Answers to URCA's Consultation Questions

Question #1:

Do you agree with URCA's proposal that an SMP licensee should be required to publish the following components of its regulatory (separated) accounts, namely:

- Profit and loss statements (consolidated by line of business);
- Mean capital employed statement (consolidated by line of business);
- Reconciliation (with statutory accounts) statements;
- Independent auditor's opinion.
- Detailed Cost Allocation Methodology (explaining inter alia, details of cost drivers, attributions and/or ABC modeling, where applicable); and
- A Responsibility Statement signed by the Chief Financial Officer?

Please detail your responses in full and include, where possible, evidence and experiences to support your respective position. If you disagree, please provide reasons.

BTC **does not agree** with URCA's proposal. It is clearly inappropriate for BTC's mobile retail business to be separately presented while BTC has a monopoly in the provision of mobile services, i.e. there is no need for the monitoring of anti-competitive behavior in the mobile business when competition is not allowed to enter the market. In addition, it is BTC's position that URCA has failed to demonstrate that publication of its regulatory accounts in any form brings any benefit to the industry, and BTC takes the position that it does not. URCA's own analysis (as outlined in Table 1 of this Response) shows that the non-publication of data from the separated accounts will not prevent the Authority from achieving its objectives.

The company sets out other reasons for objecting to the publication of **separated accounts for any sub-market** below.

URCA's benchmarking study is inconclusive and flawed

URCA appears to have come to the preliminary conclusion that publication of consolidated separated accounts at this stage of the liberalization cycle is merited wholly on the basis of its benchmark study. BTC is firmly of the view that this benchmark study is incomplete, leading, misleadingly structured, and that the results are at best inconclusive. URCA also does not consider the reasons why publication has not happened in many countries in its sample or elsewhere in the EU, for example in Germany, Austria, Denmark, Hungary, Bulgaria, the Czech Republic, Finland, Portugal, Slovenia and Sweden. This is particularly curious given that URCA's own benchmarks show that, out of the twenty nine (29) countries surveyed, only ten (10), or less than 35 percent, of the countries sampled, required the publication of regulatory (separated) accounts. Among the twenty one (21) small and/or less developed countries identified in URCA's benchmark study, only five (5) countries, or less than twenty five (25) percent, require public disclosure (Guernsey, Jersey, Malta, New Zealand and Jamaica). In the case of Jamaica, there is a requirement to publish the regulatory accounts as per the Office of Utility Regulation (OUR) Determination Notice (May 2006), but this requirement has not been implemented to date.

URCA states in this Consultation Paper that: ***"...the majority of EU member countries that have implemented a requirement for separated accounts have also required the publication of those separated accounts..."*** The references which URCA uses to support this argument include France, Guernsey, Jersey, Italy, Ireland, Malta and the United Kingdom. This is a misleading and factually inaccurate conclusion. URCA does not present a comprehensive overview of EU practice, but rather a selective and misleading sample of experience in nine (9) out of twenty seven (27) EU countries. For example, the vast majority of more recently liberalized EU countries that impose obligations to prepare separated accounts, like Poland, Romania, Hungary,

Slovenia, the Czech Republic and Bulgaria, do not require publication, yet these countries are excluded from the sample. On the other hand, Guernsey and Jersey (which are not part of the EU) are included. The EU experience shows that some countries require publication and that some countries are strongly opposed to publication (for example Germany and Austria), and for URCA to present the EU publication experience as supporting URCA' s intentions to require publication is, in BTC's view, misleading. In fact, the balance of evidence even in the EU (in the rest of the world publication requirements are very rare) rejects publication as best practice. EU experience, if anything, shows that confidence in the accuracy, timeliness and appropriateness of regulatory accounts needs to be assured before publication is considered, and that, even so, many countries have decided against publication.

BTC suggests that a fundamental flaw in the benchmarking approach presented by URCA is that no attempt was made to construct a properly defined peer group of countries for The Bahamas as the starting point for the benchmark exercise. This is a crucial first step without which any outcome should be treated with extreme caution. It is BTC's position that a properly structured benchmark would give reasons for the inclusion or rejection of the countries with which The Bahamas is to be compared. BTC's own review of the benchmarked countries shows that publication of regulatory (separated) accounts is the exception rather than the rule. For example, there are no countries in the English speaking Caribbean, to date, that have published regulatory (separated) accounts. This includes Jamaica, Barbados and the ECTEL countries of the Commonwealth of Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines. BTC would suggest that this finding should carry more weight in the benchmark exercise because the state of development of competition in The Bahamas is much closer to that in other Caribbean markets than in most EU countries. In this context it is relevant that the URCA analysis indicates that there is no accounting separation/cost accounting obligation in Barbados. This is inaccurate. In Barbados, LIME is required to submit separated accounts to the

regulator but, on a confidential basis. Again, this supports the notion that the accepted regional practice is **not** requiring publication even where separated accounts have been developed.

