



# **The Bahamas Telecommunications Company Limited**

## **Response To**

### **The Utilities Regulation and Competition Authority's Public Consultation Papers on Preliminary Determinations and Draft Guidelines**

- i. Types of Obligations on BTC re: Section 116 (3) Communications Act, 2009 (ECS 18/09)*
- ii. Types of Obligations on Cable Bahamas Limited Section 116 (3) Communications Act, 2009 (ECS 19/09)*
- iii. Draft Guidelines Accounting Separation & Cost Accounting issued to BTC (ECS 20/09)*
- iv. Draft Guidelines Access & Interconnection (ECS 22/09)*

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## Executive Summary

The Bahamas Telecommunications Company Limited (BTC) thanks URCA for the opportunity to respond to the consultation documents on significant market power (SMP) and the draft accounting separation (AS) and access and interconnection guidelines that have been issued in response to the SMP assumptions of the Communications Act and to its attendant Transition Framework.

BTC notes that URCA has undertaken a thorough review of the markets, within the compressed timeframe available, and is pleased to note the symmetrical treatment of BTC and Cable Bahamas Ltd (CBL), which BTC considers to be very important in order to create a level playing field between operators, particularly at this stage in the market liberalisation process.

### *SMP regulatory obligations*

BTC understands the need to introduce new regulations in the market in order to progress with the liberalisation process. However, BTC has serious concerns over some aspects of URCA's analysis. In particular:

- BTC is firmly of the view that URCA should have considered the wider context of the liberalisation process before imposing regulatory remedies. BTC is concerned that URCA has not considered the interaction between the proposed obligations and other issues which affect BTC's financial position, such as the USO obligations, the access deficit and the need for tariff rebalancing. Moreover, URCA has not taken into consideration the effects that the proposed obligations might have on the privatisation process. In particular, the imposition of cost-oriented prices while BTC is still providing some services significantly below cost will significantly impact BTC's profitability and reduce the value of the company. Since the privatisation of BTC is a key step in the liberalisation of the market, BTC would have expected URCA to pay more attention to this issue. While BTC hopes to propose a rebalancing plan in the near future which would partly address the access deficit issue, URCA should recognise that a rebalancing plan is a major exercise, which will have major commercial implications for BTC and therefore BTC should be allowed sufficient time to discuss its plans with the new strategic partner, when it is selected.
- BTC notes the onerous conditions imposed on the company with respect to Special Offers or Discounts ('Special Promotions'). Again, URCA should have considered the wider context of liberalization and how the process impacts the company going forward. The conditions imposed as part of Special Offers or Discounts severely constrains the ability of BTC to respond to competitive pressures. It is in the interest of consumers to the extent that BTC can respond to changes in market conditions. The conditions imposed under Special Offers or Discounts are not consistent with international best practice.
- URCA has not considered the impact of the proposed regulation on infrastructure investment incentives. BTC is in the process of rolling out a new NGN network, which will bring considerable benefits for BTC customers and for the wider economy. URCA

however has not considered that the proposed regulations will considerably reduce BTC incentives to invest in these new technologies.

- URCA has not developed a long-term view of the market. URCA should conduct a forward-looking assessment of the market before it imposes regulatory remedies. In particular, URCA should consider the contestability of markets in the short to medium term and assess the required remedies in light of the constraints imposed by this prospective competition.
- BTC notes that there is no significant international precedent for regulation of Mobile Network Operators (MNO) at the retail level, BTC expects that consistent with international experience, no retail regulation will be imposed on the mobile sector in The Bahamas. This will be discussed in greater detail in the response.
- BTC understands that the timeline imposed by the Communications Act 2009 on URCA for the initial market review process was constrained. However, BTC is of the view that, in the future, URCA should conduct market review processes following international best practice. In particular, URCA should in the future apply or adopt the following where applicable:
  - **The principle of technology neutrality:** only the characteristics of the products and not the technology used to deliver them should be used at the market definition stage. URCA has not applied this principle in this review, as it has considered Voice Over the Internet (VOI) to be a distinct product from other voice services. This is contrary to international best practice. The principle of technology neutrality is fundamental for the correct definition of markets and competitive constraints. VOI products are imposing strong constraints on BTC Domestic Long Distance (DLD) and International (ILD) call products (as demonstrated by falling volumes and revenues) and this should have been recognised in the market definition exercise. The application of the technology neutrality principle would have probably resulted in the DLD and ILD markets to be defined as prospectively competitive.
  - **Prospectively competitive markets:** BTC is of the opinion that URCA should introduce a classification of markets into competitive, non-competitive and prospectively competitive markets. This classification is consistent with the principles reflected in the EU Electronic communications Framework. URCA has not paid sufficient attention to prospectively competitive markets and in particular has not considered sufficiently the constraints imposed on BTC by the contestability of the fixed access and voice markets by CBL.
  - **Impact assessment:** URCA has not conducted an impact assessment before introducing regulatory remedies. This is contrary to international best practice and is exposing the industry to the risks and costs of regulatory errors and imperfect remedies.
  - **Geographic markets:** URCA has not defined geographic markets, although it has noted the difference in competitive conditions across different islands in The

Bahamas. BTC is of the opinion that each island should be considered in isolation for the purposes of assessing competitive constraints and only islands that show similar levels of competition should be grouped in the same market. Moreover, geographic markets will be particularly important in the near future, since new market players are likely to be present only in island with high customer (and in particular business customer) density. Imposing homogeneous obligations on BTC across different islands would therefore prevent the company from responding effectively to competitive pressures.

- **In its market definition analysis, URCA has failed to recognise the possibility of defining geographic markets.** BTC's position is that URCA should reconsider this aspect of market definition, as competitive conditions are very different across the different islands of The Bahamas and this should be reflected in the decision of whether to impose regulatory remedies and the form those remedies might take.
- **URCA has also failed to recognise that business and residential markets should be separately defined.** This is particularly important during the early stages of the liberalisation process, as cherry-picking of the business market by new entrants is to be expected. This is already evident by the behaviour of Systems Resource Group Ltd (SRG).
- The remedies imposed on both the retail and wholesale products represent an excessive burden on BTC:
  - Concerning products at the retail level, BTC disagrees with the regulations imposed on the provision of new services; on price reductions; and on bundling. On price reductions, BTC's view is that URCA has failed to recognise the benefits to consumers and the damaging effects of restrictions it is imposing on BTC in responding to commercial pressures.
  - As mentioned previously, BTC's position is that URCA should not have imposed cost orientation obligations at the wholesale level, until the access deficit, the cost of the USO and the rebalancing exercises are conducted. In imposing cost orientation when there still remain other products which are sold below cost, URCA is endangering the financial viability of BTC. Moreover, BTC believes that URCA should not have imposed such restrictive obligations on products which are not yet sold by BTC.

These concerns apply to both the Preliminary Determination on Types of Obligations to be imposed on BTC and on CBL.

#### *Accounting separation and cost accounting guidelines*

BTC agrees with URCA that AS models can provide valuable information to the industry and that the production of an AS model by dominant operators is a common regulatory requirement. Therefore BTC agrees that both itself and CBL should be required to develop a model and that this should be the basis of setting wholesale and retail charges going forward. However, BTC has considerable concerns with regards to the process by which the cost model is being implemented.

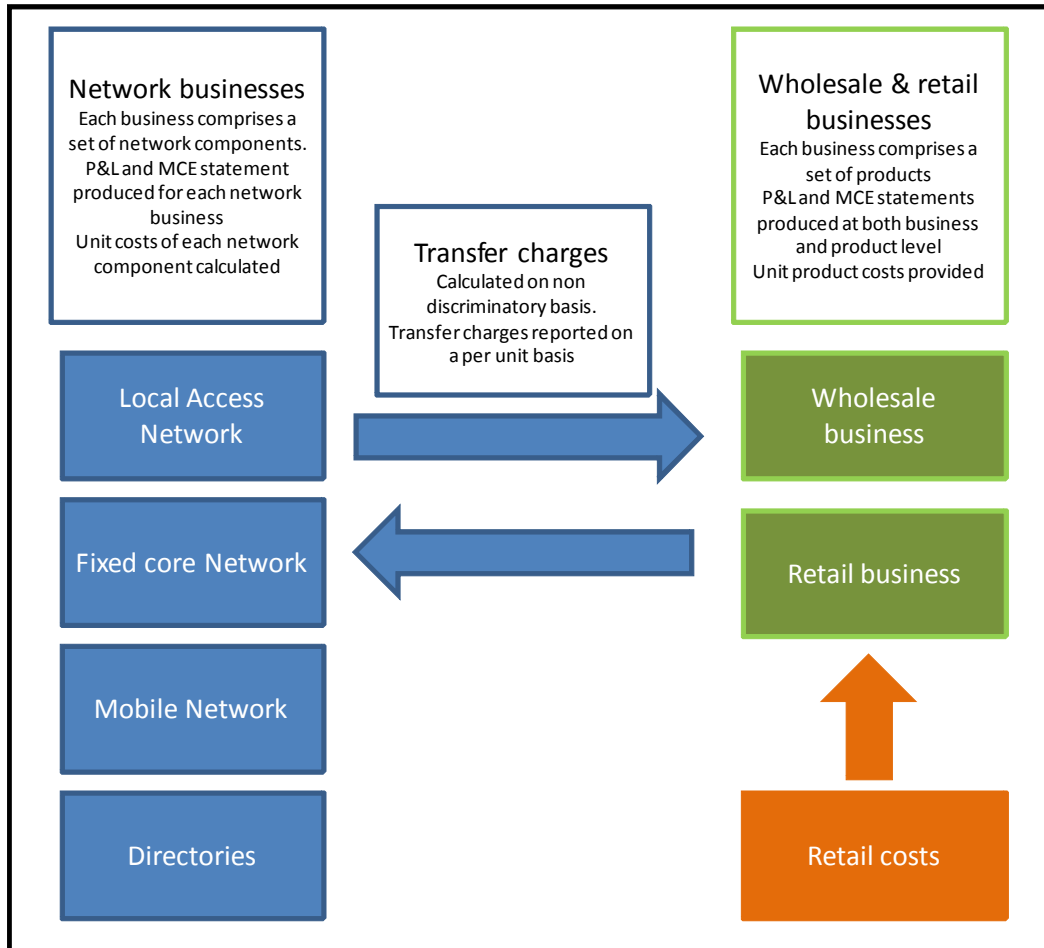
Specifically, BTC has the following concerns regarding the development of the cost model:

- The AS model should be designed based upon the final AS guidelines, to be published in January 2010. Whilst certain tasks can be undertaken before that time, it would be risky and potentially costly for BTC to design a model based upon the draft guidelines as these could change. This is because a model is designed to a specific set of regulatory guidelines.
- Operators are usually granted over a year to undertake AS. In this response, BTC sets out a proposed timeline which would lead to the company providing AS outputs in May 2010. To meet such a tight timeline, the company would need to begin the AS modelling immediately. *Therefore we seek urgent confirmation that the final AS guidelines will not differ substantially from the draft guidelines.* We note that it is not possible for AS outputs to be provided sooner than this. BTC has considerable pressures on staff time due to the privatisation process and the consultants have advised us that a model cannot be developed in less than 6 months and in many cases this can take longer.
- Depending upon the assurance from URCA that final guidelines will not substantially differ from the draft guidelines, AS modelling will begin between the end of November 2009 and January 2010, to be delivered in May 2010. The timeline remains the same whether regulatory accounts are produced for either 2008 or 2009. Therefore BTC is of the view that there is no value in producing 2008 accounts. The information in the accounts would be outdated and would not reflect the network investment and changes to products / services that occurred during 2009. However, it would require BTC to collate two sets of data and place a considerable resource and cost burden on BTC. Instead BTC proposes that it provides URCA with 2009 accounts no later than 15<sup>th</sup> May 2010.
- BTC is not clear as to the purpose of URCA requiring a “test” set of accounts. BTC notes that this is *exceptionally unusual* and places an unfair resource burden on the company. Also, BTC notes that the accounts do not appear to be a “test” when URCA is proposing that the cost values are used in the Reference Access and Interconnection Offer (RAIO). To the extent that URCA would like the opportunity to challenge the process and methodology this can be performed on the 2009 accounts. Furthermore, BTC proposes regular meetings with URCA between December 2009 and May 2010 so that URCA can be assured that the cost modelling is progressing in line with the stated timelines and to ensure that URCA’s considerations are taken into account during the model development process. We believe that it is in both our interests, as well as that of The Bahamas, to produce a high quality model on the first attempt so that the costs can be used to set tariffs as quickly as possible and support certainty in the market.
- BTC notes the requirement for a regulatory audit. BTC proposes that should a regulatory audit be required on the 2009 accounts it is undertaken after the regulatory accounts are submitted. In the first year a regulatory audit typically takes 12-14 weeks and so the regulatory audit opinion would be submitted by 31<sup>st</sup> August 2010. However BTC questions the net benefit of a regulatory audit in this particular situation. The auditors will test whether the AS model is consistent with the AS methodology described by the

operator and whether that accords to the regulator's AS guidelines. There is a relatively fixed cost of undertaking a regulatory audit, regardless of the size of the organisation. Initial estimates by BTC are that the regulatory audit could cost over \$850,000 in the first year, falling to nearer \$600,000 in subsequent years, based upon a "properly prepared in accordance with" opinion. This equates to 4% of BTC's profits and could potentially have an adverse valuation impact on BTC due to unnecessarily stringent regulatory requirements. Should BTC pass this cost through to consumers then this would equate to an additional \$6.40 per year on each fixed line / mobile subscriber. This is a key reason why many other regulators in small states have not requested regulatory audits. Instead BTC suggests that URCA undertake its own review of the model and methodology, assisted by BTC who will answer any questions needed to give URCA confidence on its robustness. Alternatively, BTC would consider submitting a Chief Financial Officer responsibility statement in lieu of an audit opinion.

- Should URCA determine that a regulatory audit is required, then BTC strongly recommends that URCA opts for a "properly prepared in accordance with" opinion, as opposed to a "fairly presents" opinion. A fairly presents opinion is overly onerous and would lead to a level of assurance that is higher than that required in most other jurisdictions where a regulatory audit is required. Furthermore, it will substantially increase the cost of the regulatory audit. It is estimated that the regulatory audit cost could increase by 25% due to the increased level of assurance, with no additional gain to consumers or the industry from this increased assurance. It is recommended that URCA remove the audit opinion entirely and allow BTC to focus on using the money saved to innovate and provide value-for money services to consumers. Should URCA be determined to impose this obligation then it should be adjusted to be "properly prepared in accordance with".
- BTC notes that the list of wholesale products required to be included in the cost model is overly complex. Furthermore, it includes wholesale access services which would usually be included following a regulatory consultation process that led to the imposition of a regulatory obligation to provide that service. Some of these services, including Bitstream services and Local Access Loops cannot be accurately costed in a top-down model. Therefore, BTC proposes a modified list of wholesale services to be included in the cost model (section 3.2.5)
- BTC also notes that the current list of wholesale / network businesses and the inclusion of Appendix 5 in the AS guidelines implies a model development process that will be almost twice as long as if network components could be transferred directly to retail components. This does not accord with URCA's preferred timeline. The requirement to transfer network components to the wholesale business before being transferred to the retail business requires BTC to develop a complete wholesale product catalogue which includes LLU, mobile call origination (MVNO) and fixed call origination (CPS) which BTC believes was never URCA's intention. BTC therefore requests that Appendix 5 is removed and the following model set-up is permitted. This is consistent with the model set up in many countries where there are no functional/operational separation guidelines. Should URCA not subsequently find the results adequate, and BTC is certain

that URCA will, then BTC would engage in further discussions with URCA to resolve any issues and, potentially, amend the regulatory costing model in future years.



- With reference to the description of network components, BTC notes that it expects to have a far greater number of network components in its model than those proposed by URCA, but these will be determined based upon a review of the final AS guidelines and the network infrastructure at the time of model development. BTC therefore requests that URCA is less rigid about the network component description and permits BTC to evaluate the best methodology for this.

*Access and interconnection guidelines*

BTC accepts that the publication of the RAIO is a standard requirement for operators and intends to comply with this requirement. However, BTC has the following concerns over the RAIO requirements outlined by URCA:

- URCA’s role in the preparation of interconnection agreements is too invasive. In many jurisdictions, RAIOS are commercially negotiated and the regulator only steps in when the involved operators cannot reach an agreement;



- The list of products included in the RAIO is not justified based on the SMP analysis, market needs or regulatory economics or on the currently foreseen level of demand for these services; and
- It is unreasonable for URCA to demand the publication of the RAIO before the outputs of the cost model are ready. This is contrary to international best practice. BTC accepts that a price schedule is needed *if* early publication is required, but this must be interim pricing and prices must be set in a conservative manner that allows tariff-rebalancing and business transformation phases to adjust to the new competitive market. Further, prices must not be set at levels that risk inefficient market entry or distortion: where there is doubt as to cost-based levels (prior to cost modelling) then wholesale prices should be initially set at the higher end of estimates to minimise competition/market risks.

#### *Responses to CBL Preliminary Determination*

BTC has provided answers to the specific questions posed by URCA in the preliminary determination on CBL, in Section (6) of this submission.

# 1 Introduction

## 1.1 Background

On the 30<sup>th</sup> September 2009, the Utilities Regulation and Competition Authority (URCA) issued 5 consultations documents to define the obligations imposed on the operators with presumed Significant Market Power (SMP):

- Preliminary Determination: Types of obligations on The Bahamas Telecommunications Company Limited under S.116 (3) of Communications Act, 2009 (the “Preliminary Determination on BTC”).
- Preliminary Determination: Types of obligations on Cable Bahamas Ltd. under S.116 (3) of Communications Act, 2009 (the “Preliminary Determination on CBL”).
- Draft Guidelines: Accounting Separation and Cost Accounting issued to The Bahamas Telecommunications Company Limited (the “AS guidelines for BTC”).
- Draft Guidelines: Accounting Separation and Cost Accounting issued to Cable Bahamas Ltd. (the “AS guidelines for CBL”).
- Draft Guidelines: Access and Interconnection (the “Access and Interconnection guidelines”).

The main aims of these documents are to:

- Notify the operators with presumed SMP under S.116 (3) of the Communications Act 2009 (the “Comms Act”) the proposed list of obligations imposed on them.
- Provide a list of services which are excluded from the proposed obligations.
- Outline the Standard and Specific obligations which URCA proposes to impose on BTC and CBL.
- Provide guidelines for the implementation of Accounting Separation (AS) and the Reference Access and Interconnection offer (RAIO).
- Define a timeline for the implementation of the obligations imposed on the SMP operators.

## 1.2 This document

This document sets out BTC’s response to the consultation documents issued by URCA.

This document is structured as follows:

- Section 2 provides general comments to URCA’s Preliminary Determinations on Types of Obligations to be applied to BTC and CBL and sets out the key principles of market

definition and imposition of regulatory remedies that should be applied in future market review consultations.

- Section 3 provides comments and alternative proposals for the AS guidelines set out for BTC.
- Section 4 addresses the Access and interconnection guidelines.
- Section 5 provides answers to the specific questions asked in the Preliminary Determination on BTC.

## 2 Comments on URCA's Preliminary Determinations on Types of Obligations to be imposed on BTC and CBL

This section of the document outlines some general considerations on URCA's Preliminary Determinations on types of obligations to be applied on BTC and CBL.

### 2.1 Comments on the Transition Framework

BTC understands that the timeline followed by URCA for these Preliminary Determinations was imposed on URCA by Section 116 of the Comms Act 2009 and that this timeline was insufficient to conduct a standard market review process. This has also been discussed during the meeting between BTC and URCA on the 20<sup>th</sup> October 2009.

BTC also acknowledges and welcomes the reassurance given by URCA during the above-mentioned meeting on the intention of URCA to adopt a standard market review process in the future and to hold a consultation on the appropriate methodology to be followed in future market reviews. BTC is also pleased to note that URCA has been consistent in its regulatory assessment of BTC and CBL. BTC is of the opinion that this consistency is very important and hopes that a similar approach will be taken in the future, when other players enter the telecommunications market.

However, BTC is of the view that the definition of markets and the imposition of wholesale and retail regulatory remedies are of critical importance to BTC in terms of how it can fairly compete as markets become competitive and in order to ensure its financial viability. It should not be acceptable to pre-define markets. If such an approach were taken in the EU, this would breach EU economic guidelines.

