



The Bahamas Telecommunications Company Limited:

Response To

Position Paper: Regarding Types of Obligations on
The Bahamas Telecommunications Company Limited and
Cable Bahamas Limited under s.116(3) of the
Communications Act, 2009

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Executive Summary

Pursuant to Section 116 (1) of the Communications Act, the interim presumption of Significant Market Power (SMP) is imposed on the Bahamas Telecommunications Company Limited (BTC) and Cable Bahamas Limited (CBL) for two high level markets respectively. BTC is presumed to have SMP in the provision of fixed voice, mobile voice and mobile data services, while CBL is presumed to have SMP in the provision of high speed data services and connectivity, and pay-television services. URCA has indicated that the interim market review process and the imposition of ex ante regulation on operators presumed to have SMP are intended to support the 12-24 month transition period of liberalization of the communications sector.

BTC welcomes URCA's publication of the methodology employed for the standard versus interim market review process as outlined in Table 1, Section 2.1 of The Position Paper. Further, BTC has noted URCA's publication of the methodology employed in the interim review process to determine which of the products provided by the licensee with presumed SMP should remain in each high level SMP market and be subject to ex ante regulation. URCA's methodology appears broadly in line with that used by many other regulatory authorities, although the interim methodology is a more limited version.

Conspicuously absent from URCA's Position Paper is its current thinking on Retail Price Regulation, more specifically the filing of initial tariffs/process, tariffs/price changes, special offers or discounts ('special promotions') and the bundling of price regulated services. BTC in its 17th December 2009 response to the Preliminary Determination on SMP Obligations pointed out that the notification period for price increases and decreases was particularly onerous. BTC also expressed concern with the data demands associated with requests for price changes for price regulated services. BTC is particularly concerned with URCA's current thinking in these areas, given the emphasis of a rules based approach to retail price regulation in the Position Paper. The incentive based price cap regulation as a general rule provides greater flexibility relative to tariff/price changes compared to the rules based approach to retail regulation.

BTC has noted that due to what URCA regards as a lack of precedent, URCA is planning to remove certain obligations on CBL whilst continuing to impose them on BTC – despite in many cases BTC having a lower market share than CBL. This is not consistent with the principle of proportionality and technology neutrality where market reviews and remedies are not based on the underlying technology used to provide the service and should be revisited by URCA. BTC has provided further discussion on this issue in the section of the document titled "Country Specific Regulations for CBL" in which BTC points out that URCA's reasoning is not sustainable in the face of the facts determined in an objective analysis.

BTC in its review of the methodological steps applied (Section 2.1.2) to determine which products should remain in each high level SMP market and be subject to ex ante regulation, has found that there are some areas of the methodology that are unclear or not consistent with what is seen elsewhere. These areas of the methodology are highlighted below:

- In step 3 of the methodical steps employed in the interim review process, URCA repeats the SMP analysis for wholesale products, having first performed the analysis on retail markets. However, BTC notes that URCA then fails to return to the retail markets to assess the impact of wholesale markets on retail. The requirement to provide access to wholesale services may remove 'non transitory barriers to entry' in the retail market and therefore negate the need for regulation.
- URCA applies the SSNIP test over 12 to 24 month period. Is the deadline due to URCA plans to reassess the markets within 24 months?
- URCA does not refer to indirect constraints. With new entrants coming into the retail markets, it is possible that the increased retail competition may indirectly constrain wholesale products. It is important that this is considered within the standard market review process and BTC encourage URCA to update Table 1 to reflect these constraints.
- URCA does not sufficiently consider joint dominance. Under a European review of joint dominance, it is unlikely that the tests for joint dominance would have been passed and more likely CBL would have been found singly dominant.
- URCA has not adequately considered common pricing constraints that are created due to geographically averaged pricing policies.

BTC in its review of Section 3 of the Position Paper: new information and the revision of the analysis of products in the high level SMP markets has focused its comments on those areas where there is a significant departure from what is outlined in URCA's Preliminary Determination when compared to its Position Paper.

In Section 3.1.6 of the Position Paper, BTC supports the exclusion of bitstream access for broadband from the SMP market and its replacement with the requirement to provide 'Access to the Broadband Network and Services'. Similarly, the same conditions have been imposed on CBL. BTC, however, points out the inconsistency in the application of regulatory remedies on BTC and CBL in URCA's decision that it will not require CBL to produce a RAIO for wholesale broadband access when it has SMP in broadband. BTC is concerned that such a decision by URCA will not itself engender competition nor secure its sustainability. BTC calls for the publication by URCA of final guidelines on the RAIO in the interest of regulatory certainty

BTC has noted that URCA has removed wholesale access to content distribution from the list of SMP markets, with the rationale that CBL does not have exclusive access to content and that new operators could negotiate directly with content providers. This does not accord with Ofcom's recently completed pay-tv market review that shows that access to 'must have' content like sports channels is essential to enter and operate profitably in this space. Access to content is a barrier to entry.

Finally, a review of URCA's methodology (Section 2.1.2 of the Position Paper) suggests that pay television services provided by CBL, at both the retail and wholesale level should remain in the high level SMP market. Applying the three (3) criteria test to determine whether products are

susceptible to ex ante regulation places retail and wholesale pay television in the high level SMP market. Notwithstanding the fact that URCA's own analysis suggests that pay television should be included in the high level SMP market, URCA has excluded this service.