URCA has not conducted a detailed analysis of the relative merits of publication and has ignored its own previous analysis

Even on URCA's own evidence, the benchmarking exercise results in a mixed picture. In the face of this, it is BTC's view that URCA should reasonably be expected to produce objectively justified reasons why this additional, and controversial, regulatory measure should be introduced in The Bahamas now or at all. International best practice suggests that regulatory obligations should **not** be imposed unless the benefits clearly outweigh the costs, and BTC does not consider that URCA has discharged this obligation. It is BTC's view, that publication of regulatory (separated) accounts may harm the interests of operators with SMP, and will not advance the interest of the public.

URCA purports to deal with the reasons for publication in the opening language of Paragraph 4 of ECS 21/2011, but this text contains nothing to explain why publication is in the public interest. URCA merely says, without further justification that:

“URCA is of the view that the publication of regulatory accounts is central to the attainment of the public policy objectives articulated in s.4 of the Comms Act, specifically the promotion of investment and innovation, and the sustainability of competition in the Electronic Communications Sector (ECS) in The Bahamas.”

No reasons are given for this decision and, in BTC's view, this decision is not justified either as a result of the flawed and inconclusive benchmarking exercise or otherwise.

BTC is also concerned that URCA may not have reviewed the analysis it performed less than two (2) years ago, which concluded that publication of accounts was not merited at that stage. It is highly informative to review URCA's reasoning at that time, which is presented below in Table 1.

In URCA's Final Decision: "Obligations imposed on Operators with Significant Market Power", URCA stated that the objectives of accounting separation can be achieved without the requirement to publish accounts. URCA's views on the impact (or lack thereof) of the publication of the separated accounts relative to its objectives are outlined in Table 1 below.

Table 1: URCA's views on whether the individual objectives of accounting separation can be achieved without the publication of separated accounts¹

Supporting retail tariff regulation	Retail tariffs are subject to URCA's approval and only subject to public consultation in limited circumstances (i.e., price increases and withdrawals / discontinuation of price regulated services). Publication of Accounting Separation data will therefore have limited bearing on meeting this objective.
Transparency and non-discrimination between upstream and downstream business units	Publishing Accounting Separation data will allow other operators, as well as URCA, to assess whether the SMP operator is engaging in price discrimination. However, in reality, the complex nature of the accounts and cost allocation methodologies may mean that URCA is

¹ Obligations imposed on operators with Significant Market Power (SMP) Final Decision (ECS 11/2010), April 22, 2010

	<p>best placed to review non-discrimination. It will therefore still be possible to meet the objective without publishing the accounts.</p>
<p>Supporting cost based wholesale charges</p>	<p>URCA will play a leading role in reviewing proposed RAIO charges and ensuring they reflect principles of cost orientation, based on Accounting Separation results. Without publication of all Accounting Separation information (including documentation), other operators will not be able to conduct a detailed review of how charges were derived. However, they will still be in a position to comment on the absolute level of charges.</p>
<p>Overcoming information asymmetry between regulator and operator</p>	<p>This objective seeks to close the information asymmetry between the regulator and the SMP operator. It is therefore not affected by the decision on whether to publish the separated accounts.</p>
<p>Audit independence and objectivity</p>	<p>This is concerned with ensuring an independent and objective review of the SMP operator's cost accounting information. This should be met by audit requirements imposed on Accounting Separation statements and is not affected by whether accounts are published.</p>

As outlined in the Final Decision: "Obligations imposed on Operators with SMP (ECS 11/2010)", URCA took the position at that time that, ***'... [it] does not believe that publishing the separated accounts is critical to it achieving the***

objectives of the Accounting Separation obligation.² URCA further concluded that: ***'...at this stage of the development of the market, it would be reasonable not to require BTC and CBL to publish their Accounting Separation statements for 2009.'***

BTC submits that the circumstances described by URCA have not changed materially and that to change URCA's position on the basis of a flawed and inconclusive benchmarking analysis would undermine predictability of regulation in the market and with it, confidence in the consistency and fairness of regulation. The analysis made earlier by URCA still holds and BTC does not see any evidence presented by URCA that would require URCA to change its original stated position.