Moreover, BTC would like to express its concern over the speed at which the process is being conducted. The results of this consultation are extremely important for the future of BTC and will significantly impact its future commercial and strategic decisions. It would therefore have been more appropriate if these decisions were delayed until BTC had the opportunity to discuss these changes with its new strategic partner.

Looking forward, BTC encourages URCA to form a long-term view of the development of the telecommunications sector in The Bahamas. As will be discussed in more detail in the following sections, BTC believes that URCA should develop a strategic forward-looking assessment of the sector and should consider that:

- Entry in the market of new Mobile Network Operators (MNOs) is expected in the short to medium term and will rapidly increase competition in the sector.
- There is no significant international precedent for regulation of MNOs at the retail level. We expect that, consistent with the international experience, no retail regulation will be imposed on the mobile sector in The Bahamas.

- New entry, from both MNOs and other fixed operators, will stimulate the provision of new and more advanced products at the wholesale level.
- The development of competition from the MNOs and other fixed operators will rapidly impose constraints on BTC's fixed services and regulation at the wholesale level will create a level playing field across operators. Therefore, we expect to see gradual deregulation at the retail level.

BTC also wishes to state that the determination of SMP obligations should be decided with regard to the overall sector development. In particular, BTC is concerned that URCA has determined regulatory remedies without having considered how these remedies interact with the following.

- Universal Service Obligations (USO) obligations (and their cost).
- The access deficit.
- The need for rebalancing and for ensuring that SMP operators are not required to provide services at cost when there is at the same time an obligation to provide other services below cost.
- The privatisation process and the need to ensure that BTC retains financial viability.

The remainder of this section outlines:

- The methodology that we believe should be adopted in any future market review process.
- Specific issues that we believe URCA has not taken into account in its analysis of the products and markets.

## 2.2 Appropriate conduct of a market review process

As explained by URCA during the meeting with BTC on the 20<sup>th</sup> October 2009, the restrictive timelines imposed on URCA by law have not allowed URCA to conduct a standard market definition process. URCA has therefore preferred to effectively leave out the market definition exercise and has considered each of the products currently sold by BTC as separate markets.

While BTC understands that the time constraint under which URCA was operating was stringent, BTC is of the opinion that a standard market review should have been conducted.

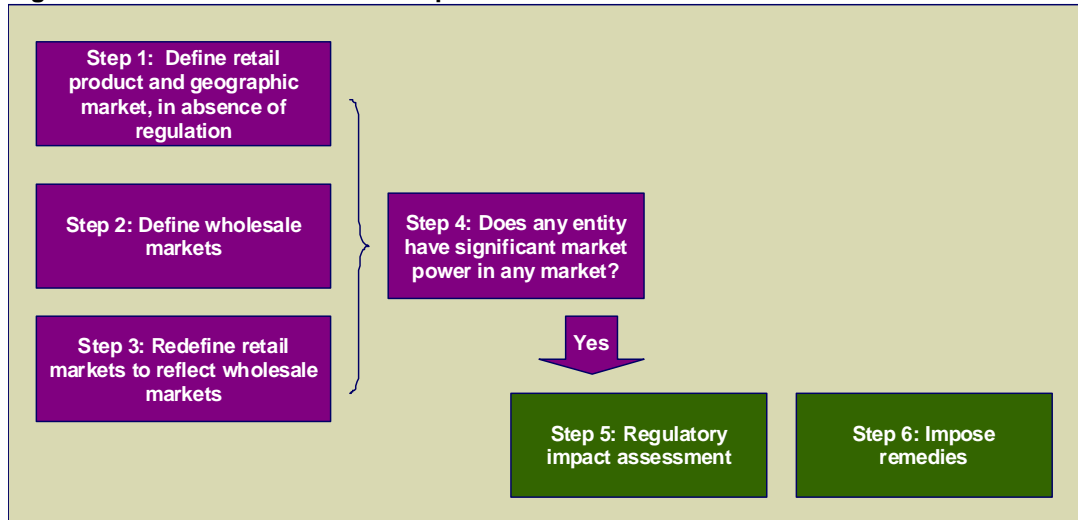
### 2.2.1 Process

BTC is pleased to note that URCA has recognised the need for proportionality when establishing regulatory intervention – most regulatory processes and remedies have very high fixed costs and it is important to consider this when assessing the situation in The Bahamas. BTC welcomes the attention paid by URCA to the experience in other small states internationally, which have combined the best practice established by the EU with the local need for proportional regulatory processes.

It is generally recognised that the first step when considering the regulation of telecommunications services is to set out a framework for assessing those markets that may require intervention. This is because it is standard practice to only impose remedies in those markets in which one or more entities have been found to have SMP.

Figure 1 below outlines the standard end-to-end market review process followed.

**Figure 1: End-to-end market review process**



BTC submits that it is important, and consistent with international best practice, that a process should be put in place that allows for adequate time for consultation on the market definition and SMP assessment to take place, before any consultation on regulatory remedies. Furthermore, a regulatory impact assessment must be undertaken before the remedies consultation. This has not been conducted by URCA.

BTC understands that URCA is obliged by law<sup>1</sup> to publish before the end of its financial year (31<sup>st</sup> December) a plan of its proposed activities and consultations for the following year. However, BTC is concerned that the timeframe for which the market review and remedies will be in place and at which point URCA plans to review the market definition is still undefined.

### 2.2.2 Definition of economic markets

The relevant market definition for the purpose of determining the appropriateness of ex-ante regulation should be conducted on a *forward-looking* basis, so that possible future developments in the market can be taken into account in determining the regulatory response. URCA seem to acknowledge this, however we believe that it has not fully considered the speed at which these developments are taking place.

The standard conceptual framework for market definition in competition analysis is the so-called Small but Significant and Non-transitory Increase in Price (SSNIP) test or hypothetical monopolist

<sup>1</sup> Utilities Regulation and Competition Authority Act, 2004. Section 41.7.(4).

test (HMT). This test attempts to identify the smallest set of products (including the product under analysis) such that a hypothetical monopolist controlling that set of products would find it profitable to impose a 5% to 10% rise in price.

The SSNIP test has been widely used, not just in the EU, but all over the world for the purpose of market definition, including in smaller jurisdictions such as Bahrain, Jamaica, Guernsey and Malta.

The purpose of defining the relevant market is to delineate the scope of the relevant constraint on the hypothetical monopolist. Figure 2 outlines the SSNIP test, as adopted by the UK Office of Fair Trading (OFT).

### Figure 2: SSNIP Test

#### OFT guidelines - SSNIP test

“In essence the test seeks to establish the smallest product group (and geographical area) such that a hypothetical monopolist controlling that product group (in that area) could profitably sustain 'supra competitive' prices, i.e. prices that are at least a small but significant amount above competitive levels. That product group (and area) is usually the relevant market.

If, for example, a hypothetical monopolist over a candidate product group could not profitably sustain supra competitive prices, then the candidate product group would be too narrow to be a relevant market. If, on the other hand, a hypothetical monopolist over a subset of a candidate product group could profitably sustain supra competitive prices, then the relevant market would usually be narrower than the candidate product group.

The steps in applying this approach are as follows. We start by considering a hypothetical monopolist of the focal product (i.e. the product under investigation) which operates in a focal area (i.e. an area under investigation in which the focal product is sold). We then ask whether it would be profitable for the hypothetical monopolist to sustain the price of the focal product a small but significant amount (e.g. 5 to 10 per cent) above competitive levels. If the answer to this question is 'yes', the test is complete. The product and area under the hypothetical monopolist's control is (usually) the relevant market.

If the answer to this question is 'no', this is typically because a sufficiently large number of customers would switch some of their purchases to other substitute products (or areas). In this case, we assume further that the hypothetical monopolist controls both the focal product and its closest substitute. We then repeat the process, but this time in relation to the larger set of products (or areas) under the hypothetical monopolist's control.

As before, we ask whether it would be profitable to sustain prices 5 to 10 per cent above competitive levels. If so, the test is complete. The relevant market is (usually) the focal product and its closest substitute. If not, we assume that the hypothetical monopolist also controls the second closest substitute to the focal product and repeat the process once more. We continue expanding the product group in this way (i.e. by adding the next best substitute) until we have found a group of products (or areas) for which it is profitable for the hypothetical monopolist to sustain prices 5 to 10 per cent above competitive levels (by adding the next best substitute).

When the test is complete for the first time, the relevant market has usually been defined. However, occasionally it will be appropriate to define the relevant market to be wider than the narrowest product group (or area) that passes the test”.

URCA states in its Preliminary Determinations that it has adopted the SSNIP test in its methodology, but it has used the "actual monopolists, i.e. the presumed SMP operator, based on available data, rather than the hypothetical monopolist test"<sup>2</sup>. While the use of the SMP operator, instead of the hypothetical monopolist is understandable given the presumed SMP status imposed on BTC and CBL, *BTC nevertheless thinks that the SSNIP test has not been correctly conducted and has led to the incorrect definition of markets*. This is explained in more detail in section 2.3 below.

Moreover, URCA seems to have ignored a number of other supplementary tests, such as the critical loss test, the price correlation test and the assessment of market price-elasticities, which are generally considered during a market review exercise.

The critical loss test defines the "critical loss" as the percentage of current sales that would need to be lost in order to make a price rise of 5 or 10% by a hypothetical monopolist unprofitable. The critical loss can be calculated from information on the current margin between price and variable cost. The critical loss is normally smaller for high margin products (as a greater profit is lost on each unit of lost demand when a price rise is implemented).

After the critical loss has been calculated, it is necessary to estimate the actual loss that would result if the hypothetical monopolist raised prices by 5% to 10%. If, for the candidate product market, the actual loss exceeds the critical loss, then a 5% to 10% price rise would not be profitable and the product market should be widened. By contrast, if the actual loss is less than the critical loss, then this is evidence that the candidate market definition is appropriate.

Given information about the existing price-cost margin, calculating the critical loss is normally straightforward. Typically harder to estimate is the actual loss, although this can sometimes be estimated on the basis of product own-price elasticities. Figure 3 provides an example of the critical loss test applied in practice.

**Figure 3: Example of the critical loss test**

**FTC v Tenet Healthcare Corp: critical loss in geographic market definition<sup>3</sup>**

In 1998, the US Federal Trade Commission (FTC) tried to block the merger of the only two hospitals in Poplar Bluff, a town in Missouri. A critical element of the FTC's case was that the geographic market was confined to Poplar Bluff. The merging parties argued that the geographic market was wider. They submitted that a five per cent price rise would be unprofitable if seven per cent of the merged hospital's patients were to switch to another hospital (i.e. the critical loss was seven per cent). They argued that since 55% of the patients of the merged hospitals would come from areas where a significant proportion of patients chose hospitals outside Poplar Bluff it was plausible that the actual loss in the event of a five per cent price rise would be more than seven per cent. This argument was accepted by the Appeals Court, which overturned the FTC's decision.

<sup>2</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd under S.116 (3) of Communications Act 2009, page 22.

<sup>3</sup> United States Court of Appeals for the Eighth Circuit No. 98-3123, <http://www.ftc.gov/bc/healthcare/antitrust/fedcourtbrieffs/tenetpetitionrehearing.pdf>, 1999.



Another example of this is the price correlation test:

Price correlation analysis has been used in many competition cases as an indicator of whether two products or geographic areas are in the same economic market. When prices of two products (or a single product in two regions) move together, this is taken as an indication that it is more likely they are in the same market.

Given two series of prices, the correlation coefficient can easily be computed. This statistic ranges from +1 (perfect correlation of prices) to -1 (prices are perfectly inversely correlated). A coefficient of 0 implies there is no relationship between the price series.

The reason that correlated prices between two products (A and B) may be regarded as evidence of substitutability is that if the price of product A rises, and A and B are substitutes, then demand for product B will rise. This would normally lead to the price of product B rising (unless supply is perfectly elastic). Accordingly, the typical expectation is that the prices of substitutable products will be correlated.

The European Commission has used the price correlation technique for market definition in a number of merger cases such as Nestlé/Perrier<sup>4</sup>, Procter & Gamble/VP Schickdanz<sup>5</sup>, CVC/Lenzig<sup>6</sup>. Figure 4 provides an example of the practical application of the price correlation test.

**Figure 4: Example of the use of price correlation for market definition**

**Nestlé/Perrier: the use of price correlation for market definition**

The 1992 merger between Nestlé and Perrier reduced the number of major mineral water firms in France from three to two. Important questions in the case were whether still and sparkling bottled water were separate markets, and whether other soft drinks should be included in the same market as bottled water. The European Commission found that the price of still and sparkling bottled water was highly correlated, but that prices for soft drinks were less correlated with the prices of bottled water. In part on the basis of this evidence, the Commission included still and sparkling in the relevant market, but excluded other soft drinks.

However, while price correlation is sometimes a useful aid in market definition, highly correlated prices are not always indicative of two products being the same market. In particular:

- Two products may have highly correlated prices even though they are not substitutes if the cost of an input which is used in the production of both products is varying, or because of general inflation.
- Even when products do not have highly correlated prices they may be substitutes, for example because the supply of one is perfectly elastic the price does not rise in response to an increase in demand caused by a price rise of the other.

<sup>4</sup> Case IV/M190 [1993] 4 C.M.L.R. M17; [1992] O.J. L356/1.

<sup>5</sup> Case IV/M430 [1994] O.J. L354/33.

<sup>6</sup> Case COMP/M.2187 (2000).

URCA has not conducted any analysis of the correlation of prices of potentially substitutable products. BTC believes that this type of analysis should be conducted in the future by URCA.

A further piece of evidence that is usually used in defining markets is price elasticity analysis. Whether a hypothetical monopolist of a particular product could profitably increase price by 5 to 10% depends on the responsiveness of demand to changes in price and the existing price-cost margin. The own price elasticity is a measure of the responsiveness of demand to a change in price.

Where reliable own-price elasticity estimates are available they provide the most economically well-grounded method for defining the relevant market. However, reliable estimation of elasticities is typically data intensive and time consuming as it normally involves econometric analysis.

In all of the above market definition tests, it is necessary to show evidence of substitution. Where markets can be shown to be contestable then evidence of possible, rather than actual, substitution is sufficient.

Figure 5 provides an example of evidence used by OFT in considering the level of substitution.

**Figure 5: Example of evidence of substitution**

**OFT's example of evidence of substitution<sup>7</sup>**

"Evidence on substitution from a number of different sources may be considered. Although the information used will vary from case to case and will be considered in the round. The following evidence and issues are often likely to be important:

- Evidence from the undertakings active in the market and their commercial strategies may be useful. For example, company documents may indicate which products the undertakings under investigation believe to be the closest substitute to their own products. Company documents such as internal communications, public statements, studies on consumer preferences or business plans may provide other useful evidence.
- Customers and competitors will often be interviewed. In particular, customers can sometimes be asked directly how they would react to a hypothetical price rise, although because of the hypothetical nature of the question, answers may need to be treated with a degree of caution. Survey evidence might also provide information on customer preferences that would help to assess substitutability: for example, evidence on how customers rank particular products, whether and to what extent brand loyalty exists, and which characteristics of products are the most important to their decision to purchase.
- A significant factor in determining whether substitution takes place is whether customers would incur costs in substituting products. High switching costs relative to the value of the product will make substitution less likely.

<sup>7</sup> Market Definition, Competition law, [http://www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/of403.pdf](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of403.pdf); 2004.

- Evidence on product characteristics may provide useful information where customer substitution patterns are likely to be influenced significantly by those characteristics. Where the objective characteristics of products are very similar and their intended uses the same this would be good evidence that the products are close substitutes. However, the following caveats should be noted. First, even where products apparently have very similar characteristics and intended use, switching costs and brand loyalty may affect how substitutable they are in practice. Second, just because products display similar physical characteristics, this does not necessarily mean that customers would view them to be close substitutes. For example, peak customers may not view rail travel during off peak times to be a close substitute for rail travel at peak times. Third, products with very different physical characteristics may be close substitutes if, from a customer's point of view, they have a very similar use.
- Patterns in price changes can be informative. For example, two products showing the same pattern of price changes, for reasons not connected to costs or general price inflation, would be consistent with (although not proof of) these two products being close substitutes. Customer reactions to price changes in the past may also be relevant. Evidence that a relatively large proportion of customers had switched to a rival product in response to a relatively small price rise in the focal product would provide evidence that these two goods are close substitutes. Equally price divergence over time, without significant levels of substitution, would be consistent with the two products being in separate markets.
- Evidence on own or cross price elasticities of demand may also be examined if it is available. The own price elasticity of demand measures the rate at which demand for a product (e.g. the focal product) changes when its price goes up or down. The cross price elasticity of demand measures the rate at which demand for a product (e.g. a rival product) changes when the price of another product (e.g. the focal product) goes up or down.
- In some cases critical loss analysis may be relevant. One definition of critical loss is the minimum percentage loss in volume of sales required to make a 5 (or 10) per cent price increase on a product unprofitable. The critical percentage tends to be lower when an undertaking has a high mark up over unit costs (since each sale lost entails a relatively large loss in profit). However, the fact that an undertaking can set a high mark up might also demonstrate that its current customer base is not particularly price sensitive. These potentially opposing effects might need to be balanced and assessed in conjunction with other evidence (e.g. estimates of elasticities of demand); and
- Evidence on the price: concentration relationship may also be informative. Price concentration studies examine how the price of a product in a distinct area varies according to the number (or share of supply) of other products sold in the same area. These studies are useful where data are available for several distinct areas with varying degrees of concentration. For example, if observations of prices in several geographic areas suggest that when two products are sold in the same area, prices are significantly lower than when they are not, this might suggest that the two products are close substitutes (provided that it is possible to distinguish this from the effect of other factors which might explain the price differences)".

Further, it is important that URCA notes, both in relation to this Notice and as a general point of principle for subsequent market definitions, that products that provide different degrees of “quality/convenience” and hence have different prices (such as fixed and mobile telephony) may in principle be part of the same market. In the face of a relative price increase, consumers who initially opted for the cheaper product might switch to the more expensive/more convenient product, as the smaller price differential may no longer compensate for the lower quality/convenience of the cheaper product. Similarly, if the price of the more expensive product rises, consumers who initially opted for the more expensive product might switch to the cheaper/less convenient product, as the larger price differential may no longer justify the difference in quality/convenience. However if price differentials are very large (the price of one being several times the price of the other), sufficient switching in response to small relative price changes may not occur.

In addition URCA should consider two-sided markets. In two-sided markets, where prices set on one side of the market influence demand on the other side, the knock on effects of a price increase on one side onto the other side should be considered in understanding whether the price increase would be profitable. The market for call termination is a two-sided market, because operators seek to attract both those individuals who make calls and those who receive them. Operators only charge one side of the market for call termination (i.e. the calling party). However, the profitability of a price increase for call termination needs to consider in principle also the effect on the called party. For example, a price increase may prompt some called parties to switch to alternative networks (for example if they wanted to ensure that callers onto their fixed or mobile numbers were not put off by the higher fees and hence maximize the likelihood of being called).

There may be circumstances in which the strict application of the principles of demand and supply side substitution under the SSNIP framework may lead to inappropriately narrow markets. In those instances, it would be appropriate for URCA to take into account additional considerations, such as those discussed below:

- Common pricing constraints: In defining relevant markets it is appropriate to consider whether common pricing constraints exist across customers, products/services or areas such that they should be included in the same relevant market even if demand and supply side substitution are not present. For example, even if substitution between products/services offered in different geographic areas is not possible, if the products are priced in the same way and at the same level across different areas then they would all be included in the same market; and
- Homogeneity of competitive conditions in defining the relevant geographic market: demand and supply side substitution, and common pricing constraints, are also relevant for defining whether the supply of the products or services in question in different geographic areas significantly constrain each other (geographic market definition). However, where demand or supply side substitution, or common pricing constraints are not sufficient (such that they might lead to impracticably narrow markets), it is possible to define the boundaries of the geographic markets by analysing geographic variations in competitive conditions. Geographic markets may be defined for areas where the conditions of competition are similar or sufficiently homogeneous and that can be distinguished from other areas in which the competitive conditions are appreciably different. Factors that might be considered in identifying geographic areas with similar competitive conditions include the presence of

competitors, the likelihood of entry or the presence of alternative infrastructures. For example, Ofcom has adopted this approach in defining geographic markets for wholesale broadband access, and has accordingly identified three different geographic markets: a market for those exchanges where there was only one operator, a market for those exchanges where there were 2-3 operators and a market for those exchanges where there were four or more operators, as will be discussed in more detail in section 2.3.4. BTC believes that competitive conditions vary considerably across the different islands within The Bahamas and that URCA must factor this into account in future market reviews.