Introduction

BTC welcomes the opportunity to respond to URCA's Position Paper – Regarding Types of Obligations on The Bahamas Telecommunications Company Limited (BTC) and Cable Bahamas Limited (CBL). BTC's review of URCA's Position Paper has revealed that, there is a departure in some instances from the proposed obligations as outlined in URCA's Preliminary Determination when compared to the Position Paper. In areas where there is a departure, BTC is obliged to take the additional step of assessing the proposed changes on the business going forward.

The publication of the methodology employed in URCA's Position Paper increases the overall transparency in URCA's approach to the analysis. When the methodology is applied consistently and correctly across all market players, it should lead to fairness in the designation of SMP and the application of ex ante regulation. However, despite what appears to be URCA's good intentions, BTC has concerns that the methodology has not been applied consistently to CBL and BTC. In some cases BTC has been declared SMP in products where URCA's criterion for ex-ante regulation has not been met and in other cases CBL products have been removed from SMP despite the criteria appearing to indicate otherwise.

It is the absence of the consistency in the treatment of CBL when compared to BTC in the application of ex ante regulation that would allow CBL to leverage this differential treatment to the disadvantage of BTC.

BTC's Response to URCA's Position Paper is sub divided into the various sections as they appear in said Position Paper.

Section 2: Product analysis methodology

While URCA's methodology appears to be broadly in line with that of other regulatory authorities, there are areas highlighted in the interim methodology that are either unclear or out of kilter with that seen elsewhere.

As BTC had outlined above in its response, in Step 3, URCA repeats the SMP analysis for wholesale products, having performed the analysis on retail markets. However, URCA fails to return to the retail markets to assess the impact of wholesale markets on retail. The requirement to provide access to wholesale services may remove 'non transitory barriers to entry' in the retail market and therefore negate the need for regulation. URCA states that it undertakes the retail assessment under the assumption that no regulatory intervention takes place. BTC notes that this is the standard approach to the SSNIP test for considering regulation within the market, but that the impact of upstream wholesale remedies is usually considered. For example, one of the reasons why the wholesale broadband access (WBA) market is often found to be competitive in Europe is due to the impact of Local Loop Unbundling (LLU) remedies in the upstream wholesale local access (WLA) market.

URCA in its analysis has not given sufficient consideration to joint dominance. Under a European Union (EU) review of joint dominance, it is unlikely that the tests for joint dominance would have been passed and more likely CBL would have been found single dominant.

BTC notes that one of the ex ante options available to URCA as outlined in Section 2.2 of the Paper includes the option of forbearance or 'do nothing'. This option provides CBL with an advantage vis-à-vis BTC given that BTC has always been subjected to ex ante regulation for a number of services that the company provides. Currently, for CBL, its basic cable television service is the only service subject to price regulation. The status quo gives CBL an advantage.

Section 3: New information and revision of the analysis of products in the high level SMP markets

Retail access to digital packages (3.1.3), Wholesale access to content distribution and digital packages (section 3.1.7)

URCA has removed wholesale access to content distribution from the list of SMP markets, since CBL does not have exclusive access to content and new operators could negotiate directly with the content providers. This does not accord with Ofcom's pay-tv market review, which was published on 31 March 2010¹. This shows that access to "must have" content, for example sports, is essential to enter and operate profitably in this space. Access to content is a barrier to entry. Furthermore, it is inefficient to conduct multiple sets of negotiations with content providers. It is also not clear that content providers will always supply – for example, Sky has won the rights to carry premier ship football in the UK and Virgin Media is unable to carry this as it cannot reach an agreement with Sky. (Sky has no incentive to reach an agreement as it knows that being the sole carrier of premier ship football boosts its customer acquisition or retention rates). This is why Ofcom has stepped in to regulate the pay-tv market. An analogy can also be made to telecommunications – BTC has to provide international connectivity between other licensed operators and overseas operators. It could be argued that each operator should form their own interconnection agreements with every overseas operator, however this is not the case.

BTC believes that when using URCA's own methodology (Section 2.1.2 of URCA's position paper) then pay-tv services provided by CBL, at both the retail and wholesale level, should remain in the high level SMP market. As URCA notes, the three criteria test to determine whether products are susceptible to ex-ante regulation are (step 2 of methodology on page 13):

- Whether there is the presence of high and non-transitory barriers to entry.
- Whether there is the presence of a market the structure of which does not tend towards effective competition during the timeframe of the review.

If both the preceding criteria are met, then ask:

- Whether the application of ex post competition law alone would not adequately address market failures that may arise.

¹ See http://www.ofcom.org.uk/consult/condocs/third_paytv/statement/

When this test is applied it would appear that: (i) all retail pay-tv should remain in the high level SMP since without a wholesale offering there are non-transitory barriers to entry that are not likely to be overcome in the next few years; and (ii) wholesale pay-tv should remain in the high level SMP since without access to content it is not possible to provide a wholesale offering and negotiations with (multiple) content suppliers are likely to be difficult and time consuming and therefore there is unlikely to be market entry during the timeframe of the review.