Other limitations to the use of the separated accounts

In BTC's opinion the analysis of information presented in its separated accounts, whether publicly available or otherwise, has limited merit without further investigation of the costs incurred by BTC to provide universal service in The Bahamas. The operational circumstances in The Bahamas are such that this obligation is likely to result in significant costs to BTC, raising the average costs incurred to provide services like fixed telephony. This is highly relevant because new entrants are likely to focus on the most attractive areas to provide service and by using geographically averaged costs from the separated accounts users would be presented with a misleading picture of BTC's cost base in competitive and prospectively competitive areas. In addition, a universal service obligation that is only funded by BTC would put the company at a competitive disadvantage. BTC would therefore urge URCA to review the net costs associated with universal service as part of the use of the separated accounts.

² *ibid.* page 12

BTC has significant reservations about the use of BTC's regulatory (separated) accounts as a basis for testing and monitoring anti-competitive behavior. BTC is currently going through a rigorous cost reduction program and the results of this program are not expected to be reflected fully in the separated accounts for a significant period of time. Until this occurs, published information is likely to be misleading. In this context, BTC is concerned that regulatory (separated) accounts prepared by CBL could be misleading if transfer values for transactions between CBL and its associated companies SRG and Caribbean Crossings Limited are not subject to review.

There are better ways to monitor the behavior of SMP operators

URCA states that: “***...preparation and submission to URCA of separated accounts by SMP licensees provides URCA with credible information that can be used to assess whether competitive market outcomes are realizable and to effectively monitor and detect potential behaviors that are unfavorable to competition***”. In its consultation document, URCA also concludes that “***...The publication of those accounts as proposed in this consultation document will enhance the availability of relevant and reliable information on a timely basis that is understandable by all stakeholders and can be effectively used by interested parties to make informed decisions.***” However, URCA fails to explain why this should be so, relying instead only on the mixed and unconvincing benchmarking exercise. In URCA's submission, a case has not been made out that the requirement for publication is proportionate. BTC notes that:

- under Section 40(2) of the Act, URCA must consider the regulatory burden and the benefits to consumers, and then find an appropriate balance; and
- under Section 40(3) of the Act, URCA is **not** obliged to require publication of BTC's regulatory accounts and, in its consultation document, URCA

failed to make the case that such publication would promote efficiency and sustainable competition and maximize consumer benefits.

BTC agrees that the separated accounts could provide a helpful tool **for URCA** and its advisors, but recent ex post investigations conducted by URCA have shown that a properly conducted analysis requires a deep review of commercially sensitive information on the basis of imputation tests on individual services and promotions, which requires the review of information that is not present in the separated accounts. This is suggesting that access to the separated accounts alone has limited value to assess anti-competitive behavior and the end-result of the proposal to publish would therefore be that commercially sensitive information ends up in the public domain while delivering limited value in the monitoring of SMP operators.

BTC has therefore approached a number of regulators in the EU where publication of regulatory accounts is not mandated (including Spain, The Netherlands and Austria) to assess whether URCA can achieve its objective of engendering competition in the absence of the requirement of publishing BTC's regulatory (separated) accounts. The feedback that BTC has received is that, in most countries where publication has not been mandated, it has been a result of a view of regulators that the costs to the SMP operators (of publishing information that is potentially detrimental to their commercial interests) outweighs the benefits, i.e. transparency, promotion of competition and non-discrimination to the industry. In these countries, monitoring of SMP operators is ensured by a process of audits (for example an audit of the accounts followed by a peer review conducted by a second accounting firm) and reviews by the regulator and BTC would propose a review of the merits of such a process. For example, in the Netherlands during the time of non-publication of the regulatory accounts there was an elaborate system of accountancy checks: KPN's own accountant was obliged to publicly report whether or not the rules had been respected (which guarantees the best in-depth knowledge of the accounts), and a second

independent accountant performs a peer review on this accountant's work (which guarantees independence). BTC proposes that such a system be implemented in The Bahamas. The results of these audits, together with a detailed description of the accounting separation methodology can then be published. This system would provide confidence in the accounts and the monitoring system of SMP operators (by URCA) while not requiring commercially sensitive information to reach the public domain.

Question #2:

Do you agree with URCA's proposal that an SMP licensee be required to publish its regulatory (separated) accounts on its website within eight months after the end of the relevant financial year?

Please detail your responses in full and include, where possible, evidence and experiences to support your respective position. If you disagree, please provide reasons.

BTC **disagrees** with the publication of its regulatory (separated) accounts.

URCA should take account of the stage of market development in The Bahamas (relatively recent market liberalization) and market players' experience of separated accounts (which is very limited). Many of the countries in the EU did not immediately impose publication obligations after market liberalization; for example The Netherlands and Belgium did not impose such a requirement until approximately fifteen (15) years after market liberalization and in the Netherlands the obligation to even develop separated accounts has since been removed entirely. The Netherlands is the country with the highest overall score in the 2009 ECTA Scorecard (highlighted by URCA) and BTC therefore takes the position that a further review of the situation there is merited. Publication of separated

accounts for cellular mobile services serves no regulatory purpose while BTC maintains a legal monopoly for the provision of this service.