### 2.2.3 Recognising prospectively competitive markets

Since the market is in the early stages of liberalisation, it is necessary to show contestability and prospective competitiveness of markets.

- Contestability: There are low barriers to entry and therefore other entrants could enter the market. This threat of new entry is sufficient to reduce the market power of existing players and to ensure they act in a competitive manner. These arguments are noted in the economic literature (see Baumol<sup>8</sup>) and have been made consistently by incumbent operators including Cable & Wireless in the Caribbean and AT&T in the USA.
- Prospective competition: To the extent that new entry is likely to occur (e.g. licences will be issued) or existing competition is expected to increase in force then markets are viewed to be prospectively competitive. In these types of markets, regulatory remedies are usually limited to non discrimination and an obligation to supply.

In defining the markets, we recommend that URCA introduce three classifications for markets that are defined:

- Competitive markets;
- Non competitive markets; and
- Prospectively competitive markets. This classification would reflect those markets which are not currently competitive, but where URCA sees the development of competition, creating the requirement for a regular review of the extent of competition.

This classification is consistent with the principles reflected in the EU electronic communications framework<sup>9</sup>. This is enshrined in the approaches adopted by National Regulatory Authorities

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<sup>8</sup> William J. Baumol , Contestable Markets: An Uprising in the Theory of Industry Structure The American Economic Review, Vol. 72, No. 1 (Mar., 1982), pp. 1-15

<sup>9</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03). Paragraph 20 states that in carrying out the market analysis NRAs should conduct a forward looking, structural evaluation of the relevant market, and determine whether the market is prospectively competitive.

(NRAs) in the EU and in the many other countries who follow the broad principles of this framework<sup>10</sup>.

If a market is competitive then there is no need for ex-ante regulation. The main question for regulators is often to determine whether a market is competitive or prospectively competitive. Whether there is a prospectively competitive market will have a massive influence on whether an undertaking holds SMP.

A prospectively competitive market can only be determined by taking a forward looking approach to market structure. In essence, URCA should look to see if the lack of competition in the market is durable and only use past evidence if it is relevant in assessing the future of the market.

Firstly, URCA should assess the barriers to entry, either structural or regulatory, which would hinder access to the market. These barriers identified should be high and non transitory. However, these barriers should be looked at over a relevant time horizon due to the dynamic nature of the sector. Regulation should only be applied to those markets where competition would not be effective within the time horizon. That said, barriers to entry are not as important in an innovation driven market such as communications because there can be competitive constraints from innovative competitors. This in turn leads to dynamic or long term competition based on innovative threats from potential competitors that do not necessarily exist and are not considered a static market concept.

Due to this dynamic it is also clear that the markets need to be reviewed periodically to see if there is effective and sustainable competition.

Regulators should also be hesitant to apply ex-ante regulation to an emerging market as premature intervention can unduly influence the competitive conditions taking place. This is offset by a regulators ability to periodically review any emerging market to ensure that these competitive conditions are falling into place. Any current market analysis may run the risk of becoming inaccurate and irrelevant if not periodically reviewed on a forward looking basis.

In the UK, both BT and Vodafone had determinations against them that they had market influence. This was subsequently reviewed and the determinations removed largely because Oftel concluded that the mobile sector was prospectively competitive and reached the following conclusion:

“Looking ahead, Oftel believes that competition should continue to develop ...the changing nature of mobile services is likely to bring countervailing power in the form of new content providers and providers of mobile Internet services; competition between the existing operators should continue to develop and prices should continue to fall. That is why Oftel believes that the sector remains prospectively competitive.”<sup>11</sup>

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<sup>10</sup> See for example Oftel's Notices of determinations to remove the determinations that Vodafone and BT Cellnet have Market Influence under Condition 56 of their respective licences, where Oftel concluded that the mobile sector was prospectively competitive

<sup>11</sup> See Oftel's Effective competition review: mobile, 26 Sept 2001.

Oftel also noted that there was a long term trend of price decreases in the mobile sector which support its view that there was prospective competition.

In Finland, the regulator Ficora<sup>12</sup> proposed draft obligations that TeliaSonera had SMP and should relinquish access rights to its mobile network (amongst other things). After analysis and consultation, these draft obligations and findings were rejected by the European Commission, largely on the basis that the evidence provided was insufficient to prove that Ficora had undertaken a forward looking approach.

Recognising prospectively competitive markets is of extreme importance in markets like The Bahamas, where other fixed and mobile operators are expected to enter the market in the short to medium term. URCA should conduct frequent reviews of the markets and pay serious consideration to the future development of competition.

#### 2.2.4 Assessment of dominance

BTC acknowledges that it was designated as SMP operator by act of law and therefore URCA was not required on this occasion to conduct an assessment of dominance. It is important that in the future URCA adopts a standard methodology for the assessment of SMP, consistent with international best practice.

SMP status is determined 'if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers'.<sup>13</sup>

From an economic point of view, independence of competitors, customers and consumers is a matter of degree. At one extreme, market power is absolute: a monopolist is not constrained by any competitor in its pricing power (although it is still constrained by what consumers are willing to pay for its products). At the other extreme is perfect competition where the firm has no control over pricing and must accept the market price. There are a number of indicators which should be assessed. These are well summarised by the OFT in the UK.

#### Figure 6: OFT framework for assessing market power

##### OFT framework for assessing market power<sup>14</sup>

When assessing whether and to what extent market power exists, it is helpful to consider the strength of any competitive constraints, i.e. market factors that prevent an undertaking from profitably sustaining prices above competitive levels.

<sup>12</sup> Commission Decision Case FI/2004/0082: Access and call origination on public mobile telephone networks in Finland.

<sup>13</sup> Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, The Official Journal of the European Communities S. 70. 11/07/2002.

<sup>14</sup> Assessment of Market Power; OFT Competition Law, [[http://www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/oft415.pdf](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft415.pdf)]; 2004.

Competitive constraints include:

- Existing competitors - 'Existing competitors' are undertakings already in the relevant market. If an undertaking (or group of undertakings) attempts to sustain prices above competitive levels. Therefore, attempts to sustain prices above competitive levels might not be profitable because customers would switch their purchases to existing competitors. The market shares of competitors in the relevant market are one measure of the competitive constraint from existing competitors. It can also be important to consider how the market shares of undertakings in the market have moved over time.
- Potential competition - This refers to the scope for new entry. Where entry barriers are low, it might not be profitable for one or more undertakings in a market to sustain prices above competitive levels because this would attract new entry which would then drive the price down – if not immediately, then in the long term.
- Buyer power - Buyer power exists where buyers have a strong negotiating position with their suppliers, which weakens the potential market power of a seller.

Economic regulation is a further relevant factor when assessing market power in industry sectors where, for example, prices and/or service levels are subject to controls by the government or an industry regulator. While economic regulation is not a competitive constraint in itself, it can limit the extent to which undertakings can exploit their market power.

Evidence about the behaviour and financial performance of undertakings is also relevant. Where there is direct evidence that, prices substantially exceed relevant costs over the long term or profits substantially exceed competitive levels, this may indicate market power.

As noted above, the analysis of the trend in market share is very important, in particular in markets like The Bahamas, where the level of competition in all telecom markets is changing very rapidly. URCA should consider that, where market shares of different firms change over time, it is likely that high market shares in volume or revenue terms are a sign of a temporary competitive advantage due to innovative product design, marketing or cost-efficiency. Similarly, companies should not be penalised for meeting competition as this is what ensures that the benefits of competition are passed-on to consumers. Market shares staying at similar levels for an extended period of time may be an indicator of weak competition, although this could also be an indication of intense competition where competitors are quick to replicate each other's offerings.

### **Technology neutrality**

It is important that, in its assessment of market power, URCA takes the concept of technology neutrality into account. This refers to the need to define markets and products on the basis of the product characteristics and not with reference to the specific technologies used to deliver the service. This has been recognised in most jurisdictions internationally. As outlined in Figure 9, the European Commission specifies that NRAs should impose obligations that neither impose nor discriminate in favour of the use of a particular technology whilst still taking proportionate measures



to take account of specific technical characteristics of fibre networks<sup>15</sup>. Additionally, in Bahrain, the TRA has accepted Batelco's comment that optical and satellite links should be included in the same market as traditional leased lines provided over MPLS, on the basis of the principle of technology neutrality<sup>16</sup>.

The concept of technology neutrality is particularly relevant in the case of The Bahamas in relation to Voice over Internet (VOI) services. As discussed in more detail in section 2.3.2 below, URCA draws a distinction between calls provided over traditional PSTN and VOI, which is incompatible with the principle of technology neutrality. URCA justifies this distinction based on the lower quality of service of VOI calls compared to PSTN calls. However, URCA has failed to consider the trade-off between quality of service and price – if VOI prices are sufficiently low, the cost savings compensate for the lower quality of service and therefore customers would prefer to use VOI rather than PSTN. This is in fact what is currently happening in the DLD and ILD markets, where the cost differential between PSTN and VOI calls is considerable.

In the future, it is important that URCA adopts this technology neutrality principle, especially in light of the following:

- Competition from Cable Bahamas. Voice products, even if delivered over a different technology, are expected to be offered by Cable Bahamas in the near future and will be in direct competition to BTC voice services.
- Competition from mobile services. As discussed in more detail in section 2.3.3, fixed and mobile substitution and the concept of technology neutrality imply that in the future, the calls originated on the fixed and on the mobile networks should be considered as part of the same market. This will be particularly relevant when new licenses are granted to alternative mobile operators.

### **Indirect constraints**

Pricing constraints for wholesale products may be based on the pricing model for products that use similar inputs but that are sold to the retail market.

Relevant international precedents include the UK example, where cable is considered to be in the same market as ISDN and PSTN wholesale local access even though cable companies do not provide wholesale access to third parties to a material extent<sup>17</sup>. Ofcom argues this to be the case due to the indirect constraints exerted on wholesale local access by retail products offered over cable (even though cable coverage in the UK is not national). Other regulators who have included different technologies in the same wholesale market on the basis of indirect constraints from the

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<sup>15</sup> European Commission staff working document -Explanatory note, accompanying document to the European Commission recommendation on regulated access to Next-Generation Access Networks (NGA).

<sup>16</sup> TRA Bahrain, "Determination of significant market power in certain relevant retail markets", June 2008, page 22-23.

<sup>17</sup> Ofcom has applied this approach both in respect of wholesale unbundled access to local loops (Case 94, 06.10.04) and wholesale broadband access (Case 32-33, 05.02.04).

retail level include Austria (both in the case of transit markets and wholesale broadband access, including both cable and DSL)<sup>18</sup> and Ireland (Wholesale broadband access again including both cable and DSL<sup>19</sup>).

**Figure 7: Indirect constraints**

**Indirect constraints in wholesale products<sup>20</sup>**

When considering the substitutes of a wholesale product, it may be necessary to consider substitution possibilities at the downstream level. For example, assume a supplier which produces a wholesale product A that is a necessary input for supply of a retail product B, and there is also a vertically integrated supplier that supplies a product C which is a substitute for B at the retail level. The ability of customers to substitute product C from product B at the retail level may constrain the ability to raise the price of the wholesale product A.

BTC understands that, at this early stage of market liberalisation, indirect constraints might not be particularly strong. However, BTC submits that URCA should consider indirect constraints in future market reviews.

### 2.2.5 Appropriate regulatory remedies

Before deciding to implement remedies, URCA should be clear about its objectives. In the Preliminary Determination on BTC, URCA mentions the following objectives:

- Promoting competition;
- Proportionality;
- Contributing to the development of sustainable competition; and
- Promoting the interest of persons in The Bahamas<sup>21</sup>.

While BTC recognises that URCA should give most focus to customer welfare, BTC also notes that these objectives should be expanded to include the financial sustainability of BTC. The importance

<sup>18</sup> RTR, Summary notification form, Notification of a draft measure according to Article 7 of Directive 2002/21 EC (Framework directive), Finding of effective competition and the withdrawal of SMP related obligations for Telekom Austria AG on the market Nr. 10 (Transit services in the fixed public telephone network), M 16/06, M 16a/06. For wholesale broadband access see: RTR Maerkeueberpruefung, Oeffentliche Konsultations des Entwurf eines Beschlusses gemaess § 36 Abs. 1 Telekommunikationsgesetz 2003 idF BGBl. I Nr. 133/2005 (TKG 2003), 10 Wien, am 21.12.2005.

<sup>19</sup> ODTR Ireland, Case: 93, 25.08.04.

<sup>20</sup> OFT's guideline on *Market Definition*, paragraph 5.12; Competition law; [[http://www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/oft403.pdf](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft403.pdf)]; 2004.

<sup>21</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116(3) of Communications Act 2009, Section 4.4, page 28

of this will be highlighted later in the documents when discussing the specific obligations imposed on BTC.

BTC considers that URCA should follow an effects based approach to competition policy when determining appropriate remedies. This approach is outlined in Figure 8.

**Figure 8: Effects based approach to competition**

**Effects based approach to competition policy:**

This approach focuses on consumer welfare, and stresses that the ultimate objective of competition policy is to address consumer needs. This implies that the assessment of each case should be based on likely anti-competitive effects of business strategies. This 'Effects-based approach' stands out against the 'Form-based' approach, where the regulator focuses on the actual form of a company's behaviour.

The 'Effects-based approach' is based on the following principles:

- "Fair and undistorted competition is the best way to make markets work better for the benefit of both business and consumers. Healthy competition, including by dominant undertakings, should be encouraged.
- Focus of [...] enforcement policy [...] on protecting consumers, on protecting the process of competition and not on protecting individual competitors.
- [The regulator] does not need to establish that the dominant undertaking's conduct actually harmed competition, only that there is convincing evidence that harm is likely.
- [...] for pricing conduct the regulator should examine whether the conduct is likely to prevent competitors that are as efficient as the dominant undertaking from expanding on or entering the market and that can be expected to be most relevant to consumer welfare.

Since the focus of the [...] enforcement policy is on the likely effects of a dominant undertaking's conduct on consumers, [the regulator] will examine claims put forward by dominant undertakings that their conduct is justified on efficiency grounds – as is already the case under Article 81 of the treaty and for merger control"<sup>22</sup>.

The following figures set out the principles that should be used to define regulatory remedies and that BTC believe represents regulatory good practice.

<sup>22</sup> Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings; [<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1877&format=HTML&aged=0&language=EN&quiLanguage=en> ]; 2008.

**Figure 9: General principles for imposing regulatory remedies (European Commission)****European Commission General principles of the imposition of remedies<sup>23</sup>**

1. "It is worth recalling that when one or more operators have significant market power (SMP) National Regulatory Agencies (NRAs) must impose at least one of the regulatory obligations listed in Directive 2002/19/EC. Such obligations imposed on operators designated as having SMP on a relevant market (hereinafter referred to as "SMP operators") must be appropriate and based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive, in particular maximising benefits for users, ensuring that there is no distortion or restriction of competition, encouraging efficient investment in infrastructure and promoting innovation.
2. In accordance with these principles and other provisions of the Framework Directive, additional guidance to NRAs may be provided along the following lines when imposing remedies in the context of NGA roll-out:
  - **Timely analysis of the markets concerned:** NRAs will have a significant role to play in the transition to NGA both in facilitating investment and in safeguarding competition. This role is likely to be even more delicate during the phase when the initial investments are expected to take place or are taking place. It will be important to ensure that appropriate remedies are introduced in a timely manner to promote the realisation of the regulatory goals set out above.
  - **Technological neutrality of remedies:** NRAs should impose technologically neutral obligations, that is to say remedies that neither impose nor discriminate in favour of the use of a particular technology. Nevertheless, the principle of technological neutrality does not prevent NRAs from taking proportionate measures to adjust remedies to take account of the specific technical characteristics of fibre networks.
  - **Gradation of remedies:** As set out in the Explanatory Note to the Recommendation on Relevant markets, there is a logical sequence for analysing and regulating markets. Accordingly, the market to be analysed first is the one that is most upstream in the vertical supply chain. Taking into account the ex ante regulation imposed on that market, an assessment should be made as to whether there is still SMP on a forward-looking basis on the related downstream markets. Accordingly, a downstream market should only be subject to direct regulation if competition on that market still exhibits SMP in spite of wholesale regulation in the related upstream markets.
3. Therefore, in view of the objective of promoting infrastructure-based competition set out above, there should be a clear prioritisation of remedies. The concept of gradation of remedies in this context takes into account the need to promote infrastructure-based competition to the greatest extent possible while bearing in mind the necessity to maintain remedies to safeguard the level of service-based competition that has already been reached. Thus the gradation of remedies approach aims to ensure investment at the lowest level of the network infrastructure".

<sup>23</sup> European Commission staff working document -Explanatory note, accompanying document to the European Commission recommendation on regulated access to Next-Generation Access Networks (NGA).

### European Common position on defining appropriate regulatory remedies

Article 8 of the EU Access Directive (Directive 2002/19/EC) states that remedies must:

- Be based on the underlying competition problems that have been identified;
- Should be proportionate to the extent of the problem that has been identified; and
- Must be justified in the light of identified objectives.

The European Regulators Group (ERG) recommends four principles for the setting of appropriate regulatory remedies.

**Principle 1:** The National Regulatory Authority (NRA) must provide a reasoned discussion as to why the remedy was chosen. This is to include regulation in this context<sup>24</sup>:

- How the remedy is justified by the nature of the problem identified;
- The proportionality of the remedy;
- Alternative remedies so that the least burdensome remedy can be chosen; and
- The potential impact of the remedy on related markets.

**Principle 2:** In cases where infrastructure competition is unlikely to be feasible, the sufficient access to wholesale inputs is required;

**Principle 3:** In cases where, during the market review process, the replication of the incumbent's network infrastructure is determined to be feasible, then the remedies should be chosen so as to assist with the transition to a sustainable market; and

**Principle 4:** The remedies should be incentive compatible. The advantages to the regulated party of complying with the regulation should outweigh the benefits of evasion.

Before imposing any remedies, URCA should undertake a regulatory impact assessment which calculates the cost of imposing each remedy and seeks to select a remedy which has the least cost to meet the defined objective. URCA should adhere to international best practice on regulatory principles when imposing regulation. When undertaking a regulatory impact assessment, it is important to consider the risk and cost of regulatory errors and imperfect remedies. This is recognised by the European Commission, for example, and is one of the reasons why retail remedies and micro-management of remedies is frequently avoided. In particular, it is necessary to weigh the cost to the economy and consumers of a regulatory error, potentially creating additional market distortions in addition to existing ones, against the cost of refraining from a specific type of regulatory intervention or remedy. Whilst making such an assessment it is important to recognise

<sup>24</sup> ERG Common Position on the Approach to Appropriate Remedies in the New Regulatory Framework. Approved by ERG on 1st April 2004

that the absence of ex-ante regulatory intervention does not imply that abusive practices will go unpunished.