In removing wholesale access from the SMP market, URCA is effectively arguing that the wholesale content distribution is prospectively competitive, due to low barriers to entry. However, URCA has rejected similar arguments that BTC has made about prospective competition in the telecommunications market. Given CBL's level of network roll-out and high population coverage levels it can be argued that the fixed access, local calling, DLD and ILD markets also have low barriers to entry and that the potential for CBL and or a new mobile operator to enter these could also lead to removal of SMP designation. Is it really any harder for CBL to enter these telecoms markets (absent regulation) than it is for BTC or another player to enter the television market (absent content regulation)? The application of URCA's methodology cannot lead to a position where BTC has SMP in wholesale or retail telecoms access but CBL does not have SMP in wholesale or retail markets for content distribution and digital packages. If the test is applied fairly then both should be declared SMP or non SMP. In summary, BTC believes that URCA should reinstate bitstream access for content distribution and wholesale access to the Superbasic and Digital packages into the SMP markets.

Asymmetric SMP assessment of BTC and CBL

It could also be argued that the asymmetric regulation of CBL and BTC allows CBL to leverage its market power in the provision of pay-tv into telecoms but limits the opportunity for BTC to compete with CBL. In the UK, it is widely noted that BT views Sky as its number one competitor (as opposed to any of the mobile or other fixed line operators) purely for the reason that Sky has the opportunity to buy BT products on a regulated basis, at a regulated price. BT does not have the same opportunity with Sky. Therefore Sky can offer bundles of television or telephony that BT cannot offer or cannot offer as competitively as Sky. This is another reason why pay-tv is to be regulated in the UK – to ensure a level playing field between pay-tv and telecommunication operators. A similar argument could be made in The Bahamas. We do not believe that URCA's current proposals will lead to the prospect of sustainable competition in the pay-tv market. This will ultimately harm consumers who are being denied choice and potential price decreases.

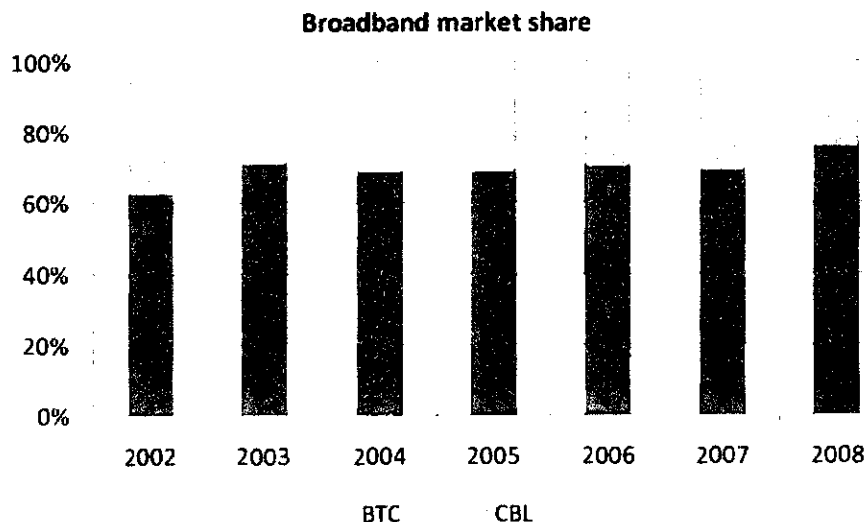
SMP designation of BTC products (section 3.2)

Retail broadband access SMP assessment

BTC has noted that URCA continues to denote BTC as having SMP in areas (islands) not currently serviced by CBL.

BTC continues to disagree with this position for three reasons:

1. BTC has approximately 30% market share in broadband, by URCA's own calculation. BTC's market share has not been growing and there is no evidence to suggest pricing or other behavior necessary for BTC to be jointly dominant with CBL.



2. To the extent that BTC has committed to a geographically averaged pricing policy with regards to broadband, competitive constraints felt from CBL in one geographic area will be reflected in BTC prices across the country. This implies that BTC cannot profitably raise prices for a particular product by 5%-10% for 12 to 24 months (URCA, page 14) and this holds across all geographic areas. This common pricing effect is recognised by other regulatory authorities. We cannot understand why URCA has failed to take this point on board.
3. There is not the presence of high and non-transitory barriers to entry as required to implement ex-ante measures (URCA section 2.1.2). BTC and CBL are required to provide wholesale broadband access and this will negate barriers to entry to the retail broadband market. Therefore, barriers to entry can be described as transitory at best.

SMP designation in other markets

With respect to the other markets where URCA has designated BTC as having SMP, BTC views these markets as prospectively competitive and as such URCA ought to keep these markets under review.

BTC is of the view that the following product markets should be kept under review by URCA. BTC has provided its rationale for the treatment of these product markets as 'prospectively competitive'.

- Fixed telephony access (Section 3.2.1): Based on the three (3) criteria test set out on page 13 of the Position paper, in order to apply remedies URCA must show that there are "high

and non transitory barriers to entry” and “a market structure that does not tend towards effective competition during the timeframe of this review”. The high population coverage of CBL indicates the potential for CBL to quickly enter the telecoms access market and with the sustained growth of SRG’s “IndiGO for business” product, it could be argued that there are neither high or non transitory barriers to entry in either the residential or business access market. In which case, URCA should not presume to impose remedies.

- *Wholesale and retail national and international leased lines (section 3.2.4 and 3.2.9):* BTC also requests that URCA keeps under review the wholesale and retail leased line SMP designation and reconsiders the geographic market arguments. Since BTC sells leased lines on a geographically averaged basis then constraints felt in one geographic market will be felt in another. So, URCA should consider whether CBL sufficiently constrains BTC in those areas where both CBL and BTC are present. In section 3.2.9 it can be seen that BTC’s wholesale prices are below those charged by CBL/CCL suggesting that BTC is not the price leader in the market and its prices are being constrained to some extent. Consumers are benefiting from these lower prices across The Bahamas due to geographically averaged prices. URCA has not presented any evidence to show that this is not the case. Therefore, when updating the market review in the future, BTC requests that URCA continue to closely monitor this market and believes that a position could be reached whereby BTC is not dominant across the Bahamas whereas CBL / CCL is considered dominant in those areas where it operates.