Question #3:

Do you agree or disagree with URCA's proposal that an SMP licensee be required to publish and maintain its annual regulatory (separated) accounts on its website, in the prescribed format, for a period of not less than three years?

Please detail your responses in full and include, where possible, evidence and experiences to support your respective position. If you disagree, please provide reasons.

BTC maintains that its separated accounts **should not be published**. The company is firmly of the view that this position is consistent with what URCA has outlined in its 2010 Final Decision on Obligations imposed on operators with SMP. The non publication of BTC's separated accounts will not prevent the Authority from meeting its five (5) regulatory objectives as outlined in its 2010 Final Decision.

Question #4:

Should SMP licensees be required to provide evidence to support a contention that publication of regulatory accounts would harm legitimate commercial interests? If so, what sort of evidence should be required?

Please detail your responses in full and include, where possible, evidence and experiences to support your respective position. If you disagree, please provide reasons.

BTC is firmly of the view that publication of information contained in the separated accounts could provide competitors with sensitive market information and have the potential to harm BTC's commercial interests.

BTC recognizes that the onus of demonstrating that publication of particular data would harm the commercial interests of a SMP licensee should rightly fall on that licensee. However, what is confidential should be considered in light of the nature of the data in question and of the prevailing circumstances at the time of disclosure. It is neither safe, nor fair on an SMP operator for URCA to limit the reasons justifying non-disclosure in advance. The Australian regulator ACMA puts it well³: ***"...It is often difficult to determine whether public disclosure of regulatory information will in fact determine commercial interests...The impact of disclosure will likely depend on circumstances in particular markets."***

The Comms Act does not address the issue in any detail, but Section 14 (1) provides that ***"...URCA shall not be required to publish or otherwise divulge information that in its view would be commercially confidential."*** While this does not go so far as to say that URCA may NOT publish such information, it points to the conclusion that commercially confidential information should **not** be published in these or other circumstances.

Without prejudice to BTC's stated objections to publication, BTC considers that the following provision would be fairer and more in line with international best practice:

"If BTC considers that the publication of any information contained in the separated accounts is likely to prejudice the commercial position of BTC it may, at the time of submission of the information, notify URCA of the particular information which it

³ As cited in Paragraph 5 of URCA's Consultation Document ECS 21/2011.

requests should not be published, giving specific reasons why it reasonably considers that disclosure of such information could reasonably be expected to cause material economic damage to BTC or otherwise materially prejudice BTC's rights or legitimate interests.

The notification shall be supported by a certificate in writing from the Financial Director of BTC or from a lawyer employed by BTC to that effect.

URCA shall review BTC's request and shall determine whether:

(a) publication of the information concerned is in the public interest on the basis that it makes a material contribution to the creation of a transparent, open and competitive market; and

(b) the advantages of publication outweigh any harm to BTC; and

(c) the information should be published in full, excluded from publication or published in a summarised or redacted form."

Question #5:

Do you agree with URCA's proposal that the independent auditors' opinion should include:

- The conclusion of the auditor;
- All identified irregularities;
- Recommendation made by the auditor; and
- A detail description of the verification methodology utilized by the auditor.
-

Please detail your responses in full and include, where possible, evidence and experiences to support your respective position. If you disagree, please provide reasons.

Without prejudice to BTC's stated objections to publication, BTC has no objections to this proposal. It is BTC's recommendation that this approach should be tailored to ensure public confidence in the accounts without their publication.

Conclusion

In conclusion, it is BTC's position that it has set out a reasonable and suitable approach to the problem identified by URCA, namely that public confidence in the reliability and usefulness of the separated accounts is important to the functioning of the regulatory system in The Bahamas. BTC maintains that the publication of its separated accounts would put BTC at a disadvantage to its competitors without meeting URCA's stated goals. When compared to URCA's stated objectives, the requirement for BTC to publish its regulatory (separated) accounts is disproportionate and not fit for purpose. BTC therefore proposes an alternative system, where the monitoring of confidential information is the responsibility of URCA as the independent regulator of the industry, while confidence in the reliability and robustness of the accounts is safeguarded

through a series of audits by independent auditors, the results of which could be published. BTC trusts that URCA will review the relative costs and benefits of such an approach and support its introduction.

Reservation of Rights

BTC has addressed the issues but 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, Regulatory and Carrier Services Division
The Bahamas Telecommunications Company Limited (BTC)
February 3, 2012