**Figure 10: Approach to impact assessment**

**Ofcom's approach to Impact Assessment**

1. "These guidelines explain how Impact Assessments will be used to help us apply these principles in a transparent and justifiable way. [...]. Impact Assessments form a key part of best practice policy making, which is reflected in Ofcom's statutory duty to carry them out. They provide a way of considering different options for regulation and then selecting the best option. In selecting and analysing options, the need to further the interests of citizens and consumers is of paramount importance. [...].
2. Impact Assessments are also useful tools for reviewing existing regulation. They provide a framework for weighing up the costs and benefits of removing regulation, as well as analysing other options. In identifying options, Ofcom will aim to consider a wide range of options, including not regulating. Where appropriate, Ofcom will explore more risk-based, targeted approaches to regulation and will consider whether there are alternatives to formal regulation, such as co-regulation. In developing policy proposals, Ofcom's aim will be to think widely about the possible impacts, taking account of the whole value chain and knock-on effects across the communications sector. By doing so, Ofcom will seek to minimise any unintended consequences.
3. To be effective, the process of doing an Impact Assessment should begin right at the start of a project, with the Impact Assessment being developed from then onwards. An Impact Assessment should therefore be a core part of the policy-making process, not a bureaucratic add-on.
4. [...] In carrying out Impact Assessments, [Ofcom] will be guided by the principle of proportionality. This means that a decision which is likely to have a wide-ranging impact and/or impose substantial costs on stakeholders will have a more comprehensive Impact Assessment than a decision which will have a less significant impact.
5. [...Ofcom] is also required to keep the carrying out of [Ofcom's] functions under review to ensure that regulation does not involve the imposition of burdens which are unnecessary; or the maintenance of burdens which have become unnecessary.
6. The benefits for citizens and consumers are potentially largest where markets are open, new entrants can compete against incumbents, investment is encouraged and innovation flourishes. For this reason, [Ofcom is] committed to promoting open and competitive markets. Where appropriate, therefore, Impact Assessments need to show the extent to which the options under consideration would have an impact on competition. Another benefit of carrying out Impact Assessments is that they provide a mechanism for considering the impact of [Ofcom's] work on the interests of the full range of Ofcom's stakeholders, including different groups of citizens and consumers. In some cases, for example, Ofcom will need to consider the impact of policy options on the interests of people living in different parts of the country or people who are elderly, disabled or on low incomes.

7. [Ofcom's] stakeholders play an important part in the Impact Assessment process as often they will be in possession of the information needed to carry out the analysis. Generally, therefore, [Ofcom] will seek to engage with stakeholders at an early stage."<sup>25</sup>

*BTC is concerned that the lack of an Impact Assessment cost-benefit analysis in URCA's methodology has led to excessive obligations being imposed on BTC.* This will be discussed in more detail in Section 3.

## 2.3 Specific issues on URCA market definition and regulatory remedies

While the sections above set out the process by which we would expect URCA to define markets and impose regulation, in this section we outline our comments on specific issues regarding the market definition exercise conducted by URCA. We accept that these issues could not have affected the current SMP status imposed on BTC. However, we feel that there are important aspects of the current telecommunications market, which are having a big impact on BTC and on the industry in general and which are rapidly causing significant changes in the level of competition in the market, which need to be taken into consideration by URCA in the future.

### 2.3.1 Timeline for future market reviews

In the Preliminary Determination, URCA states that the current interim determinations will be valid for a period of 12 to 24 months, after which a new set of market reviews will be conducted. *Given the rapidity with which the telecommunications market is evolving, BTC considers a period of 24 months excessive.* At these early stages of liberalisation, the market conditions evolve very rapidly and therefore it is important that market reviews are conducted at least every 12-18 months.

As recognised in the Comms Act<sup>26</sup>, each operator should be able to challenge its SMP status and the market review at any time by providing evidence to support the need for a review. URCA should consider this and undertake reviews in the future as required.

### 2.3.2 Impact of VOI

In section 6.2 of the Preliminary Determination on BTC, URCA states, in relation to the substitutability between Domestic Long Distance ("DLD") and International Long Distance ("ILD") fixed calls and BTC mobile voice, VOI, payphones and CBL fixed telephony over cable, that "the comparison of characteristics, price and coverage is the same for these products as it was for fixed access and local calling... Based on the evidence available, URCA concludes that these services

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<sup>25</sup> Consultations, Better Policy Making; [[http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)]; 2005. Paragraph numbering removed.

<sup>26</sup> Communications Act, 2009. Part IV, 39

are unlikely to be effective substitutes for BTC's voice calling services in the time period under review"<sup>27</sup>.

**BTC strongly disagrees with this view and in particular notes that the constraints imposed by some of the products mentioned by URCA on DLD and ILD calls are widely different from the constraints these products impose on fixed access and local calls, because some of the characteristics of these calls, and in particular the price differential, are very different. URCA should have therefore conducted a separate analysis and not refer to the analysis conducted for fixed access and local calls. URCA, in doing this, has severely overlooked some important product characteristics and has distanced itself from international best practice.**

In particular, BTC takes the position that:

- VOI is not a separate product, but only a different technology which can be used to provide local, national and international calls. This should be considered in light of the technology neutrality principle referred to above; and
- Competition from VOI in the DLD and ILD calls market is strong and growing over time and therefore there are strong price constraints from VOI to DLD and ILD services.

URCA justifies its conclusion that VOI (from either international providers and BTC and SRG) is not a good substitute for fixed access for the following reason:

- VOI has a lower quality of service;
- VOI requires more sophisticated hardware and specific software; and
- VOI depends on consumers having access to broadband.

Firstly, BTC would like to point out that the quality of VOI has increased considerably over time, and will continue to improve as BTC progresses with the upgrade of its network to a full IP network. Moreover, as discussed in section 2.2.2 above, quality of service should not be considered in isolation. In response to a 5%-10% price increase of DLD and ILD calls, subscribers could in any case switch to VOI, because the price differential compensates for the difference in quality. In its assessment of substitutability, URCA has failed to consider this price/quality trade-off faced by consumers.

Secondly, BTC notes that broadband services are available, either via wired or wireless local loop, to most settlements in the Bahamas and therefore access to broadband services is not a significant constraint in switching between VOI and PSTN services.

Thirdly, BTC would like to point out that, for two services to be considered part of the same market, constraints only need to be unidirectional. So, for VOI and PSTN calls to be included in the same

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<sup>27</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.2, page 70.



market, it is sufficient for VOI to place constraints on the provision of DLD and ILD calls and it is not necessary to observe the reverse.

As shown already in our response to the Retail Price Regulation Consultation, revenues from DLD, but in particular ILD, calls have drastically reduced over time. This was due to both a reduction in volumes and a reduction in tariffs, which was imposed on BTC by the strong competition faced by both licensed and unlicensed VOI providers.

The following table shows the decrease in revenues from ILD calls over the past five years.

**Table 1: Annual percentage change in BTC revenues from DLD and ILD calls**

	2004-2005	2005-2006	2006-2007	2007-2008
ILD revenue change	-64.3%	-21.7%	-17.3%	-16.6%
DLD revenue change	-5.0%	-4.3%	-4.8%	-12.2%

BTC competes against CBL and SRG on VOI services. BTC estimates SRG has approximately 13% of the fixed line market through VOI, with estimated revenues of US\$13 million<sup>28</sup>.

The inclusion of VOI in the market for voice telephony has been accepted by more regulators internationally. For example, the Malta Communications Authority states “Local voice telephony traffic encapsulates all voice traffic originating and terminating on the Maltese Islands. Voice traffic using fixed line copper/fibre, VOIP media and the airwaves as its carriers all qualify for classification under this term...”<sup>29</sup>. The East Caribbean Telecommunications Authority (ECTEL), states, in its VOIP policy: “the deployment of VOIP represents merely the use of a new or different technology. In this regard, the provision of VOIP services represents a new means of delivering a service substantially the same or similar to traditional PSTN voice services...”<sup>30</sup>.

In light of the evidence provided above, BTC believes that URCA’s conclusion that VOI does not constrain BTC in the DLD and ILD calls markets is wrong, as it obviously does not take into consideration the reality of the market. In the future, we would recommend URCA conducts a proper assessment of the volume and price trends when considering substitutability in this market.

### 2.3.3 Impact of fixed-mobile substitution

In BTC’s opinion, URCA should in the future consider the constraint imposed by mobile products on fixed services. Similarly to the case of VOI discussed above, the constraints between fixed and mobile access and calls need not be bidirectional – in order to consider fixed and mobile services in the same market it is only necessary for mobile to impose constraints on fixed services and not vice versa.

<sup>28</sup> BTC Corporate Performance Report, June 2009.

<sup>29</sup> Malta Communications Authority, “Electronic Communications Market Review September 2006-March 2007: Voice Telephony”, page 30.

<sup>30</sup> ECTEL, “Policy Recommendations on Voice over Internet Protocol (VOIP) Regulatory Issues – Discussion paper”, May 2009, page 9

URCA justifies its conclusion that fixed and mobile access and calls belong to different markets on the basis that:

- There are quality of service issues with mobile calls; and
- Prices of mobile calls are too high compared to fixed calls; and
- Provision of alternative mobile services is not expected in the next few years, as BTC has exclusivity on the provision of mobile services for 2 years after privatisation is completed.

*BTC strongly disagree with each of the above points:*

- On the quality of service issue, BTC notes that URCA relies on “anecdotal evidence”<sup>31</sup>. This is clearly unacceptable and contrary to international best practice. Moreover, BTC notes that, after the upgrade of its mobile network to GSM, quality of service, and in particular indoor coverage, has dramatically improved and therefore URCA is, at best, drawing conclusions on outdated information. In the future, as 3G technology is adopted, substitution between fixed and mobile access services will become even more pronounced, as 3G will enable data services which are currently only provided over the fixed network.
- In its discussion of prices<sup>32</sup>, URCA refers only to the prices paid by post paid customers. However, BTC notes that for low usage customers, the use of mobile phones could be cheaper, as it does not involve the payment of a fixed rental. Prepaid customers only need to pay \$15 for a SIM card and \$45 (or even less, during special offers) for a mobile phone.
- Although BTC has been granted a two year exclusivity period for the provision of mobile services, precedents in the Caribbean region indicate that the exclusivity period can sometimes be reduced. This is the case, for example, of Barbados and Trinidad and Tobago, where new mobile licenses have been issued before the expected end date of the exclusivity period. In both cases, the new entrants pursued very aggressive entry strategies and managed to expand their subscriber base very rapidly, putting the incumbents under strong competitive pressures. This concern is highlighted by the fact that official statements made by the Government have indicated that two mobile licences are likely to be granted on the first anniversary of the sale to commence commercial service on the second anniversary of the sale. A review of URCA’s decision on the timing of the granting of new mobile licences will therefore need to be undertaken as soon as there is more clarity on the timeline for the issue of new licenses. URCA needs to ensure that the full exclusivity is able to be preserved.

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<sup>31</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 5.2.3.1, page 51.

<sup>32</sup> See Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.1.1, and page 62.

Convergence between fixed and mobile markets has been recognised internationally, as outlined in the following figure.

**Figure 11: Impact of fixed and mobile convergence**

**Fixed and mobile convergence at the retail level: A summary of some recent evidence**

In more developed telecommunications markets, mobile services are complementary to fixed line services, as most people use both. In emerging markets mobile services are often substitutes to fixed phone services.

As of 2004 there were more subscriptions to mobile services than to fixed-line and broadband services combined. (By 2010 there are predicted to be twice as many mobile service subscriptions as fixed-line and broadband subscriptions. By 2007, mobile phone and fixed voice traffic levels are expected to reach a 50-50 split.)

Convergence between fixed and mobile services is expected to speed up. There will be an increased mobile offering of services that are available on a fixed-line basis today. Short dialling, switchboard services, call queuing, distribution features, electronic phonebooks and emails will increasingly be incorporated into mobile offerings. This will make it attractive for customers to substitute fixed line services for integrated mobile services. Businesses can benefit from this as these solutions require relatively low capex and ongoing operational and maintenance expenditure compared to fixed line telephone networks.

International experience suggests that mobile phones especially have a high potential in emerging markets. For example, increasing numbers of micro-entrepreneurs in Rwanda use mobile phones for conducting their business, and offering phone services on a mobile phone basis represent an opportunity for micro-entrepreneurs in Uganda and Bangladesh.

Increasingly, integrated infrastructure is seen as a means of leapfrogging older infrastructure. Several service providers offer mobile phones that allow users to access services over IP protocols when at home or within the reach of a WiFi hotspot. Furthermore, recent developments suggest that the technical barriers to an integrated network infrastructure are diminishing.

During the last two years, fixed-mobile substitution has become more common also internationally. A study conducted by Analysis Research<sup>33</sup> indicates that mobile phones are progressively substituting for fixed voice services in Western Europe, with the proportion of people with mobile phones but without fixed lines reaching 12% in Q1 2006. Between 2004 and 2006, the number of mobile connections grew 21% while the number of fixed line connections declined by 1%. The volume of mobile originated traffic has also experienced rapid growth in Europe, growing by 35% between 2004 and 2006, while the volume of fixed originated traffic has declined.

In the latest review of the market for call services provided at a fixed location, the Malta Communication Authority has explicitly considered the possibility of including fixed and mobile originating calls in the same market. The Authority in this case has considered that it is still too

<sup>33</sup> "Fixed-Mobile Substitution in Western Europe: causes and effects", (2007), Analysys Research.

early to include fixed and mobile originating calls in the same market. However, the Authority reached this decision only after an extensive analysis of prices and other product characteristics<sup>34</sup>.

Given this evidence, and the arguments made above, BTC would recommend that a proper analysis of the constraints imposed by the mobile voice markets to the fixed voice markets is conducted by URCA in future market reviews. This will become particularly important when new MNOs are licensed. International experience, also in the Caribbean region, shows that competition in the mobile sector develops very rapidly from the moment new licenses are issued. The constraints that this will impose on the fixed voice services should lead to a rapid deregulation of fixed voice services at the retail level.

### 2.3.4 Consideration of geographic markets

BTC is concerned that URCA has not correctly used the definition of geographic markets. In particular, URCA repeatedly uses the argument that competition from other providers is limited to certain geographic areas within The Bahamas to justify its decision to include some products in the high level SMP market. URCA uses this argument in the following product analyses:

- Fixed voice access and local calls. "SRG's coverage is considerably more limited than BTC's due to the scope of its existing license... URCA believes that SRG's fixed access represents a viable substitute to BTC's fixed access... in the areas which SRG serves."<sup>35</sup>
- DLD and ILD fixed calls. "SRG's fixed wireless network has considerably less coverage than BTC's. For this reason, URCA believes that this is unlikely to represent an effective substitute for BTC's voice calling services."<sup>36</sup>
- Broadband internet access. "BTC's coverage is more extensive than CBL's and therefore CBL cannot be considered a substitute in all areas. Based on the evidence available, URCA believes that CBL's broadband represents an effective substitute for BTC's broadband *where it is available*. This conclusion is limited to those areas where CBL provides broadband."<sup>37</sup> Also, "The ISPs have less coverage than BTC, which limits their ability to provide overall effective substitution for BTC's broadband."<sup>38</sup>

<sup>34</sup> Malta, communications Authority, "Retail Public Telephone Call Services provided at a Fixed Location", December 2008, page 9-17.

<sup>35</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.1.1, page 61.

<sup>36</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.2.1, page 70.

<sup>37</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.5.1, page 82. Emphasis in original document.

<sup>38</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.5.1, page 83.

- National and International leased lines: “CBL’s services have less coverage than BTC’s; therefore it is unable to act as a substitute in some areas.”<sup>39</sup>

As demonstrated by the statements above, URCA has not differentiated between product and geographic markets. Differences in coverage could lead to separate geographic markets and should not necessarily be used to assess product markets. If certain companies, e.g. Cable Bahamas and SRG, have different coverage areas than BTC, then URCA should have considered defining geographic markets – i.e. split areas in which competition exists into separate markets.

This approach has been taken, for example, in the UK where for wholesale broadband access Ofcom has defined four markets:

- Those geographic areas covered by exchanges where KCOM is the only operator (“the Hull area”);
- Those geographic areas covered by exchanges where BT is the only operator (“Market 1”);
- Those geographic areas covered by exchanges where there are 2 or 3 Principal Operators AND exchanges where there are 4 or more Principal Operators but where the exchange serves less than 10,000 premises (“Market 2”); and
- Those geographic areas covered by exchanges where there are 4 or more Principal Operators and where the exchange serves 10,000 or more premises (“Market 3”)<sup>40</sup>.

In Market 2, due to the potential for increased competition, Ofcom decided to impose only limited non-price regulation and no remedies at all were imposed in Market 3.

Geographic markets have also been considered in other jurisdictions. For example, in defining the relevant markets, the Telecommunications Regulatory Authority (TRA) of Bahrain recognises the growing need to consider in detail geographic market boundaries. The TRA has considered the practices of the European Commission and the European Regulatory Group to understand the most appropriate form of analysis for Bahrain. Their preliminary analysis began with identifying any regions that do not belong to a single national market, in doing so the size of the proposed market and the stage of development of the market is considered. A market will only be considered national if: service coverage is national, pricing is national and there are no competitors with significant market share at a local level.<sup>41</sup>

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<sup>39</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.6.1, page 87.

<sup>40</sup> Review of the wholesale broadband access markets–Final explanatory statement and notification”, 21st May 2008.

<sup>41</sup> Section 2.3, Consultation Draft Competition Guidelines, Telecommunications Regulatory Authority of Bahrain, 4 November 2008.

The TRA concluded that Bahrain should be considered a national market. However, before reaching this conclusion consideration had been made to certain new developments in the Amwaj area that require significant network roll-out and where the incumbent Batelco does not currently own infrastructure. As these developments are still under construction TRA believed that it was premature to designate these markets as a provider had not yet been decided upon.<sup>42</sup>

*BTC is of the opinion that URCA should pay serious consideration to the definition of geographic markets.* Given the archipelagic nature of The Bahamas, the boundaries of the geographic markets are even more easily identified than in other jurisdictions and therefore they are not impediments to the definition of geographic markets. BTC believes that each island or in some cases groups of islands with distinctive characteristics should be considered in isolation for the purposes of assessing competitive conditions and only islands that show similar levels of competitions should be grouped in the same market.

This should also be considered in conjunction with the separation of residential and business markets, as discussed in the following section.

### 2.3.5 Separation of residential and business markets

Despite recognising that different competitive conditions exist in the residential and business fixed and broadband access and calls markets, URCA has not considered the possibility of defining separate residential and business markets. BTC disagrees with URCA on this point and in particular notes the following considerations made by URCA in the Preliminary Determinations documents:

- Fixed voice access and local calls: URCA believes that SRG's fixed access represents a viable substitute to BTC's fixed access for business customers only in the areas which SRG serves."<sup>43</sup>
- DLD and ILD fixed calls: "SRG's fixed wireless network has similar characteristics to BTC voice calling services... However, this product is only available to businesses and therefore cannot currently serve as a substitute for the majority of consumers."<sup>44</sup>

Firstly, URCA is not correct when it states that SRG's fixed access products are only available to business customers. In fact, SRG has introduced the "onephone" residential telephone service which allows residential customers to choose from a variety of calling plans.

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<sup>42</sup> Section 10, Determination of significant market power in certain relevant retail markets, Telecommunications Regulatory Authority of Bahrain, 3 June 2008.

<sup>43</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.1.1, page 61.

<sup>44</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 6.2.1, page 69.

Moreover, based on the above comments, URCA recognises that the products offered by SRG are a direct substitute for BTC fixed and broadband access and call services for businesses, but has decided to ignore this fact and not to separate residential and business markets.

Competition from SRG in the provision of fixed telephony services for business customers is strong. BTC has seen recently experienced a significant decrease in the volume of business customers.

The separation of business and residential access and calls markets is standard in most jurisdictions internationally, including the EU countries and within the Caribbean region. For example, the regulator in Barbados imposes separate price caps on residential and business services and therefore implicitly defines separate markets<sup>45</sup>.

As noted also by URCA<sup>46</sup> a degree of price discrimination between business and residential customers already exists, as the monthly fixed line rental charged by BTC is currently \$15 for residential customers (\$12 for qualifying senior citizens) and \$36 for business customers. Similarly, broadband access packages are different for residential and business customers<sup>47</sup>. BTC would therefore invite URCA to consider Oftel's observation that *"the ability to price discriminate successfully between business and residential customers for essentially the same narrowband exchange line is an indication that there are separate markets for business and residential access"*<sup>48</sup>.

BTC also notes that business customers tend to require a different range of services. In the same consultation, Oftel observed that *"the requirement for residential telephony are fairly straightforward, including some basic Select Services, [...], but not the wide range of [...] services used by business customers"*. The technology used for residential access services is often different from that used for access for business customers, with many residential customers requiring only analogue exchange lines, while business customers requiring more than 8 voice channels would generally use T1 connectivity. Business customers also often require a PBX.