Section 4: Selection of types of obligations

- URCA has set out its approach to selecting remedies. This is laid out more fully than in previous consultations and, if applied correctly, should lead to fair and consistent remedies being applied to SMP products offered by CBL and BTC. Of course, this requires URCA to have correctly determined SMP products in chapter 3 which BTC note has not occurred.
- URCA’s approach as set out for the most part appears sound although BTC would have expected URCA to add an explicit principle on consistency – this is consistency over time and, in particular, between industry players who have been designated with SMP.

Section 5: Obligations

Consistency of regulation on CBL and BTC

URCA is not proposing to apply remedies consistently on BTC and CBL. Due to what URCA regards as a lack of precedent, URCA is planning to remove certain obligations on CBL whilst continuing to impose them on BTC – despite in many cases BTC having a lower market share than CBL. BTC notes that:

- Market reviews and remedies should be technology neutral, focus on the product characteristics and not on the underlying technology used to provide them. For this reason, cable companies are invariably included alongside telecoms operators in market reviews with the products being defined to be in the same economic markets. This was recently reviewed by Ofcom in its WBA market review who concluded that differences in speed do warrant a structural break in the market. Regulators in Ireland, Austria, Holland and Denmark amongst others have also concluded that DSL and cable modem are in the same market.
- Where telecommunication remedies have not been imposed on cable companies, this is because the cable company has not been found to be dominant in that particular market and not because cable was excluded from the market review process. Telecoms services provided by cable are consistently determined to be in the same product market as those provided by the fixed line operator within the EU.
- CBL in its submissions has been selective in its choice of benchmark countries. There are countries in which cable companies have been subject to telecommunications remedies following a market review. For example, in the Netherlands, Singapore and Denmark.
- CBL has benchmarked remedies being imposed on cable-tv operators. However, BTC notes that CBL is not purely a cable-tv operator and, through its subsidiary Caribbean Crossings, provides telecommunication services including broadband, international connectivity and leased lines. This is not common to the benchmarked cable companies. BTC notes that in Denmark, where there is common ownership between the telecoms and the cable company, the regulator considered the combined market share of the company and imposed remedies on both entities.

URCA should consider telecommunication services being provided by CBL and its subsidiaries to be in the same product market as those provided by BTC. CBL and BTC should be assessed under a consistent market review process and a consistent set of remedies imposed. Where multiple operators are found to be dominant in a market, symmetric and non-discriminatory remedies should be imposed. For example, CBL should be required to provide bitstream in the wholesale broadband access market.

Rule based retail price regulation

URCA has not clarified its current thinking on the form of the rule-based retail price regulation that it intends to impose. BTC has already submitted its comments on the proposed rules in its December 2009 submission, however, URCA has not replied to these comments. Is URCA intending to consult separately on the form of rule-based retail price regulation?

BTC is concerned that URCA's position shift from price controls (incentive based) towards rule-based price regulation will hamper the liberalization process. It imposes a more restrictive form of price controls that reduces incentives to improve efficiency. The benefits of incentive based regulation are widely cited in the academic literature and therefore BTC is surprised that URCA should seek to deprive the market of these benefits. Furthermore, the move away from a price control means that BTC will be required to seek approval for all price changes whereas an incentive based price control would have allowed BTC to change prices within a given limit without notification.

BTC has previously stated that the pricing notification process is overly onerous, prevents BTC from competing on a level playing field and denies consumers the immediate benefits of price declines. This is particularly true for those instances where BTC is seeking to decrease the price of products. BTC has presented information to URCA which shows that other regulatory authorities either require fewer price notifications or commit to reviewing them in a speedier manner. BTC therefore requests that URCA either relaxes the price notification requirement or, at the very least, speeds up the review process. BTC understands that URCA has concerns that the removal of a price notification process for price decreases could lead to margin squeeze. However, BTC doubts that this is a valid concern considering the current stage of market liberalization and the fact that where price controls (as opposed to rules) have been used in other countries then there have been few instances of margin squeeze.

BTC does not necessarily agree with URCA that the costs associated with a price cap approach would exceed that of rules based retail price obligation.

- URCA should consider the net cost of the two obligations – this requires the consideration of benefits in terms of pricing flexibility as well as the cost of building a price cap model versus the costs of price notification.
- URCA should not only consider the up-front costs of model development but also the cost to BTC's business of not being able to compete effectively should rules based obligations be imposed.

BTC believes that to the extent that a price cap would provide flexibility to change prices within the cap, without notification, the net cost of this may well be lower than the net cost of a rules based approach. BTC therefore requests that URCA engages more fully with BTC on this issue to understand the costs and benefits of both approaches. Only after URCA understands these, can URCA undertake a valid impact assessment.

Producing bundling

URCA should recognize efficiency benefits of bundling as well as competitive harm and make an informed decision. BTC would expect products to be made available on a standalone basis, however it should be recognized that the price of a bundled product may well be less than the price of its standalone components due to efficiency benefits.