Regarding the calls markets, BTC does not currently offer differentiated prices to residential and business customers. However, it should be noted that there are clear reasons why this is what would occur in a competitive market absent regulation:

- Business customers tend to have very different service requirements from residential customers, in terms of higher reliability requirements, different customer service requirements, higher volumes of calls and different peak times; and

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<sup>45</sup> See Fair Trading Commission of Barbados, "Price cap mechanism – Decision", April 2005

<sup>46</sup> See Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116(3) of Communications Act 2009, Section 5.1.1, page 31

<sup>47</sup> See Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116(3) of Communications Act 2009, Section 5.1.6, page 37-38

<sup>48</sup> See Oftel, "Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets – Consultation document issued by the Director General of Telecommunications", 17 March 2003, page 35

- The roll-out of alternative network operator networks commonly starts from areas with a high density of business customers due to the large increment and reliability of revenues associated with business customers. This is the case for RGL, which is currently specifically targeting business customers.

In summary, BTC considers that URCA should define separate business and residential access markets. Had URCA done so, it could have concluded that business fixed line and broadband access markets should be excluded from the high level SMP market, due to:

- Existing competition from SRG, which is currently impacting BTC business subscriber volumes; and
- Prospective competition from CBL and other operators, which are likely to target business customers before residential customers, due to the higher margins observed in the business markets.

## 2.4 Specific comments on SMP as applied in the CBL Preliminary Determination

This section specifically considers URCA's Preliminary Determination on Types of Obligations to be applied to CBL.

In this respect, BTC notes and welcomes URCA's decision to conduct a symmetric analysis on both BTC and CBL, and in particular, its decision to apply the same methodology in the two Preliminary Determinations. BTC believes that all forms of economic regulation should be applied symmetrically to all telecommunications service providers having SMP in any telecommunications market. BTC considers such symmetric treatment to be very important for the future development of the industry and to create a level playing field between operators.

While symmetric treatment is particularly important at this stage of the liberalisation process, BTC considers that this symmetry of regulation should continue to apply to all operators designated as having SMP going forward. Conversely no regulation should apply where no SMP is found. Thus, any regulatory changes that might apply to BTC should also affect CBL and vice versa, for example, in relation to local access obligations, such as unbundling requirements. The rationale for asymmetric regulation, where it appears, is to address market power concerns. It does this by imposing obligations on incumbent or dominant operators that might otherwise act anti-competitively and not those without SMP.

BTC notes that while in some overseas jurisdictions, there are or have been differences in cable and copper regulation, this is due to historical reasons that are no longer relevant. In particular, when these regulations were established they were designed to address distinct TV broadcasting and telephony issues and broadband was not provided. Given technological convergence, broadband services can now be provided over both technologies, and such an approach is no longer appropriate.<sup>49</sup> To continue such an approach would also be inconsistent with the

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<sup>49</sup> For example, cable and telephony have traditionally been regulated differently in the US. As a result broadband services provided by the different technologies were subject to quite different regulation, where



technology neutral approach discussed in Section 2.2.4. Further, it is not clear which service providers in the longer term will be the most significant players in different markets. Treating operators differently may lead to significant efficiency losses due to their impact on incentives to invest and innovate, artificially discouraging (or encouraging) investment by an operator (which in the case of The Bahamas is also distinguished by technology) relative to another.

In relation to the specific approach URCA has adopted in its Preliminary Determination for CBL, the comments that we have made in Sections 2.1-2.3 above regarding URCA's methodological considerations apply to both BTC and CBL.

In addition, we note that in the Preliminary Determination on CBL, URCA concludes that "because of the price differences and the fact that BTC does not offer high download speeds, it is URCA's view that BTC's broadband is not an effective substitute for CBL's, in those areas where CBL's broadband is available."<sup>50</sup> BTC disagrees with URCA's conclusion. As explained in Section 2.2.2, for two products to be considered part of the same market, it is only necessary that they have unilateral constraints – i.e. it is only necessary for CBL services to place a constraint on BTC services and not vice versa. URCA has instead conducted two separate analyses for the same product (in the Preliminary Determination on BTC and in the Preliminary Determination on CBL), without cross-referencing the two analyses. BTC considers that this is a serious flaw in URCA's analysis. In addition, URCA should consider the relevant geographic definition of the markets: differences in coverage between CBL and BTC should only matter for the definition of geographic, and not product, markets.

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the main providers of copper-based services (Incumbent Local Exchange Carriers or ILECS) were subject to unbundling obligations whereas cable incumbents were not. In 2003 the Federal Communications Commission (FCC) partially deregulated the ILEC services, no longer requiring them to offer line sharing. (i.e. access seekers need to purchase access to the whole local loop and not just the part used for broadband services). This led to an increase in prices charged for access to the ILEC's network and represented a step towards the regulatory harmonisation of technologies providing broadband services.

<sup>50</sup> Preliminary Determination: Types of obligations on Cable Bahamas Ltd. under S.116 (3) of Communications Act 2009, Section 6.1.1.

### 3 Comments on Accounting Separation Guidelines

In this section we provide comments on the draft Accounting Separation (AS) and Cost Accounting guidelines that have been proposed by URCA for use by BTC. We focus our comments on:

- The process for implementing AS
- The methodology for undertaking AS
- The high level approach and process for CCA

#### 3.1 Process for implementing AS

##### 3.1.1 Timeline

URCA has proposed in section 4.1.1 of the AS guidelines that “BTC must submit separated accounts for 2008 within three months of the publication of the Final Determination”. BTC notes that the timeline suggested by URCA for the implementation of the regulatory accounting systems is overly stringent when considered alongside other regulatory and privatisation requirements currently being placed on BTC and also when compared to the timelines that have been required by other regulatory authorities. BTC would like to stress that the timelines proposed by other regulators for the preparation of AS reports have ranged between six months to two years. BT took 2 years to develop its first set of regulatory accounts. C&W Barbados took eighteen months to prepare their first set of accounts while C&W Jamaica took a year. The table below shows the time given to other telecom operators to produce regulatory accounts.

**Figure 12: Timelines pertaining to submission of Regulatory accounts**

Regulatory Authority	Time allowed to produce initial set of Regulatory Accounts (months)	Time allowed to produce Regulatory Accounts following financial year end (months)
URCA*	3	6
Telecommunication Authority of Trinidad and Tobago (TATT)	3**	6
Info-Communications Development Authority of Singapore	6	6
Telecommunications Regulatory Authority Bahrain	6 – 9	6
Telecommunication Regulatory Authority UAE	12	6
Office of Utility Regulation (Guernsey)	18	6
Fair Trading Commission (Barbados)	18	6

\*\*TATT indicates in a document titled “Proposed Accounting Separation Guidelines for the Telecommunications sector ref. TATT2/3/14” that the authority may extend initial timeline to 9 months in the first year

BTC is required to design the AS model based upon the final AS guidelines, to be published by URCA in January 2010. Whilst certain tasks can be undertaken before that time, it would be risky for BTC to design a model based upon the draft guidelines as these could change. This is because a model is designed to a specific set of regulatory guidelines.

As illustrated above, operators are usually granted a minimum of 1 year to undertake AS from the point at which the AS guidelines are formally published. In this response, we set out our proposed timeline which would lead to us aiming to provide AS outputs to URCA in mid May 2010, this will be approximately 4-5 months after the publication of the final guidelines. This would be a shorter deadline than that that provided to other operators in similarly sized markets. The indicative timeline that BTC proposes to work towards is set out below.

**Figure 13: BTC’s indicative timeline for producing regulatory accounts on an AS HCA basis**

	Nov	Dec	Jan	Feb	March	April	May
Define modelling methodology including							
Products							
Activities							
Network components							
Process GL and FAR into AS categories							
Map revenue to products							
Map depreciation to activities / network components							
Map cost categories to activities							
Collect cost driver information for ABC							
Staff time surveys							
Engineering transmission study							
Engineering route factor study							
Engineering models on NGN and switching							
Traffic study							
Working capital analysis							
Other data required for cost drivers							
Develop cost drivers							
Develop route factors							
Update GL and FAR processing for full yr 2009 data							
Develop and run AS cost model							
Calculate transfer charges							
Produce regulatory accounts							
Reconciliation of reg accounts to statutory accounts							
Produce other outputs / documentation							
Submit accounts and documentation to URCA							

Based upon our understanding of the level of data collection / analysis that is required, and discussions with our consultants, the timeline set out above should be viewed as ambitious and constitutes a challenge to BTC. Whilst we hope that the company will be able to meet this deadline, BTC firmly believes that it is not possible for AS regulatory accounts to be submitted to URCA before mid May 2010. If the reports are available sooner, then they will be submitted to URCA at an earlier date. BTC request URCA to consider international precedent and our indicative timeline and to extend the deadline for the submission of the first set of regulatory accounts to 15<sup>th</sup> May 2010.

To meet a timeline of 15<sup>th</sup> May 2010, BTC would need to begin the AS modelling immediately. Therefore BTC seeks urgent confirmation that the final AS guidelines will not differ substantially from the draft guidelines.

We note that, even by beginning the AS modelling during November, it is not possible for AS outputs to be provided sooner than mid May. BTC has considerable pressures being placed on staff time due to the privatisation process and, additionally, the company's consultants have advised that a model cannot be developed in less than 6 months.

### 3.1.2 Requirement for 2008 and 2009 accounts

Subject to receiving assurances from URCA that the draft guidelines are not likely to be significantly revised before being published as final, the AS modelling will begin during November 2009, with outputs being delivered to URCA in mid May 2010. The timeline remains the same whether regulatory accounts are produced for 2008 and 2009. This is because the level of analysis and model build remains the same and the activity based costing and network component analysis that is required for the model can take place before the final 2009 GL is available at the start of January 2010.

Since the timeline remains the same whether it is the 2008 or the 2009 accounts which are produced, BTC is of the view that there is no value in producing 2008 accounts. Furthermore, information in accounts based upon 2008 financial and operational information should be considered outdated as it would not reflect the network investment (particularly in NGN) and changes to products / services that occurred during 2009. Therefore, it would be not sufficiently robust for use in wholesale and retail price setting. However, it would require BTC to collate two sets of data and would place a considerable resource burden on BTC. For this reason, BTC believes that the cost of producing the 2008 accounts does not outweigh any limited benefit that could be achieved from them.

Furthermore, BTC is not sure of the purpose for which URCA requires a "test" set of accounts, noted in section 4.1.1 of the AS guidelines for BTC. BTC notes that this is exceptionally unusual to undertake a test year and has not identified any other countries where this has been implemented. BTC notes that either regulatory accounts have been produced in line with the AS guidelines using recent financial information and so are fit for purpose, or they have not been and so are not. Producing a test set of accounts in a 3 month period by following the AS guidelines is not possible. Any "test" accounts would therefore not be a test of the robustness of BTC's approach which will be applied going forward when BTC is allowed sufficient time to undertake a robust modelling process. BTC also notes that the accounts do not appear to be a "test" when URCA is proposing that the cost values are used in the RAIO. Any values that are purported to be cost based in the RAIO must be extracted from a robust set of regulatory accounts that have been implemented based upon the AS guidelines. To take "proxy" values from a test set of accounts is likely to lead to incorrect incentives to new operators and distort the build / buy decision. At this early stage of market liberalisation, it is essential that the correct investment incentives are provided to new entrants – and this can only be the case if cost-orientated figures are used in the RAIO.

BTC does however, recognise that URCA may like the opportunity to challenge the process and methodology that is being undertaken by BTC. This challenge can be provided on the 2009 accounts and can be provided throughout the model development process rather than concentrated on the submission period. Therefore, BTC proposes regular meetings with URCA between December 2009 and May 2010 so that URCA can be assured that the cost modelling is progressing in line with the stated deadlines and to ensure that URCA's considerations are taken

into account during the model development process. We believe that it is in both our interests, as well as that of potential new entrants and The Bahamas more generally that BTC produces a high quality model on the first attempt so that the costs can be used to set tariffs as quickly as possible.

BTC therefore proposes that it provides URCA with 2009 accounts no later than 15th May 2010. Should URCA require 2008 accounts then these will be prepared for 15<sup>th</sup> May 2010, however this will then delay the 2009 accounts until at least July 2010. Such a delay would not assist in the development of sustainable competition, since it is the 2009 costs that are required for the RAIO and which would also impose an unfair resource on burden on BTC. Therefore BTC is optimistic that URCA will remove the requirement for a test set of accounts based on outdated 2008 financial data.

### 3.1.3 Level of assurance

URCA's AS guidelines for BTC (section 4.4) set out a requirement for the AS accounts to be independently audited. A regulatory audit typically involves the regulatory auditor undertaking a review of: (i) whether the methodology document produced by BTC accords to the AS guidelines published by the regulator; and (ii) whether the AS model and the input assumptions, particularly the financial data from the GL / FAR and the cost drivers aligns with that set out in BTC's methodology. A regulatory audit often takes 3-6 months in the first year, reducing to around 3 months in subsequent years. However, BTC notes that there is no set timeline and that we understand that KPMG's audit of Telkom South Africa takes around 4 months despite it having been undertaken for a number of years.

BTC notes that whilst a regulatory audit is usual in larger countries it is often not required in smaller countries (see Figure 14). For example, Cable and Wireless is not required to submit a regulatory audit opinion on its regulatory accounts for most, if not all, of its AS statements prepared in its Caribbean business units, including Jamaica and Barbados. It is also not a requirement in Monaco or Jersey. A regulatory audit opinion is also not always required in larger countries, for example Ofcom (UK) consulted on introducing regulatory audit or related compliance obligation on the mobile network operators (MNOs) in the UK but subsequently withdrew as it was considered overly onerous<sup>51</sup>.

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<sup>51</sup> <http://www.ofcom.org.uk/consult/condocs/compliance/statementold/statement.pdf>

**Figure 14: Requirement for Regulatory Audit across different regulatory jurisdictions**

Regulatory Jurisdiction	Regulatory Audit required	Population	Fixed line subscribers	Mobile subscribers	GDP – per capita (PPP - \$)
Monaco	No	32,965	35,000	22,000	30,000
Cayman Island	No	49,035	38,000	33,800	43,800
Jersey	No	91,626	74,000	83,900	57,000
Barbados	No	284,589	150,000	406,000	19,100
Bahamas	Yes*	309,156	133,000	358,000	29,600
Bahrain	Yes	727,785	220,000	1,400,000	37,300
Jamaica	No	2,825,928	316,000	2,723,000	7,500
Finland	Yes	5,250,275	1,650,000	6,830,000	36,900
Denmark	Yes	5,500,510	2,487,000	6,551,000	37,100
UK - BT	Yes	61,113,205	33,209,000	75,565,000	36,500
UK - MNO price control compliance	Noi	61,113,205	33,209,000	75,565,000	36,500

*Note: This table refers to regulatory audit requirements on the regulatory accounts for the incumbent fixed line or integrated operator unless otherwise stated (Source for demographic, economic and subscriber data: CIA The World Factbook)*

A regulatory audit is associated with a high fixed cost, particularly in the first year. Whilst a slightly lower fee may be expected in smaller countries, the main cost of the audit is driven by the level of assurance that is provided, the number of GL/FAR account codes, the number of systems check and the extent of data verifications on the input assumptions. There tends to be only limited variance in this between countries. Once an unqualified regulatory audit opinion is achieved, and this may often take several years, the costs of subsequent regulatory audits may fall. This is also due to the regulatory auditors becoming more familiar with the company and its systems and, in turn, the company becoming familiar with the requirements of the regulatory auditors.

We estimate that the costs of a regulatory audit on the AS model, using a “properly prepared in accordance with” opinion, may be approximately \$850,000 in the first year, reducing to approximately \$600,000 after the first couple of years. Putting these numbers in perspective, BTC notes that this would constitute around 4% of its 2008 net revenues. It would cost \$6.40 per fixed line in The Bahamas. The costs associated with regularly carrying out a regulatory audit would ultimately be recovered by BTC through an increase in the cost of provision of telecommunication services to both wholesale and retail customers. URCA should undertake a regulatory impact assessment and this should show that the benefits of a regulatory audit outweigh its costs,

including that on customers. In the case of a small country such as The Bahamas, where the high fixed cost of a regulatory audit is effectively being apportioned over a smaller customer base, BTC doubts that URCA will be able to show that there is a positive net welfare impact.

Whilst BTC believes that the regulatory audit obligation should be removed, BTC does agree that it is important that URCA, the telecommunications industry and the public are able to rely upon BTC's regulatory financial information and that it is perceived to be robust and of high quality. Instead of a regulatory audit, BTC proposes the following more cost effective option:

- The modelling methodology, input assumptions and model are provided to URCA for a review by URCA. BTC, or its consultants, will be available to provide training to URCA on the model should this be required.
- BTC is available to answer questions from URCA and to respond to any challenges on its methodology or development of the input assumptions. Since the development of assumptions is relatively constant over time, we would not expect there to be a need for significant challenge after the first year.
- BTC provides a statement of reconciliation between the regulatory accounts and its audited financial statements as part of the audited financial statements.
- BTC includes a responsibility statement from the CFO, and / or other responsible party at BTC on the regulatory accounts. The responsibility statement from the CFO, and / or other responsible party, will provide written confirmation on the correct extraction and accuracy of data submitted to URCA. This would result in an increased scrutiny of the information provided. This would further increase the level of assurance given that the CFO and / or other responsible party at BTC would not want to be found having signed off on incorrect information.

A combination of the provision of a responsibility statement, statement of reconciliation and a submission of BTC's methodology accompanied with input assumptions and models would have several benefits. It would enable URCA to develop a better understanding of BTC's systems and processes. Furthermore, it would enable URCA to conduct its procedures first hand and not rely on a report from a third party. URCA would be able to tailor its procedures to gain sufficient assurance on the data submission. In short, these propositions would significantly improve the level of assurance while ensuring the provision of a cost effective solution. In line with these arguments, BTC strongly urges URCA to remove the regulatory audit requirement.

BTC notes that if URCA determines that a regulatory audit is required, then BTC strongly recommends that URCA opts for a "properly prepared in accordance with" opinion, as opposed to a "fairly presents" opinion. A fairly presents opinion is overly onerous and would lead to a level of assurance that is higher than that required in most other jurisdictions where a regulatory audit is required. Furthermore, it will substantially increase the cost of the regulatory audit. We estimate that the regulatory audit cost could increase by 25% due to this increased level of assurance, whilst we do not see any additional gain to consumers or the industry from this increased assurance. We therefore recommend that URCA removes the audit opinion entirely and allows BTC to focus on using the money saved to innovate and provide value-for money services to consumers. Should

URCA be determined to impose this obligation then it should be adjusted to be “properly prepared in accordance with”.

## 3.2 Methodology for implementing AS

BTC has reviewed the proposed AS methodology and would like to thank URCA for the effort that it has taken to document a full and encompassing set of guidelines. BTC has reviewed the methodology, with two particular concerns in mind:

- The extent to which the methodology can practically be implemented by BTC; and
- Whether a regulatory audit or CFO responsibility statement can be produced based upon the guidelines.

Mostly, BTC has found that the proposed methodology can be implemented and follows international norms. Furthermore, BTC believes that it is specific enough to allow a compliance statement to be provided. However, in places, BTC finds that the methodology is perhaps overly prescriptive and may not lend itself easily to future innovation and industry evolution. We provide fuller comments on these issues below.

### 3.2.1 Cost Allocation Principles

BTC agrees with the general principles of cost orientation (more commonly referred to as cost causality), transparency, non-discrimination and cost effectiveness proposed by URCA to underpin the AS methodology in section 2.1 of the guidelines. This set of principles aligns with international norm.

### 3.2.2 Accounting Principles

In section 2.2, URCA states that “all costs should be reported using the same assessment of materiality and aggregation adopted by BTC in preparing its statutory accounts”. BTC is unclear of URCA’s meaning. BTC notes that the GL and FAR are the starting point of the AS and so the disaggregated account codes will be entered into the AS model as a matter of course. BTC asks URCA to clarify this statement.

### 3.2.3 Cost Allocation Process

BTC broadly agrees with the high level presentation of a typical cost allocation process depicted in the cost allocation diagram (section 2.3) in the AS guidelines for BTC.

BTC notes that Activity Based Costing (ABC) is a necessary part of developing an AS model. This uses cost drivers to allocate the costs of the business to activities and onwards to services and business units on the basis of cost drivers. The tricky part of this process is tackling the “circularity” of cost allocation – for example, costs relating to the HR Cost Centre are usually allocated to all Cost Centres based on the number of FTEs in each cost centre or the pay costs of each cost centre. However, the costs of these Cost Centres may also be allocated to the HR Cost Centres. For example, the costs of the IT department and the financial department are likely to be caused in



part by supporting the HR department. There are three main approaches for dealing with this circularity:

- Cost centres such as HR that are allocated to all cost centres, or a large majority of cost centres, are instead allocated directly to either network components or services on an EPMU basis according to the total cost allocated to the networks or to the services. It may be pragmatic to employ this approach to a small percentage of costs where it is difficult to ascertain a reliable underlying cost driver. However, it would not be correct to employ this in the example provided above where the underlying cost driver for HR is known (number of FTEs or pay costs) as this would detract from cost orientation. Furthermore, since many Cost centres, and to a lesser extent assets, are likely to be allocated to each other this could result in a high percentage of costs being allocated on an EPMU basis which is not optimal and would not comply with URCA's principles. BTC therefore agrees with URCA that this approach should be limited to no more than 10% of cost and, as far as possible, BTC will seek to use robust cost drivers to reduce the 10% further.
- A cost dependency hierarchy is imposed in the model. Cost centres are grouped into 3 or 4 categories, with those cost centres which bear the greatest "common cost" characteristics being allocated last. So in the above example, finance and IT Cost Centre costs would be allocated to the HR cost centre, but HR cost centre costs would not be reallocated back to finance and IT Cost Centres. There are a number of disadvantages with this approach, including its subjectivity and the fact that costs are being allocated to only a subset of activities that cause them to be incurred. Therefore, this does not strictly comply with cost orientation.
- Costs are repeatedly reallocated to each other until all costs are allocated to network components or services. This is the approach which is employed in dedicated ABC software, for example in Metify, but can be also employed in MS Access or perhaps MS Excel provided that the number of reallocations is kept to a manageable number. BTC believes that this is the most robust approach and should be combined with EPMU to ensure that the modelling remains manageable. This is the approach that is generally considered to be best practice and is documented by Batelco (Bahrain), C&W Guernsey, BT (UK) and Eircom (Ireland) amongst others.

The use of reallocations is presented alongside BTC's proposed modelling approach in the diagram below.

**Figure 15: Overview of the allocation process**

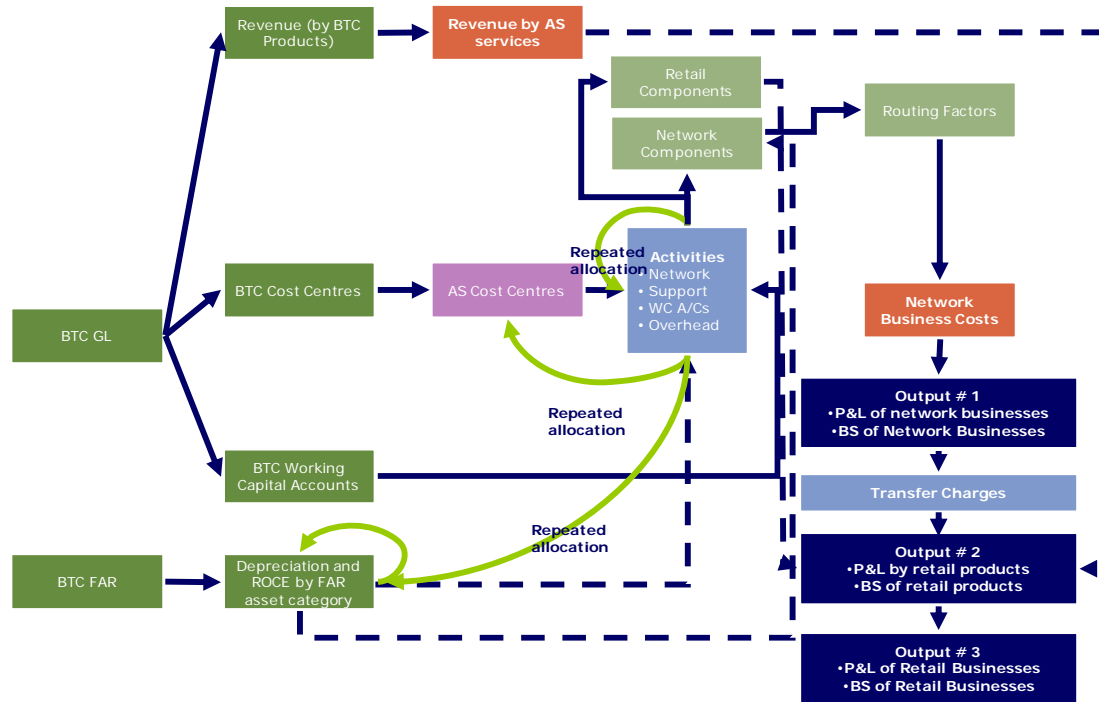


Figure 15 shows a schematic representation of an ABC model which is used to allocate revenues, costs, assets, liabilities and working capital to activities, network elements and services. The calculation is performed on a top-down basis, providing an analysis of information derived from BTC’s financial records (General Ledger and Fixed Asset Register) to reflect as closely as possible the activity, network element and service costing as well as overall service and business unit profitability. Top-down AS costing entails allocation of the organisation’s total cost to the final business areas and services.

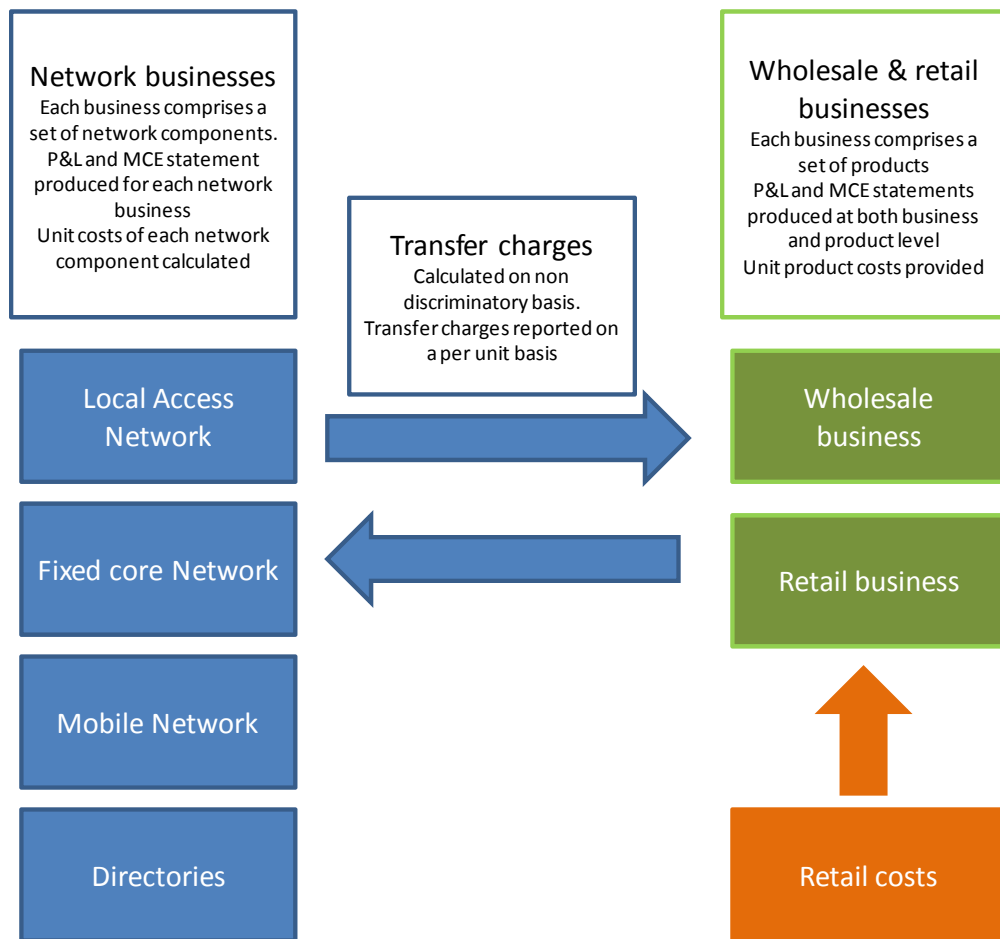
BTC believes that the ABC model shown above would comply with URCA’s principles of cost orientation, transparency, non-discrimination and cost effectiveness and would be compliant with the draft AS guidelines upon which URCA is consulting. It is consistent with international best practice for regulatory costing and allows for the production of unit component costs, transfer charges and service costs in addition to regulatory accounts for wholesale and retail business units. The model can be used to produce the regulatory statements that have been set out by URCA in section 2.3 of the draft guidelines.

BTC trusts that URCA agrees that the above approach is consistent with the guidelines put forward by URCA. Should this not be the case, BTC requests that URCA confers with BTC on the model before issuing the final AS guidelines.

### 3.2.4 Business definition

BTC has reviewed URCA's proposed set of business units and has concerns that the wholesale business has not been separated from the network businesses. BTC believes that it would not be able to implement a model based upon the AS guidelines that have been proposed.

BTC therefore request URCA to provide clarification on the guidelines and, in particular, to review proposed list of network, wholesale and retail businesses set out below and the interactions between them. BTC submits that this layout complies with the requirement to produce accounting separation statements on a transparent and non-discriminatory basis. It continues to incorporate transfer charges, so that the charges made to the wholesale and retail businesses from the network businesses will be non discriminatory.



In the above diagram, each network business will be further split into network components and each wholesale and retail business will comprise, at a minimum, those services that URCA lists in the AS guidelines. Where these services are not currently provided by BTC, they will be assigned a zero cost and revenue.

BTC also believes that it could be pragmatic, at least at some point in the future, to define a separate international wholesale business. This is because wholesale international competition may occur earlier than competition in the fixed core network. In time, depending upon the manner in which competition and regulatory requirements evolve, BTC may also wish to define separate retail businesses. BTC therefore requests that URCA defines the main business areas in section 3.1 of the guidelines to be the “minimum set of main business areas”.

With regards to the definition of each main business area, BTC is of the view that the disaggregation between the local access business and the fixed core network business has been insufficiently defined. BTC proposes that the definitions are amended to include the following text:

- Local access network: The network costs of providing access to the fixed-line network. These costs are line sensitive (driven by the number of fixed line subscribers). In a network diagram, they are the costs from the subscriber premise up to and including the line card. The boundary between the core and access network is at the switch side of the line cards.
- Fixed core network: The network cost of the core PSTN/NGN fixed network and the data network. These costs are traffic sensitive, being driven by the amount of required capacity. In a network diagram, these are the costs of the main transmission and switches – excluding those in the data and mobile networks. The core network business includes the links to the mobile network, to the international switches and to the points of interconnection.

These definitions are considered standard for regulatory accounting purposes and are consistent with those commonly used by telecommunications regulatory authorities.

URCA has defined “other activities” which are grouped into a single business. BTC assumes that this refers to unregulated services, or those services for which it is not required to report separately.

BTC requests that URCA **tighten** the business definitions before issuing the final AS guidelines. This is important for the production of a regulatory compliance statement.

### 3.2.5 Product definition

URCA has set out a list of services to be included in the model in the draft guidelines. BTC notes that:

- The list of retail services proposed by URCA appears reasonable. These are currently provided by BTC and so the cost of providing these services will be an output of the AS model.
- Costs should be allocated to services based on their underlying cost causation, complying with the cost orientation requirement, rather than to justify URCA's policy aims. To this extent, URCA should remove its instruction on the allocation of costs to fixed line access and local calls.

- An accounting separation model allocates the costs to products and services that were provided during the reporting year. Should the product not be provided, as in the case of many of the wholesale products included in URCA's product list (See Figure 16), then a volume and cost will not be reported against the product in the AS outputs
- The proposed wholesale product list is overly complex. Furthermore, it includes wholesale access services which would usually only be included following a regulatory consultation process that led to the imposition of a regulatory obligation to provide that service. This applies to the requirement to cost call origination, which is required to support CPS/CS and wholesale local loop costs which are required to support LLU and line sharing. BTC should not be required to calculate the costs of these services until such time as it is subject to a regulatory obligation to provide these services. During a meeting with URCA on 24<sup>th</sup> November 2009, URCA indicated that the inclusion of these products might have been the result of an oversight. BTC expects URCA to clarify this as soon as possible.
- To the extent that URCA requires BTC to calculate "hypothetical" costs for "hypothetical" wholesale products that were not provided during the reporting year but are required to be included in the RAIO, this may be possible for some products by applying hypothetical route factors to the network component costs calculated in the AS model. However, this should not be a required output of the AS model and should instead be considered under any obligations imposed following the access and interconnection consultation. We therefore discuss this in more detail in our comments on that consultation.
- Accounting separation models cannot be expected to provide the costs of all services that may be required to be provided in a RAIO. For example, the cost of site and mast sharing depends on a number of factors that cannot be sufficiently disaggregated or calculated on an appropriate costing standard in the AS model. There is a one off cost of site inspection / preparation which is usually charged as a one-off standalone cost and so cannot be captured in an AS model based upon average costs. In addition, charges for sharing masts/towers usually depend upon the particular tower in question (e.g. rent paid by BTC, the type of tower, whether it needs to be replaced, the amount of space required by the new entrant) and this detailed costing cannot be provided by an AS model. Therefore these types of charges should be calculated separately by BTC using an appropriate cost-based methodology.

**Figure 16: Wholesale services to be included in the AS model**

URCA service	Network business	Provided by BTC in 2009?	Expected to be provided in 2010?	Proposed for inclusion in AS model
Call transit Domestic	Fixed core	Yes	Yes	Yes
Call transit International	Fixed core	Yes	Yes	Yes
Call termination Domestic	Fixed core	Yes	Yes	Yes
Call termination Int.	Fixed core	Yes	Yes	Yes
Term.of calls to 911/919	Fixed core	Yes	Yes	Yes
Term.to automated Ancil Scv.	Fixed core	No	Yes	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
Termination of Dir. Enq (916)	Fixed core	Yes	Yes	Yes
Term. To Toll freephone #	Fixed core	No	Yes	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
Termination of calls to Op. asst.	Fixed core	No	Yes	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
National backhaul	Fixed core	Yes	Yes	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
International backhaul	Fixed core	No	No	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
National leased lines	Fixed core	No	No	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
International Leased Lines	Fixed core	No	No	Yes: Placeholder. Cost and revenue to be recorded once service is being provided.
Bitstream service	Local access	No	No	No. This cannot be accurately calculated in a top-down model as dedicated set-up costs will not be considered.
Local Access Loops	Local access	No	No	No: Assume this is LLU. This cannot be accurately calculated in AS, would normally be costed on a bottom-up basis. Should not be costed until LLU is required following a regulatory consultation process
Mobile voice call termination	Mobile	Yes	Yes	Yes
Mobile voice call origination	Mobile	Yes	Yes	Yes
Mobile on-net voice calls	Mobile	Yes	Yes	Yes

BTC assumes that the AS guidelines are to be imposed for a number of years. This provides regulatory certainty and is consistent with other regulatory authorities who appear to only update guidelines at most every 5 years. This implies that the guidelines must be sufficiently flexible to reflect the changes to the telecommunications environment and, particularly, product innovation that may occur over the period. Therefore any list of products should be indicative with the requirement being for BTC to include any product where it has been deemed to have SMP and the product was supplied during the regulatory accounting year.

### 3.2.6 Network Component Definition

URCA has set out the minimum set of network components that it expects to be included in the model (section 3.2 of the AS guidelines). *BTC notes that it is extremely unusual for a regulator to proscribe the network components.* Instead the following process is usually used to determine the network components:

- The regulator defines the minimum product set to be included in the AS model
- The regulatory defines the wholesale and retail businesses and the mapping of products to these
- Based upon a review of its network structure, e.g. the equipment that is used in the network, and the regulatory requirement on business units and products, the operator defines the necessary set of network components to meet this requirement.
- The network components are a logical set of components to which a routing factor can be applied to calculate service costs. The network components are therefore not equivalent to asset categories, which appears to be URCA's assumption.

BTC notes that it expects to have a significantly higher number of network components in its model than those proposed by URCA, but that these will be determined based upon a review of the final AS guidelines and the network infrastructure that is deployed at the time that the model is developed.

With respect to the specific set of network components set out by URCA:

- URCA has assumed that the network is PSTN based and has not considered BTC network topology
  - URCA has set out the break down of switches into Remote Concentrator Unit, Local switch and Transit Switch without a review of the types of switches used by BTC.
  - URCA has not considered the inclusion of NGN network components, particularly different types of NGN routers and soft switches.
  - As BTC moves to NGN and removes legacy equipment it will no longer need network components for concentrators, local and tandem switches.
- URCA has not correctly defined access network components:
  - The definition of the access network is subscriber sensitive costs. Therefore the access network should contain the line cards and associated costs of the concentrators and, potentially, local exchanges. (Although BTC notes that URCA does recognise these costs should be in the local access business in its definition of the local access business in section 3.1 of the AS guidelines for BTC.)

- Network components related to switches should be included in the access and core network businesses. Costs that are traffic sensitive should be allocated to the core network components, e.g. port charges, whilst costs that are subscriber sensitive, e.g. line cards, should be allocated to the access network components.
- URCA has defined three types of transmission links. BTC recognises that it is necessary to calculate the cost of calls between islands and internationally. However, that may also be done by using routing factors applied to types of equipment (network components) as opposed to necessarily defining separate links. BTC commits to calculating the cost of inter/intra island and international traffic separately and recognises that this is necessary to calculate the costs of services. However, BTC requests that URCA is less rigid about the network component description and permits BTC to evaluate the best methodology for this – providing that it accords with the over-arching principle of cost causation. This issue is particularly complex as BTC is installing NGN and so this must also be factored into distance based costing components.

### 3.3 Other reporting requirements

This section contains BTC's comments on other reporting requirements in the draft guidelines.

#### 3.3.1 Cost Reports and Outputs

In section 4.2 of the AS guidelines for BTC, URCA requires a “wholesale-retail mapping, showing the relation of retail and wholesale services”. BTC notes that this should be replaced with a mapping of network components to wholesale and retail services.

URCA requires each of the retail services to be mapped to one or more wholesale services. URCA proposes a reporting template for this in the draft guidelines. (Annex 5). However, BTC believes that URCA has erred in the report template and that it is the network components that should be mapped to retail services and not wholesale services. BTC does not believe that it possible to map wholesale services to retail services. Examples of this are provided below.

- A local call from BTC to BTC may use the following network components: remote concentrator unit, remote concentrator to local switch link, local switch, local switch to local switch link, local switch, local switch to remote concentrator link, remote concentrator. The cost of the local call is obtained by multiplying the cost of each network component (in the wholesale business) by the route factor for a local call.
- The “closest” wholesale service to a local call is call origination plus call termination. However, these two services will also use the point of interconnection, and this will not be used by a BTC to BTC call. Therefore these two services cannot be used to define a local call from BTC to BTC.

BTC notes that it has never seen a requirement to map wholesale to retail services, because this cannot be done accurately. Instead there is usually a requirement to map network components to retail services and to show that the network component charge to the retail services is equivalent to



the network component charge to the wholesale services. That is, the transfer charges are non discriminatory. BTC proposes that the reporting requirement related to Wholesale – Retail mapping, shown in Annex 5 in the guidelines, is replaced with a mapping of network components to retail products and a mapping of network components to wholesale products.

In annex 1 and annex 2 of the draft guidelines, URCA suggests reporting template formats for Profit and Loss and Mean Capital Employed statements. BTC notes that it will be unable to provide the accounts for the previous year in its first regulatory accounts submission in line with the arguments in section 3.1.2

### 3.3.2 Non Financial Inputs

In section 4.2 of the AS guidelines for BTC, URCA describes the reporting formats of non financial information related to the separated accounts.