URCA should also be consistent in its treatment of bundled products offered by CBL and BTC. To the extent that BTC is required to offer bundled telecommunication products on a standalone basis then the same requirement should apply to CBL.

Accounting separation

BTC is pleased that URCA has taken on board its comments on accounting separation and, in particular has moved to 2009 accounts. However, BTC notes that URCA has not provided comment on many other aspects of AS. Will the updated accounting separation guidelines be published separately? For example:

- URCA has not issued formal timelines for the submission of regulatory accounting documentation and accounts. Whilst BTC has informally committed to providing this information to URCA by 31st May 2010, BTC is unaware as to whether CBL has also made a similar commitment. Furthermore, BTC is currently spending considerable resources in interacting with URCA and in allowing URCA to conduct an in-depth review of the model. URCA should disclose whether a similar process is also being put in place by CBL.
- URCA has not confirmed that these remedies are being applied consistently to CBL and BTC.

RAIO

BTC agrees with URCA that a RAIO is an appropriate form of ex-ante regulation. Where an obligation to supply is imposed, then a RAIO ensures that a product can be provided promptly and on a non-discriminatory basis, which improves regulatory certainty. BTC is therefore exceptionally concerned that URCA is not requiring CBL to develop a RAIO. In particular, URCA notes that there is not an international requirement for other cable operators to develop a RAIO. However, as BTC has previously stated to URCA, this is because other cable operators have not been found dominant in the provision of the services. BTC believes that it is exceptionally important that URCA applies regulations consistently between BTC and CBL and should CBL not be required to develop a RAIO for certain services then the same reduction in obligations should be imposed on BTC – since the cost of developing a RAIO is no greater for CBL than it is for BTC.

Cable companies are routinely included in the same economic market as that of incumbent telcos for market definition purposes. The reason that remedies are not subsequently imposed on these cable operators is because their market shares do not lead to them being declared dominant. If they were declared dominant, they would have been subject to regulatory remedies. Also, the size of the company should not be used as an argument to justify the removal of an obligation. For example, Kingston Communications (KCOM) is a small incumbent operator operating solely in the English town of Hull (with BT being the incumbent in the remainder of the UK). KCOM is still required to produce a RAIO. CBL should be required to develop and publish a RAIO along the same timelines as BTC is required.

It would also be useful if URCA could clarify the list of services that should be included in the RAIO as the latest SMP obligations appear to include a more extensive list of services than those in earlier communications by URCA on the subject. Finally we note that URCA has not provided BTC with final guidelines on the development of the RAIO (only draft guidelines on access and interconnection) and that these guidelines have not been made subject to public consultation. This increases the risk on BTC that it will publish a RAIO only to find that URCA may change its guidelines on the basis of feedback from other stakeholders. This approach has the potential to increase regulatory costs on BTC in a way that could easily be avoided.

Section 6: Obligations on CBL broadband internet

Changes to broadband regulation have been made consistently to CBL and BTC (i.e. URCA has dropped the requirement for retail regulation, other than geographically averaged prices, on broadband services for both CBL and BTC).

However, BTC questions whether it was correct to drop the obligation on CBL.

- CBL has a consistently high market share in retail broadband at around 70% on a national basis (URCA).
- Excluding areas where CBL is not present, the market share would be higher than this.
- Contrary to CBL's response, there is no evidence that BTC's market share is growing or that BTC's DSL product provides an effective constraint on CBL. In a forward-looking market review, it is highly likely that CBL would be found to have SMP and should therefore be subject to retail remedies.

Given this high market share, BTC cannot understand the rationale for URCA considering the removal of retail broadband remedies from CBL. To be consistent with remedies imposed on BTC in those markets where BTC has been found to have single SMP (e.g. fixed line access, DLD and international calls), CBL should be subject to remedies involving:

- Price rules, including the onerous price notification process being considered for BTC.
- Accounting separation obligations
- Untying

BTC has noted that the imposition of wholesale remedies could negate the requirement for retail broadband regulation by reducing barriers to entry. However, should URCA not require CBL to provide a RAIO then those barriers to entry will remain higher and this further strengthens the argument for a RAIO for CBL or, at the very least, retail broadband regulation.

Sections 7 and 8: Obligations on Cable Super basic and digital packages

No decision is made by URCA on the form of "untying" obligation to be imposed on CBL with regard to its broadband and pay-TV services. URCA is therefore not giving the chance to operators to comment on the proposed remedy. The cost considerations cited by URCA are flawed given that if some form of "untying" will be imposed, CBL will in any case need to change its billing system configurations, so as to have the flexibility of separating broadband and pay-TV charges. Given this (sunk) cost, the incremental cost of actually implementing separate charges for all customers is very limited and, as correctly identified by URCA, this option would give maximum benefit to the consumers. There is therefore no reason why URCA should not demand "untying" to be applied to all customers.

With reference to CBL's "Digital Packages", URCA states that "the prospect of emerging competition from BTC, the potential for new market entrants and the potential for BTC to match any below cost pricing by CBL, may deter CBL from entering into predatory pricing of its digital packages product". BTC is not currently offering, nor is it allowed to offer in the short term any Pay TV package that can compete with CBL's Digital Packages and therefore it is unclear to BTC why URCA considers this "prospective competition" to be sufficient to remove retail price regulation from CBL's digital packages. Prospective competition in the Pay-TV market in which CBL is currently dominant is not more imminent (and potentially much less so) than any prospective competition in the provision of fixed voice services. However, URCA has chosen to remove retail price regulation from CBL's digital packages, while retaining such regulation on BTC's fixed voice products. In doing this, URCA is showing a biased judgment and is unfairly discriminating against one SMP operator in favor of the other.

BTC would like URCA to have a look at Ofcom's recent review of pay-tv services offered by Sky UK. This provides precedent for the regulation of pay-tv. BTC notes that similar rules are being considered in Singapore.

Section 11: Obligations on CBL access to the broadband network and services

Cable and non cable based products are usually defined within a single market, due to indirect constraints. For example, Ofcom considers Siamese cables (used by the cable company) to be in the same product market as BT's local loop. Ofcom acknowledges that there may not be direct substitution between cable and non cable following a SSNIP in wholesale products. However, since the wholesale input price is a large proportion of the retail price then any increase in wholesale prices is likely to lead to a sufficiently large increase in the retail price to induce switching between products at the retail level. This indirect substitution renders an increase in the wholesale price unprofitable and places cable and non cable in the same product market. This approach is used throughout the EU.

Cable companies are often not regulated at the wholesale level because their market shares are too low to warrant a finding of SMP. However where cable market shares are higher, remedies may be imposed. The Dutch regulator OPTA has recently imposed wholesale remedies on cable companies. Remedies are also imposed in Denmark.

BTC would like to point out that the largest retail broadband market share is currently held not by BTC, but by CBL. Therefore, any requirement to provide wholesale broadband access should primarily be imposed on CBL. BTC notes that neither CBL nor BTC are currently providing this service, but using retail market share as a proxy for wholesale, CBL is more likely to be found dominant and there is no evidence to suggest that BTC is jointly dominant with CBL. Therefore, remedies should primarily be focused on requiring CBL to offer wholesale broadband access.

While URCA has proposed an obligation on CBL to propose a wholesale broadband access service (similar to the requirement imposed on BTC), BTC notes that URCA has stated that "... the lack of international experience in RAIO products in this area,.... may make this option disproportionate in the context of this interim SMP review".

BTC strongly opposes the view that a shortage of international precedents should determine whether an obligation to produce a RAIO should be imposed on CBL. As the dominant operator in the market for broadband, CBL should be required to develop a wholesale broadband access service. Once this product is developed and agreed with URCA, BTC sees no reason why a RAIO for this wholesale service could not be developed by CBL. Without a RAIO, negotiations with CBL and OLOs will take longer, regulatory certainty will be reduced and this will delay potential new market entry thereby negatively impacting sustainable competition.

Furthermore, there is no basis for applying inconsistent regulatory remedies on BTC and CBL. The development of a RAIO is equally as costly for CBL as BTC. Any regulatory impact assessment

would surely show a higher ratio of costs to benefits for BTC than CBL, due to BTC's lower market share. As in the treatment of CBL, wholesale broadband should not be a RAIO service for BTC.

BTC suggests that given CBL's higher market share, any obligation that does not require CBL to provide wholesale broadband access would be ineffective at promoting retail competition.

Obligations on CBL access to the transmission network

URCA has not provided specific details on the proposed solution and has instead stated that "URCA will assume that access to CBL's transmission network would be provided under the same principle as that applied to access the broadband network and services".

BTC is not satisfied with this position, since:

- This could imply that this wholesale service would also not be presented within a RAIO, which would be unacceptable and damaging to competition for the reasons set out previously; and
- It does not recognise the requirement for consistency in remedies between BTC and CBL. BTC understands that the technical nature of networks could result in different technical solutions being employed by BTC and CBL but does not accept that differing price rules, RAIO requirements and reporting requirements are justifiable.

Sections 13 and 14: Obligations on BTC fixed telephony access and local calling and DLD and ILD calls

- BTC is disappointed that URCA has not made reference to rebalancing. Whilst BTC accepts that it is up to BTC to submit a rebalancing plan to URCA, BTC would have expected URCA to recognize this within its remedies discussion.
- BTC is also disappointed that URCA is seeking to proceed with rules based price regulation as opposed to a price cap which would allow BTC the flexibility to adjust prices within an overall cap (or subcap). BTC is of the view that URCA does not have sufficient information on the costs and benefits of these two approaches to have completed a robust impact assessment. Further discussion on this was presented in section 5 of BTC's response to URCA's Position Paper.
- URCA has not provided sufficient information on the form of rules based competition for BTC to comment fully on this. BTC is disappointed that URCA has not provided comment on BTC's alternative price notification rules.

Section 15: Obligations on BTC broadband internet access in specific areas

- As mentioned in the comments in Section 3 above, it is unclear why, given BTC's commitment to geographically averaged prices and its low market share, URCA has still concluded that BTC has SMP in the provision of broadband access in specified areas. However, in Section 15, URCA states that geographically averaged prices are the only remedy imposed on this product. As such, the effect on BTC of this regulation is minimal, as BTC already applies geographically averaged price.
- BTC seriously doubts that it is in a position to engage in excessive pricing, given the potential for new market entry. Furthermore, BTC considers itself the price follower in this market given its low market share.
- Previously in this response, we have advocated tougher regulation of CBL's retail broadband products. We do not advocate this for BTC since BTC has less than 30% of the market by URCA's own calculation.