First, BTC presumes that when URCA notes the requirement for the provision of “operational Data, such as manpower allocated to certain services”, URCA is implying that it wants BTC to provide the numerical cost driver values. That is, the underlying survey, engineering, operational and financial data that is used to generate the cost allocation keys. In which case, *BTC recommends that URCA rephrases this to request “underlying cost driver values and their derivation”. This is an essential change as the instruction must be precise for compliance against them to be assessed.*

Second, BTC notes that URCA is requiring information that would usually be provided to the regulatory auditors. As noted previously, BTC believes that there is unlikely to be a net benefit to a regulatory audit and that the requirement should be removed. However, should URCA decide to proceed with an audit then BTC should not be required to provide the underlying cost driver data or the regulatory costing model to URCA. This is because URCA should be able to rely upon the audit opinion. This is the case in the UK and Bahrain, where the model and input data are not provided to Ofcom/TRA but are subject to a regulatory audit. This contrasts with Jersey, Barbados and OECS where a regulatory audit is not required, but we understand that the regulator receives a copy of the model and input assumptions. On balance, BTC believes the regulatory audit should be removed and URCA provided with the inputs as set out in the draft guidelines. However the current guidelines requiring both an audit and extensive regulatory submission are overly onerous when compared to international norms and so should be amended.

## 3.4 Current Cost Accounting process and methodology

URCA proposes in section 2.2.6 of the AS guidelines for BTC, “...using HCA for the first round of accounting separation, but intends to introduce Current Cost Accounting (CCA) at a later stage”. Section 2.2.6 further states that “URCA shall consult with the industry on the process and methodology for CCA at the relevant time in the future”. BTC welcomes this approach and supports the view that that HCA is appropriate until it has been determined, by consultation, that CCA is appropriate for implementation in The Bahamas.

BTC provides specific comments on the high-level approach to CCA that has been set-out by URCA in the consultation document. However, BTC will have additional comments to provide to URCA prior to the implementation of CCA:

- URCA proposes in section 2.2.6 that CCA could initially be based upon the “application of simple indexation to asset categories” and this “provides a cost effective and speedy solution...” BTC notes that the use of indices is not always simple. In particular.
  - Indexes must reflect whether assets have been incurred domestically or imported.
  - Indexes should reflect movements in exchange rates over time. For example, BTC purchases many assets from countries that do not invoice in US\$ (e.g. increasingly invoices are in Euros) and fluctuations in exchange rates should be considered.
  - There are very publically available sources of asset inflation indexes. The Swedish and Danish regulators have published cost models which contain indexes. However, these are available for a selection of assets and are several years out of date.
  - The most commonly cited “off-the-shelf” indices that are referred to are the Turner Indices. These must be purchased by the company and may be costly. Furthermore they may not be specific to the assets that have been purchased by BTC. Adjustments to the indices and the calculation of additional indices would be required.
  - To the extent that BTC has purchased assets repeatedly over a number of years then this information may be used to create indices that are specific to BTC. However, the use of indices should be considered alongside other revaluation techniques.
  - In the first year, it is necessary to calculate opening and closing balances for assets, in order that the appropriate holding gain and loss can be calculated. Indices must therefore be brought up to date.

BTC notes that the use of indexation is a useful method for revaluing assets and so should not be dismissed as a valid approach. Rather that it should not be considered a simple option and should not be obligated.

*BTC therefore suggests that URCA sets out a set of revaluation approaches that is consistent with international best practice and leaves the selection of a particular revaluation approach for a particular asset open to BTC.* Operators usually opt for different revaluation approaches for different assets depending on data availability and the underlying characteristics of the assets. The following approaches are usually permitted in CCA guidelines:

- Historical cost: For low value assets or those with a short asset life (e.g. 3 years or less) and also for those assets which have recently been purchased (e.g. within the past 2 years)
- Replacement cost using absolute valuation: The quantity of assets is revalued as those they are purchased at the new date. It is assumed that the same type of asset is purchased. For example, if the asset category contains 10 micro TRX then the replacement cost of 10 micro TRX are calculated.

- Replacement cost using indexation: An index is applied to the asset category.
- Replacement cost using Modern Equivalent Assets: Where the assets are no longer available for purchase or would be replaced within an entirely different asset then a modern equivalent asset may be used to calculate the replacement cost. In cases where the replacement asset provides increased functionality then abatement may be applied.

BTC would welcome the opportunity to respond in detail to a future consultation related to the implementation of CCA. Should BTC believe at any time that CCA would be beneficial to the development of a sustainable competitive environment and that it can be implemented in a cost effective manner whereby there is a net benefit to its implementation then BTC reserves the right to request that URCA undertakes a consultation on CCA.

### 3.5 Comments on SMP as applied to CBL

This section comments on URCA's draft guidelines related to Accounting Separation and Cost Accounting issued to CBL.

In this respect, BTC notes and welcomes URCA's decision to conduct a symmetric analysis on both BTC and CBL, and in particular, its decision to apply the same methodology in the two draft guidelines. BTC believes that all forms of economic regulation should be applied symmetrically to all telecommunications service providers having SMP in any telecommunications market. BTC considers such symmetric treatment to be very important for the future development of the industry and to create a level playing field between operators.

## 4 Comments on Access and Interconnection Guidelines

This section provides BTC's comments on the Access and Interconnection Guidelines (ECS 22/2009).

In this section we:

- Begin with a review of the general aims of the framework;
- review the process for developing the Reference Access and Interconnection Offer (RAIO) and the information to be contained within it;
- examine the more detailed scope of the Guidelines (services to include); and
- look at detailed process and scope issues not covered fully in the Guidelines.

### 4.1 General comments on the aims of the Guidelines and its framework

The Draft Guidelines form a *useful basis* to assist BTC and URCA to develop a RAIO that meets the needs of the citizens and fulfils the aims: of the URCA; those set out in the law; and also the *legitimate* commercial interests of BTC. BTC is of the opinion, however, that additional work is required to clarify a number of issues within the Guidelines, before a RAIO can be developed.

The Guidelines begin with a discussion of the Legislative Environment (Sections 2-4). These are in some places not generally relevant to the development by BTC of the RAIO itself, other than section 2.3. However there are specific requirements mentioned that are placed on URCA to ensure the RAIO complies with legal frameworks and the Act. These requirements must be checked and verified to ensure that they are met. These are fundamental issues and have an impact in the details of the Guidelines. The URCA must demonstrate that this work is carried out before the detailed requirements of the Guidelines can be agreed to. For example URCA's functions include:

- To further the interests of consumers by promoting competition in the provision of electronic communications [Section 4(a)];
- To encourage, promote and enforce sustainable competition [Section. 4(a)(iii)]; and
- To further the interests of persons in The Bahamas in relation to the electronic communications sector [Section. 4(b)].

Some RAIO services will need economic and legal verification that they contribute to these aims. The question will need to be asked, should the competition be biased to infrastructure or service-supply arenas? This impacts which services are included in the RAIO. The cost of developing some interconnection services may exceed the benefits and hence this would not be in the interests of persons in The Bahamas – this requires URCA to provide evidence and a cost benefit analysis to ensure that any service provides real benefits. This is required *before* it is included in

the Guidelines. How this is carried out is also beyond the scope of the RAIO Guidelines. *BTC requires that this work is carried out in an open and transparent manner to that ensure the final RAIO contents are developed properly. Specifically BTC insists that presumptive conclusions are not allowed (for example we note mast sharing is listed in the Guidelines) – the basis for this inclusion and the nature of the charging plus a cost/benefit analysis are prerequisites before such items can be included in the RAIO.*

The interests of consumers can be met in different ways and with short or longer terms benefits. Higher prices increase margins for competition: this gives short term dis-benefits for consumers but longer term benefits from competition entry. Less access to infrastructure based services increases the incentives to build and invest, with the longer term benefit of greater long-term sustainable competition at the *deepest level*. This may be at the expense of short-term higher prices, but increases the benefits over service-level based competition (“Re-selling”) that may produce short term retail price competition but limited long term benefits. These fundamental issues are not covered in the background aims of the Guidelines. Clearly URCA is required to address these points and develop its fuller policy and approach to benefiting the citizens. Without this, a RAIO cannot be developed to meet the aims and this risks promoting adverse market outcomes.

Further, the key aims to “promote competition” are laudable and have economic rationale. However the URCA aims need to be modified as competition is only a means to the wider aims of providing innovative services and diversity at affordable prices. Clearly simply promoting competition could result in 50 competitive operators, but these can only be sustained with higher prices. This is a fundamental issue with any services that have *economies of scale* (such as telecoms). In a small market, this issue must be addressed by URCA, *before* any service is included in the RAIO. Competition is not the required outcome, only a way (often the best) of achieving the desired outcome. The threat of competition and level of competition must be considered by URCA or else there are obvious dangers that the real aims are undermined.

We also note that the Guidelines combine legal points and policy points together with assumptions on remedies. These are best addressed in separate policy and market analysis studies in order to allow the Guidelines to focus on the contents and structures of the RAIO. For example “Rights of access” and “Cost Oriented Charges” (Section 4). Pricing methods for services are within the scope of a market analysis and remedy study. The RAIO need only define the service and the price, not how they have been determined.

There are points of definition that are contentious, such as “Reasonably bundled elements” (Section 4). The definition of “reasonable” is unclear and should not be addressed in RAIO Guidelines, but in the examination of suitable market remedies or in consultations on requests for access. BTC agrees with URCA that unbundling must be *reasonable*: very small elements could require excessive effort (and cost) and not promote infrastructure investment and full competition.

## 4.2 Comments on the process for developing the RAIO

### 4.2.1 Overall structure of the RAIO with which the process must comply

BTC has specific comments on the process by which access and interconnection should be provided. BTC notes that the following process is commonly used elsewhere:

- A RAIO is usually produced, but contains a basic set of wholesale services (the “headline services” such as call termination). This set of wholesale services is not intended to be a comprehensive list of all services that may be requested in the future, but is the minimal set required to allow new entry and to satisfy current demand. The set of wholesale services initially contained in the RAIO may therefore be fewer than those for which the operator has been defined to have SMP. The RAIO would not contain some SMP-based services if it can be shown that there is no demand for those services at the time of drafting the RAIO.
- Where the provision of a wholesale service requires a new technical solution to be implemented it is usually the subject of a separate *consultation process*. For example, to provide call origination requires carrier selection (CS) or carrier pre-selection (CPS) and this is consulted on by regulatory authorities before being added into the RAIO. This consultation and testing of the needs and the benefits for inclusion in the RAIO is a prerequisite.
- The RAIO usually has a standalone contract. This is the main body of the RAIO. It contains the terms and conditions on which the access is being provided. These terms and conditions typically remain for the life of the contract. The technical and pricing details are appended separately to the contract. Technical and pricing details may be updated regularly, often annually and so they need to be included as separate appendices such that the contract does not need to be resigned.

Further to the above, technical and pricing schedules can become extensive over time. These may become so large they are not simple to publish (see for example BT wholesale price list). This supports the logic that the RAIO development process should separate the contractual, process, technical and pricing aspects.

By way of illustration we note below links to the Jersey Telecoms RIO (also an island market).

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off er/RIO\\_Legal\\_Framework\\_v1.2\\_January\\_2005.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off er/RIO_Legal_Framework_v1.2_January_2005.pdf) JT RIO Legal Framework v1.2 (January 2005)

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off er/JT\\_RIO\\_Definitions\\_v1.2\\_January\\_2005.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off er/JT_RIO_Definitions_v1.2_January_2005.pdf) JT RIO Definitions v1.2 (January 2005)

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off er/JT\\_RIO\\_Service\\_Descriptions\\_v1.3\\_November\\_2005.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off er/JT_RIO_Service_Descriptions_v1.3_November_2005.pdf) JT RIO Service Descriptions v1.3 (November 2005)

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off/er/JT\\_RIO\\_Technical\\_Manual\\_v1.2\\_January\\_2005.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off/er/JT_RIO_Technical_Manual_v1.2_January_2005.pdf) JT RIO Technical Manual v1.2 (January 2005)

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off/er/JT\\_RIO\\_O\\_M\\_Manual\\_v1.2\\_January\\_2005.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off/er/JT_RIO_O_M_Manual_v1.2_January_2005.pdf) JT RIO O&M Manual v1.2 (January 2005)

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off/er/JT\\_RIO\\_Service\\_Schedule\\_v1.2\\_January\\_2005.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off/er/JT_RIO_Service_Schedule_v1.2_January_2005.pdf) JT RIO Service Schedule v1.2 (January 2005)

[http://www.jerseytelecom.com/upload/documents/in\\_business/reference\\_interconnect\\_off/er/JT\\_RIO\\_Tariff\\_Schedule\\_v1-5\\_Feb\\_09.pdf](http://www.jerseytelecom.com/upload/documents/in_business/reference_interconnect_off/er/JT_RIO_Tariff_Schedule_v1-5_Feb_09.pdf) JT RIO Tariff Schedule v1.5 (February 2009)

BTC expects to develop the RIAO documents in a modular form and this can cover the aspects raised in the Guidelines (e.g. Section 5) and the A&I Consultation.

#### 4.2.2 Pricing and service definition processes

We develop an examination of some of the RIAO process details in the following paragraphs.

The process begins when a new entrant places a request for access and interconnection. Discussions are based upon the pricing schedule and terms and conditions within the RIAO. The new entrant may also request additional services that are not contained in the RIAO. In this instance, BTC would usually have a maximum of 3 months to agree or deny that request. Where a request is agreed then a cost orientated price *may* also be provided. Where the request is denied then an explanation should be given. We would expect that, where a request is made for a service in which the operator has SMP then it could be provided, if it meets certain criteria (including reasonableness and compliance with the specified aims).

Commercial discussions between operators usually continue for up to 6 months. If after 6 months, an agreement has not been reached then either operator may request that the regulator intervenes, usually using a pre-defined dispute resolution process.

This process assumes due allowance is made for commercial negotiations especially for the bespoke elements: a regulator should not seek to be too proscriptive and try to define every detail, as the technical demands of each new entrant cannot be predicted. We recommend that URCA takes the process set out above and adapts its access and interconnection Guidelines to follow this.

The rates in a RIAO are *usually* cost-orientated. The definition of cost-orientation has a very broad spectrum. However, it is usual to use benchmark prices or use retail minus until such time as cost based rates can be established (and then only after a definition of cost-orientation). A typical retail minus is typically considered "retail minus 15%." In cases where the retail rate is known to be far below cost then a retail minus rate will not be appropriate as this would require BTC to subsidise a new entrant. The Guidelines allow for price setting and the need for a defined method, yet these are wider issues that require extensive consultations and agreement. The price-setting method

can only be considered in outline in the Guidelines and should be subject to future detailed and specific price setting consultations that will be required *following* the identification and testing of SMP markets and definition of the required remedies. The RAIO's details (the lists of services) and price controls (or other remedies<sup>52</sup>) must be defined separately.

BTC notes that:

- The outputs of the cost model will not be available until May 2010 (at the earliest). Before this time, an alternative pricing methodology will be required. This could be international benchmarks or retail minus. Without AS accounts and cost models, retail minus accords with international precedent. We note that URCA must be wary of the danger of retail minus where the retail process may be below cost, tariff re-balancing may be required and the wholesale process must not be locked in to a below cost level. The price can be updated when the cost model results become available. BTC notes that this was the approach used in Jamaica and Bahrain and is currently being used in the UAE.
- Section 5.13 of the Guidelines notes that retail minus must consider the avoidable cost. This requires an analysis of the retail business cost and such a detailed investigation may not be possible in many cases prior to fuller cost investigations. The actual method employed may not therefore define exactly the avoidable cost.
- Other areas of Section 5 also make presumptive statements on the services and charges, (e.g. 5.14 to 5.16). For example BTC does not believe the RAIO is where an obligation to use the lowest cost option of new equipment or leased existing equipment is required. This is an issue of price control: where incentives are set to use lowest cost option to set prices and invest correctly. Compliance of prices to cost standards (5.15) is a pricing and not a RAIO content issue.
- Some of these services are not included in the AS cost model. This includes unbundling, facilities sharing and co-location plus the specific costs associated with providing CPS/CS. BTC may need to calculate these on a bottom-up basis or by disaggregating information from the AS cost model. This is a standard approach taken by many operators around the world. However, this takes time and therefore costs for these services may not immediately be cost orientated.

*We conclude that the RAIO must consider the contents (services to include) carefully and separately to allow consideration of the pricing issues. The pricing should cover both the short term needs as well as the potentially longer term movements to cost-orientation.*

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<sup>52</sup> Price controls are only one possible remedy. Notifications or non-discrimination are possible lighter remedies. Prices may be retail minus or cost-based. There are a range of remedies and the processes defined in the Guidelines should not be presumptive without the benefit of proper prior study.



## 4.3 Scope of the access and interconnection Guidelines

### 4.3.1 General scope issues

The scope of the access and interconnection guidelines sets out the products that should be contained in the RAIO. These are included by URCA as Annex 1. BTC notes that the description of products contained in this Annex is inconsistent with the list of services subject to the RAIO obligation as set out in the specific SMP obligations list of section 12.2 of the Preliminary Determination on Types of Obligations on BTC. For example, the list of services in Annex 1 of the Draft Guidelines includes call origination, which is instead excluded from the list of regulated products in the Preliminary Determination document.

BTC requests that:

- URCA reviews the set of products included in the Draft Access and Interconnection Guidelines. If a product is excluded from the high-level SMP market, then it should not be included in the RAIO.
- URCA considers that the set of products in the RAIO typically tends to increase in time, as the market becomes more competitive and more and new services are requested by new entrants. It is neither feasible nor proportional to impose a large product set in BTC's RAIO at such an early stage of the liberalisation process. The provision of many interconnection services requires new technical solutions to be developed – BTC cannot be expected to develop all of these at once.
- The initial set of services to be included in the RAIO is limited to the minimum set required: a) to allow new market entry plus those services in which BTC has been defined to have SMP (in the draft SMP consultation), b) where it is shown to that there is a demand for that service through BTC having received a request to supply that service; and c) it meets the overall aims and will provide long term benefits.
- Where a specific regulatory remedy is required to facilitate the service (e.g. the introduction of CS / CPS, number portability or unbundling of access infrastructure) then this should be consulted upon separately before the solution is added into the RAIO. BTC has already noted that carrier selection services should not be presumed services (for example see BTC replies to Questions 6&7 of the A&I Response). Regarding Bitstream access services, BTC notes that, although it has in principle agreed to provide these services in the future<sup>53</sup>, this is not currently feasible from a technical perspective. This is because the NGN network roll-out will significantly change the topology of the network and therefore Bitstream access cannot be provided until the roll-out of the NGN network is completed. Therefore, such service should not be included in the RAIO at present, but will be included once the new equipment is in place.

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<sup>53</sup> See "BTC response to the Public Consultation Paper on the Issues and Options for the Access and Interconnection Framework for the Electronic Communications Sector in the Commonwealth of The Bahamas", answer to Question 12 in the consultation document

Based on the above definition, the initial set of services in the RAIO should be limited to:

Wholesale Services	Comments
Call termination (domestic)	Local and national termination calls (Single and double tandem <i>equivalents</i> )
Call transit domestic	Calls pass to new entrant from customer on another new entrant network
Call termination (international)	From a international operator passed via new entrant to the BTC network for termination
Call outgoing international	From a local new entrant network to international destination, conveyed over the BTC network
Termination of calls to emergency services 911/919	
Termination to toll free destination (freephone #)	Payment scheme (revenue sharing) to be defined
Termination to toll IN services (premium rate and non-geographic numbers)	Payment scheme (revenue sharing) to be defined
Termination of calls to Operator Assistance	
Wholesale DSL	See also A&I response to Question 12 and 14
National leased lines	Based on current retail line services and prices (not wholesale "half circuits")
International Leased Lines	Based on current retail line services and prices assume other half circuit in termination country is obtained by other operator
Mobile voice call termination	Termination on BTC mobile network
SMS termination	Termination on BTC mobile network
MMS termination	Termination on BTC mobile network
Data termination (GPRS)	Termination on BTC mobile network
Joining circuits and POI	Links to the alternative operator from BTC. Location of A and B end and demarcation (POI – Point of interconnections) to be defined. Prices and cost sharing methodology for the links to be defined
Call termination to Directory Enquiry	Termination of calls from an end-user on the interconnection seeker's network to the directory enquiry service located on the interconnection provider's network.

BTC wishes to point out that it has included the provision of national and international leased lines provided on a retail basis. URCA has (correctly) concluded that retail and wholesale leased line

services do not warrant regulation<sup>54</sup>. However BTC includes these services in demonstration of its commitment to continue to provide such services to both retail and wholesale customers.