Sections 16 and 17: Obligations on BTC national and international leased lines and wholesale national and international leased lines

- BTC agrees that at this time it would be inappropriate to impose specific remedies in this market. This is particularly true for international leased lines where it is not clear at this stage that BTC has SMP.
- BTC would like to remind URCA that when considering future remedies for these markets, there must be consistency of treatment of CBL / CCL and BTC.

Section 18: Obligations on BTC mobile

- URCA has not provided sufficient details for BTC to comment on this obligation. Further details on the type of rules based remedies are required. BTC hopes that these will not be based upon price notification as, especially for price falls, this would hamper BTC's ability to compete in a liberalizing environment.
- BTC notes that given the speed at which competition is expected to enter the mobile market, at this stage there would not appear to be a justification for imposing remedies. This could be reassessed after BTC has submitted its cost model.

Section 19: Obligations on BTC call transit, call termination, wholesale directory enquiry and ancillary services

BTC broadly agrees that a RAIO is the most suitable approach for the provision of these services, given URCA's finding of SMP. As noted earlier BTC expects the same principles to apply to CBL and for CBL therefore also to be given an obligation on the development of a RAIO. The company invites URCA to engage further with BTC on the draft guidelines for the development of the RAIO and of course expects, in the interest of regulatory certainty, to be provided with final guidelines prior to the development of the RAIO.

Section 20: Obligations on BTC incoming calls to mobile customers

- BTC in its Final Comments on URCA's Preliminary Determination on SMP Obligations and its ongoing dialogue with the regulator has agreed to remove the charges for incoming international calls to BTC mobile subscribers. This is consistent with URCA's preferred solution to what it considers the current market failure for international incoming mobile calls with the recommended appropriate obligation to require a one off change to BTC's pricing structure, effectively to abandon the retail charging for incoming international calls to BTC mobile subscribers.

Section 21: Obligations on BTC access to the broadband network and services

- BTC welcomes the decision by URCA to drop the requirement for bitstream access and backhaul services and will work with URCA to develop a wholesale broadband access solution that is compatible with BTC's network structure and at the same time satisfies URCA's objectives.
- BTC notes that it only has 30% market share and therefore it is important that any solution developed recognizes this low market share and associated limited market power. It would be a particularly peculiar outcome if BTC's obligations in this market would be more or even as onerous as CBL's obligations given the differences in market share and given URCA's legal obligations to ensure remedies are proportionate.

Section 22: Obligations on BTC access to the transmission network

- BTC agrees with URCA's proposed approach to the regulation of this product. However, BTC notes that any remedy imposed on the company must be consistent with that imposed on CBL. BTC accepts that it is necessary to purchase this product in order to obtain broadband access on BTC's network (in the absence of competing infrastructure build). However, the same holds true for access to CBL's network.

- Whilst a different technical solution may be deployed, the requirement to offer access and to set this out in the RAI0 should be applied equally to BTC and CBL.

It is BTC's intention to provide a wholesale broadband access product that satisfies URCA's requirements in both the market for access to the broadband network and services and to the transmission network where it relates to broadband access.

Appendix 2: Cost and benefits of identified solutions

- BTC notes that this is not a full cost and benefit assessment and has been undertaken at such a high level that no weight can be placed on the outcome. The tables presented do not necessarily lead to the conclusions inferred by URCA. For example, Table 2 does not lead to the conclusion that rules based price regulation is less costly than price caps.
- BTC recommends that URCA either removes this analysis or instead works with CBL and BTC to put values behind the costs and benefits. Only after values have been assigned, even at a high level, should the cost and benefit analysis be given the level of weight that they have been receiving in the remedies.

Country specific regulations for CBL

BTC understands that URCA has expressed concerns that there is not sufficient international precedent to allow for the regulation of CBL in a consistent manner with BTC. BTC strongly disagrees that this supposed lack of international precedent should result in a relaxation of CBL's obligations.

- There is a clear process for imposing remedies on any entity. First, economic markets are defined. Second, SMP is assessed. Third, regulatory remedies are imposed. The assessment of economic markets and SMP should be in the context of Bahamian country characteristics. In The Bahamas, CBL / CCL provides telecommunication / pay-tv services and have a market share that is consistent with having SMP. The characteristics of other telecommunications provision in other countries which may have led to different SMP assessments / remedies are irrelevant for a decision on whether to impose remedies in The Bahamas.
- As BTC has noted previously, there are examples of cable operators/ pay-tv providers being subject to regulatory remedies in cases where they have been defined to have SMP. Therefore, URCA would not be creating new precedent in this area. We have provided examples of regulation in the UK (proposed remedies on Sky pay-tv and content), Holland and Denmark amongst others.
- Cable Companies operators are routinely included in the same economic market as for incumbent telcos for market definition purposes. The reason that remedies are not subsequently imposed on these cable operators is because their market shares do not

lead to them being declared dominant. Had they been declared dominant, they would have been subject to regulatory remedies.

- Being of a smaller size is not sufficient an argument in itself to justify the removal of an obligation, for example the requirement to produce a RAIO, as the benefits of the obligation should also be considered. Kingston Communications (KCOM) is a small incumbent operator only covering the English town of Hull (with BT being the incumbent in the remainder of the UK). However, KCOM is still required to produce a RAIO.

Conclusion

BTC has previously stated the importance of applying regulatory remedies to SMP operators on a consistent basis. For example, the requirement to provide access to SMP products on a cost-orientated basis should be consistently applied to CBL and BTC for products in respect of which they have SMP.

The legal basis for this consistency of approach is set out at s.8(1) of the Utilities Regulation and Competition Authority Act 2009 (URCA Act). This provides that *"all regulatory and other measures by URCA shall be proportionate to their purpose and introduced in a manner that is transparent, fair and non-discriminatory"*. Section 7 of the Sector Policy confirms the importance of a non-discriminatory, technology neutral approach in describing how the Government has set out to create a *"converged regulatory framework, overseen by a converged regulatory and competition authority"*. Section 16 of the Sector Policy also recognises the need for consistency, symmetry and non-discrimination, in describing the *"the need to ensure as level a playing field for all as possible"*.

Finally, s.5 of the Comms Act requires that all policy measures, decisions and laws to take effect in the electronic communications sector in The Bahamas should comply with guidelines stipulating that *"market forces shall be relied upon as much as possible as the means of achieving the electronic communications policy objectives"*. Where market forces are, in URCA's view, unlikely to achieve the electronic communications policy objective within a reasonable timeframe, regulatory and other measures which are to be imposed must be *"efficient and proportionate to their purpose and introduced in a manner that is transparent fair and non-discriminatory"*.

Accordingly URCA has a statutory duty to apply a consistent regulatory process and principles to all licensees and the regulatory remedies applied as a result should be applied in a transparent, fair and non-discriminatory manner. As a result, any challenge to the SMP condition setting process by CBL or any other person must not result in the application of a different regulatory process or regime to different licensees if URCA is to discharge its statutory duties correctly. In particular, the same restraints on entering new markets in s.116(5) of the Comms Act should apply to both BTC and CBL.

CBL strongly argues in its submission that URCA has not paid sufficient consideration to the costs of the proposed obligations on CBL. BTC agrees in principle with the requirement to consider the costs versus benefits of individual remedies and to ensure that the remedies are proportionate and not unduly burdensome.

Where URCA introduces regulatory and other measures, it must, under s.5 of the Comms Act, have *"due regard to the costs and implications of those regulatory and other measures on affected parties."* As set out above, these measures should also be *"efficient and proportionate to their purpose and introduced in a manner that is transparent fair and non-discriminatory"*. The importance of this principle is demonstrated by the inclusion of the same requirement for proportionality, fairness and non-discrimination in s.8(1) of the URCA Act. It is important that the burden and cost imposed upon BTC and CBL should be equivalent if it is to be non-discriminatory.

Section 8(2) of the URCA Act provides that "URCA shall carry out its functions and exercise its powers in a manner... that is best calculated to promote any policy objectives applicable to any regulated sector". URCA must therefore have regard to the Sector Policy objectives requiring the application of proportionate remedies. Section 9 of the Sector Policy states that, "to ensure a continued incentive for electronic communications providers to invest in up-to-date and innovative services and infrastructures, it is critical that the overall policy and regulatory framework governing the sector is set out clearly and ...strikes the right balance between regulatory oversight and commercial freedom". Section 13 of the Sector Policy further states that "adopting a fair attitude to existing providers" is important. Imposing SMP obligations without regard to whether the cost is fair, proportionate and balanced by the resulting benefits to consumers arguably runs counter to these Sector Policy objectives.

Section 24 of the Sector Policy outlines the Government's expectation that "URCA should, where consistent with the core objectives, apply a light touch regulatory approach to the electronic communications sector". Again, applying burdensome and costly whole scale SMP obligations during a transitional period and without first applying a proper market review process runs contrary to this objective.

The principle in s.40 of the Comms Act, while relating to the imposition of full scale regulation, could and should also inform URCA's approach to the interim SMP regulation. Section 40(2) requires that, prior to imposing any specific conditions on licensees determined to have SMP in the relevant market(s), URCA must "review the market or markets in which the licensee has SMP" and "consider the regulatory burden and the benefits to consumers of imposing any such obligation on a licensee".

As URCA has not yet carried out a full analysis of the applicable market forces, the market failures (if any) that exist or are likely to exist have not yet been identified, and consequently the measures required to correct such failures are not yet clear. As a result, full scale regulation which places significant burdens on interim SMP licensees should not be imposed during the transitional, pre-market review period. The block on entering new markets under s.116(5) provides a further reason why such full scale regulation is not necessary during the transitional period. BTC's initial response identifies the ways in which BTC believes the market review process and imposition of SMP conditions should be effected in order to fulfil the requirements set out above.

Whilst CBL argues that the proposed SMP regulation on it imposes unwarranted cost, BTC notes that CBL then proceeds to propose that regulation on BTC should be substantially increased from that proposed by URCA, without any consideration as to the costs to BTC. BTC urges URCA to note the imbalance in CBL's arguments and to continue to regulate BTC and CBL in a consistent, non-discriminatory manner, so as not to create distortions in the market and so as to correctly

discharge its statutory obligations. In response to CBL's comments, BTC estimates that the costs of implementing a specific remedy by BTC and CBL are likely to be relatively similar and that cost is unlikely to provide a sufficient rationale for removing remedies from CBL that continue to be applied to BTC.

BTC therefore urges URCA to apply remedies on dominant operators in a symmetric and non discriminatory manner, as URCA has proposed in its initial consultation.

Reservation of Rights

BTC has addressed the issues but reserves the right to comment at any time on all issues and states categorically that the decision not to respond to any issue raised in this Consultation in whole or in part does not necessarily represent 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 Interconnection Division

The Bahamas Telecommunications Company Limited (BTC)

March 31, 2010