BTC also notes, consistent with its reply to Question 11 of the A&I Consultation, that NGN evolutions may change the services offered, including such items as POI and joining circuits.

The above list excludes a number of services suggested in the Guidelines or in the A&I Consultation, as either there is limited or no proof that there is a demand or net gain for citizens from offering them or a due study by URCA has not been shown or else BTC has noted reasons not to offer the service. An example of the latter is access to the Directory Enquiries Database (See Question 5 of the BTC A&I Response). This service was excluded in the Preliminary Determination document from the list of regulated wholesale services and therefore BTC believes that this should also have been removed from the list of services included in the RAIO.

To require a RAIO to include the full list of services set out in Annex 1 without there being proven demand is overly onerous. It risks potential serious harm to the market and incentives to invest (by both BTC and new entrants). This is because the benefits and overall aims from including each service have not been subject to due investigation and consultation. Although many services are unlikely to have such issues, a number are within a list of potential "risky and unproven service remedies." These later services may require investment that exceeds the benefits.

The unnecessary burdens from including non-required services in the RAIO are extensive. The costs are real and these must be recovered, with an impact on other retail and wholesale services and thus an adverse effect on consumers and competition. Economies of scale are highly relevant in small regimes, the set up costs are far more relevant in The Bahamas than larger economies. This places increased obligations on URCA to ensure *only* the services that are both welfare enhancing and support the required levels of competition, are included in the RAIO.

A listed service requires BTC to undertake considerable technical planning and operational/pricing analysis for services which it may never need to provide, or else only provide in very small quantities. Infrastructure and processes must be put in place for many services. Billing and IT and OSS<sup>55</sup> must be developed. In addition many services will not need to be provided within the period before the RAIO would require updating, for example new technical/pricing information. In this case including the service is pointless and increases costs (that must be recovered). The duty of care in defining the RAIO services is therefore greater for URCA than in some other economies.

Currently BTC is facing resourcing pressure due to the ongoing privatisation process and the requirement to develop an AS model under an exceptionally tight timeline. To require a set of additional (i.e. not required) services in the RAIO is overly onerous and not feasible given current resourcing constraints. For BTC to produce a RAIO for low or zero-demand services is likely to be welfare reducing, since it detracts BTC from focussing on innovation and quality without substantially enhancing competition. Also, as noted, some services proposed by URCA may not help to meet the fundamental aims. BTC emphasises that it supports the investment required to support completion and market enhancements that improve the welfare of customers and the

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<sup>54</sup> Preliminary Determination, Types of Obligations on BTC under S.116 (3) of Comms Act 2009, 12.2, pg151.

<sup>55</sup> Operations Systems Support – systems that are used to manage network elements and services.

economy. BTC however seeks to ensure that its resources are prioritised to support welfare enhancing competition.

### 4.3.2 Specific product issues

With regards to specific services included in Annex 1, BTC has the following comments.

**Call termination.** It is not clear if URCA assumes reciprocity, where payments to other operators, made by BTC for similar services are equivalent to payments to BTC. BTC supports reciprocity. In the EU, all operators were found to have SMP in the market for call termination on their own network. Differences in termination rates are generally not allowed in the EU, unless they arise from differing spectrum allocations (and even this argument has not been accepted by all regulators). URCA is required to define how services are defined, especially in new entrants' networks that may not have the same switch-hierarchy structure as BTC or the same definitions of local and long distance.

**Call origination.** URCA sets out call origination as a separate product to call origination carrier-pre-select and call origination carrier-select. BTC requests confirmation of this product and how it differs from carrier selection.

**Call origination (CPS/CS).** Both carrier selection (CS) and carrier pre-selection (CPS) are usually only implemented after a separate regulatory consultation on the issue. This should take into account the cost of implementing these solutions alongside the likely demand (and therefore benefit) of the solution. A cost benefit analysis is required on this prior to a decision to include it in the RAIO. We note that the cost of implementing these solutions may be significant and may require investment in new network commitment. Therefore any solution cannot be implemented immediately. URCA should clarify whether they consider if call origination requires call by call selection or pre-selection or both as required origination services. See also A&I Response to Questions 6-8. ). We also note that CPS is not mandated in a number of regimes including Barbados, Cayman Isles, Jamaica and Trinidad and Tobago. There are also other countries outside the region where it is not mandated.

**Incoming international calls.** This can cover two options: a) where the incoming call terminates on BTC or b) where the incoming call terminates on the new entrant's network. BTC requires URCA to clarify what payments are expected, as in both cases the calls are delivered to the terminating network as normal call termination. Is URCA implying a transfer of some of the account settlement fees to the termination network? What is the basis for this logic? Why should normal national call termination rate not be assumed?

BTC is heavily dependent on international call revenues, as they cover both retail revenues and incoming settlement fees and is concerned that URCA has not considered the issues fully. Incoming international calls that pass directly to the new entrant causes by-pass of the BTC settlement rates and could give BTC only a national termination fee. BTC accepts that competition in international calls is a positive development, but tariff-rebalancing is required and this takes time to implement. In the short term international inbound calls that terminate on BTC should be required to include some of the account settlement fees during the transition period while tariffs are re-balanced. We note that such allowances have been agreed to in other regimes (See for example: Bahrain and UK in the initial period after liberalisation).

**Mobile origination.** BTC does not understand why this service is included or what URCA is seeking to achieve from its inclusion. Such a service is provided to MVNOs, however since MVNO licensing has not been consulted upon, then this service should not be included in the RAIO at this stage. BTC notes that MVNOs (and call origination services) are rarely mandated, even after consultations and any call origination services are commercially negotiated and are *not* part of any RAIO. BTC is not aware of many MNOs being forced to include mobile origination services in their RIOs. After MNOs are licensed they may choose to make their networks available to MVNOs and often they compete to provide these services to new MVNOs. However, it would be premature to impose a mobile origination obligation on MNOs without a full and proper regulatory consultation on MVNOs in The Bahamas. We note that MVNOs are sometimes *not* permitted as a matter of course for example we understand that Bahrain and Guernsey does not permit them amongst others (such as India). In other cases MVNOs are left to commercial negotiations.

**Unbundled access to the local loop.** BTC notes that URCA has not consulted upon unbundling. Unbundling is an advanced regulatory remedy and can be costly to implement. It is unclear that it is an economically viable remedy in a micro-state and for this reason has not been universally implemented by regulatory authorities. For example, TRA Bahrain does not require Batelco to provide LLU and instead relies on bitstream access to provide competitive entry. This also encourages infrastructure build out. Saudi Arabia has LLU but with a sunset clause (we presume this is also to encourage access network build out). C&W Guernsey, Jersey Telecom, C&W Barbados amongst other small countries have also not required unbundled access (subject to cost benefit analysis). Bermuda has not mandated LLU whilst no service provider has shown an interest in LLU a Maltacom. Hong Kong reversed its policy on LLU to encourage more access network build out. Moreover, BTC notes that LLU was specifically excluded from the set of regulated products in the Draft Determination document and therefore it should not have been included in the RAIO guidelines. During our meeting with URCA on 24<sup>th</sup> November 2009, URCA indicated that the inclusion of this product might have been the result of an oversight. BTC expects URCA to clarify this as soon as possible

BTC's views on this service have already been submitted (see A&I response to Questions 17 - 21).

There should be no assumption made that LLU is a requirement for the initial RAIO.

**Unbundled access to the local loop – sub loop unbundling.** This is related to the above. BTC questions the requirement to do this as the economics are questionable as the set-up costs for other operators to access street cabinets (or manholes) are significant. Costs include both access to the cabinet and the building of hand-over cabinet space. URCA is required to study and consult on this before possible inclusion in the RAIO.

**Leased circuits.** *This requires additional clarifications and consultations.* Leased lines are already available to any new entrant based on retail prices and subject to volume discounts. It is common for this situation to prevail as it encourages infrastructure build (the UK for example used this approach in the earlier periods after liberalisation). In other cases the leased lines may later have some retail minus discount. BTC is unclear what URCA expects from these services and what the aims are from providing these services. For example, are these:

- Leased line services for backbone transmission links for use by the new entrant?

- Conventional leased lines, between two customer sites, but re-sold by the new entrant?
- “Half circuits” from a customer to a central site on the new entrant’s network (with only one access local loop)?

Each option has diverse implications and potential outcomes on the market development.

URCA should consult and consider what is required, along with a migration plan to implement changes (if any are required).

**Cable TV network access.** BTC requires clarification on what is to be provided and the justification for such a service to be included. These services could be interpreted as wholesale TV distribution or as a wholesale broadband aggregation service (cable modem aggregation). See also Question 22/23 of the A&I Consultation and Response. It is not clear if the RAIO should refer to BTC or Cable TV businesses’ services. BTC’s RAIO will only refer to services it offers, not services it may procure.

**Backhaul.** Similar to the leased line services (above), BTC requires clarification of the service and the justification for its inclusion in the RAIO. This could be general point to point backbone transmission or else backhaul links to (say) cable landing stations. As already highlighted in BTC’s A&I response to Question 26, BTC believes that this product should be provided on the basis of commercial negotiations and that BTC does not have SMP in the provision of this service. The A&I Consultation refers to: “a backhaul service should be included” but the market needs or technical solution was not defined. BTC assumes that the RAIO leased line offer will cover the requirements.

**Facility sharing/co-location.** URCA should consider the benefits of facility sharing and co-location before requiring services to be included in the RAIO. Whilst facility sharing initially speeds up the rate of competitive entry, in the longer term it may reduce the level of network competition between operators and create a monopoly in parts of the network which have the potential to be competitive. BTC has raised these points in the A&I Response to Questions 28 & 29. In particular, BTC notes that:

- Co-location services are complicated to define and have many detailed components [alarms, power, air-conditioning, planning, site visits, access rights, security, hand-over distribution frames, cages, racks, OSS, process definitions etc] making the services bespoke and so they tend to vary in detail by country. BTC requires that URCA carries out more investigations of the needs and service definitions before such services are mandated in the RAIO. In the Q28 response, BTC supports the relevance of co-location, as it may be needed for the POI, however without LLU, more extensive co-location has doubtful merits. In addition the setting up of the service facility (and any wholesale service) has significant set up costs that become highly relevant to small operators such as BTC, therefore extensive infrastructure and sharing services that may exist in larger economies such as UK should not be taken as exemplars that should be followed in The Bahamas.
- Sharing of masts and towers should not be required without a full assessment of the competitive harm versus the efficiency benefits. Furthermore, it must be recognised that in

some cases it will not be technically possible to share these towers as they have reached their maximum weight or space allowance. In the EU and many other parts of the world, sharing of masts and towers *may be* encouraged by the regulator but is often not mandated. BTC also notes that it can take many months to develop a tower or site sharing agreement. This is not an output of the Accounting Separation model and the tariffs must be structured separately to include site surveys, one-off equipment and installation costs and ongoing costs usually differentiated by the types of towers and masts. It is unrealistic for URCA to expect BTC to be able to develop this offering in a short space of time. BTC will provisionally use the draft sharing agreement currently in place. However, BTC will conduct an analysis of the costs and technical requirements for the provision of this service and will amend the agreement accordingly once the analysis is completed.

- Sharing of ducts. This obligation implies that full infrastructure unbundling has already been decided. BTC notes that URCA has not undertaken a consultation on unbundling and that this should be undertaken before an obligation to supply is imposed on BTC. Furthermore BTC notes that duct sharing is an extremely unusual/advanced regulatory solution that has yet to be implemented in most countries – even those that have liberalised many years ago. It has not been proven that there is a demand for the service or that it could be implemented in a manner that would lead to a net welfare gain. Duct sharing is likely to lead to less infrastructure investment. It may also have technical issues such as what happens when ducts are full or when duct location records are old/out of date or are paper-based. *BTC is unable to develop a duct sharing proposition and does not believe it is a sensible move for an initial RAIO. URCA should consider the broader need for all infrastructure facilities access before any are included in the RAIO. Why should duct access be considered and not dark fibre for example<sup>56</sup>? The overall aims and net benefits must be examined.*

**Data Management Amendments.** This service is not fully described and BTC is unclear as to the scope of services, though some details exist in the A&I Consultation and BTC has replied to these (see Question 33 of the A&I Response).

**Content.** The RAIO content (Section 5.16 and 5.23 of the Guidelines) proposes information exchange relating to content including “channel mix” and electronic programme guides. BTC presumes this relates only to transfer of data required to deliver the RAIO services and does not relate to the delivery of content such as TV or other media (which are not wholesale services to be delivered by BTC).

## 4.4 Access and interconnection principles

### 4.4.1 Scope and principles

URCA notes that the over-arching principle is that “The terms, conditions and charges for services and facilities offered for access and interconnection should support the development of sustainable competition to the benefit of persons in The Bahamas and the national economy”. BTC notes that it is to the benefit of the national economy to have a strong national telecommunications provider.

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<sup>56</sup> BTC does not consider either are required are present, but the gap indicates the RAIO policy has not been considered fully by URCA

Recent studies have shown that an increase in telecommunication penetration rates of 10% may increase in economic growth rates by 0.6%.

Therefore it is important that URCA also considers the viability of BTC when imposing remedies and recognises that BTC's resources are finite. This requires URCA to prioritise the imposition of remedies. It is not possible for BTC to develop a RAIO which contains this number and complexity of services whilst simultaneously developing a regulatory costing model; preparing for privatisation; and responding to additional consultations and remedies imposed by URCA. URCA must be mindful of the importance of BTC continuing to provide a high quality and innovative service and that simultaneous regulatory compliance obligations could detract from that and would therefore not accord to URCA's mission statement of benefiting persons in The Bahamas and the national economy.

Interconnection should not be required at any technically feasible point. There is a fixed cost of providing interconnection at a point of interconnection and for this reason, along with regulators typically wishing to encourage network competition, interconnection is usually limited to a set number of interconnection gateways. Many technically-feasible interconnection points could be not economically feasible, either individually or collectively (too many diverse services and points of interconnection). The economics and wider aims must be considered *before* interconnection services or points of interconnection are specified in a RAIO.

By way of an example, often a minimum of 2 POI's are required to ensure resilience, it is technically feasible to have only one, but this could compromise service quality. BTC is currently in the process of rolling out its NGN network. As part of this development, the number of technically feasible POI's will be reduced to two. This will be clearly explained in the RAIO. In addition to URCA's clarifications BTC expects to define the technical requirements for interconnection in the technical annexes to the RAIO. For the avoidance of doubt, this will also include technical obligations on the access seeker to provide network capacity and services that maintain the BTC service quality. Capacity forecasts are required to ensure that BTC is able to deliver. IT interfaces or customer/network data may be required.

#### 4.4.2 Publication of reference offers

BTC agrees that it should publish its RAIO on its website. However, only the approved RAIO should be published, otherwise it could lead to confusion for those requesting interconnection and access.

#### 4.4.3 Revision of Access and Interconnection Agreements

BTC agrees that the RAIO should evolve over time as the electronic communications sector evolves. For this reason, the initial RAIO should not be required to include services that potentially will never be required. Services can be added as and when there is shown to be demand.

#### 4.4.4 Dispute resolution

BTC notes that any dispute may be referred to URCA after 4 calendar months. BTC believes that a longer period of 6 months is more appropriate. This would allow BTC the opportunity to investigate



alternative pricing, technical and operational standards and to potentially offer alternative propositions before involving URCA. The timelines for this will need to be agreed with URCA for inclusion in the RAIO.

BTC notes that disputes between operators are generally rare. For example, OUR Jamaica has only been required to mediate in two disputes since C&W Jamaica introduced its RIO in 2001. Therefore an extension of the period before which a dispute can be referred from 4 to 6 months should not negatively impact the competitive environment.

#### 4.4.5 Timelines

BTC supports URCA's point (Section 8) that "The RAIO is expected to evolve over time as the Bahamian electronic communications sector evolves." The RAIO will take time to develop and technical aspects of it may need to change in parallel with the development of the service itself. BTC proposes that the RAIO would be developed over time and updated. An initial RAIO should be produced to have the salient contractual and process details, with the initial set of services. This would then be updated as required to include more details and to accommodate feedback from other parties. Periodic updates will be required to pricing schedules and service definitions.

*BTC estimates that a RAIO should be available for publication in May 2010. The time is required primarily to develop the technical aspects, business processes and service interfaces and to obtain the cost information from the AS model.*

#### 4.4.6 Other issues

BTC notes that there are typically four methods permitted to establish the terms and conditions in a RAIO. As noted by the OUR in Jamaica, these are:

- Voluntary commercial negotiations between the parties;
- An entrant accepting the incumbent's Reference Interconnection Offer;
- RAIO terms and conditions approved or prescribed by the regulator; and
- The regulator acting as arbitrator of pre-contract disputes.

*BTC requests that URCA amends the access and interconnection guidelines so that agreements can also be based upon voluntary commercial negotiations between the parties.* This is likely to lead to additional services being provided more quickly as it makes it possible for an interim agreement to be used before final negotiations are completed. This facilitates faster competitive entry and ultimately benefits consumers.

### 4.5 Content of reference access and interconnection offers (RAIO)

The contents of the RAIO have been raised in the A&I Consultation and the Guidelines Section 5. The required scope is broadly agreed to cover the points raised in the URCA documents. As noted

previously the structure is likely to be altered to make the document more modular and hence easier to develop and manage. The full contents will be developed by BTC using legal (contract), technical and regulatory inputs. It will be based on the scope identified by URCA and on the BTC responses in this paper and the previous A&I Response.

In this section we raise only those areas of the contents that may require additions or significant variances from those proposed previously by BTC or URCA.

#### 4.5.1 New services

BTC agrees that it should consider requests for new wholesale services to be included in its RAIO. However, it cannot provide information on the “New services development framework” that has been requested by URCA. The length of time it takes to review a request, develop a new wholesale service and provide it depends on many factors. These include:

- The number / complexity of new services to be provided;
- The extent of modifications that are required to the network; and
- Should new equipment need to be purchased, the speed at which this can be provided from manufacturers and can then be installed in the network?

The time to provide a new service will therefore vary considerably by service. BTC believes that it would be constructive to require it to provide a new service “as soon as is reasonable” following a request for provision. Furthermore, there should be put in a place a formal mechanism for an operator to request a new service.

URCA should define overall requirements for due process to be followed and for appeals to URCA. A request for a new service may be refused after BTC has examined the request. The seeker should have the right to seek a review via URCA, typically if a satisfactory response is not given in 3 months. URCA will need to define the processes to settle such disagreements – this would not form part of the RAIO.

Below is an example form that all operators would be required to submit to BTC when a new service is requested.

**Example “Request for a new service form”****To: BTC****From: [Insert name] (Requesting Operator)****Date: [Insert date]****SERVICE REQUEST IN RELATION TO BTC’S REFERENCE OFFER**

Is the service an Interconnection Service? Please explain the basis on which the Requesting Operator considers that this is the case.

Please provide the following:

- a detailed description of the proposed New Service, including a clear statement as to whether the service is capable of being and is intended to be a reciprocal service;
- an outline of the technical and functional specifications which the Requesting Operator considers should apply to the New Service; and
- the Requesting Operator's opinion of the likely scope of the New Service including a preliminary forecast of the Requesting Operators' expected use of the New Service covering a period of at least 3 years, identified quarterly.

**SIGNED** by [insert name of REQUESTING OPERATOR] by:

\_\_\_\_\_  
Signature of Director

\_\_\_\_\_  
Signature of Director/Secretary

\_\_\_\_\_  
Name of Director (print)

#### 4.5.2 Access seeker obligations

The RAIO will include obligations of the other party. These are likely to cover:

- Supply of relevant technical data to ensure BTC delivers working services;
- Compliance with health and safety principles;
- Use of suitable qualified staff;
- Delivery of demand data forecasts. Note that this also has contractual pricing implications. A demand forecast that is not met may result in additional charges to compensate for the provisioning costs that are incurred by BTC. Penalties may be included where excessive demand (above forecast) results in quality reductions;

- Quality of service. BTC service levels should be maintained to ensure customer services are not impaired by the other party. This includes (but is no limited to) calls blocking (grade of service in busy hour), speech quality (e.g. Mean Opinion Score or bit rate compression), resilience, integrity, and security;
- Signalling and IT data interfaces. These should comply with relevant standards and interwork with BTC systems;
- Legal compliance. For example: support for legal intercepts and maintenance of customer data confidentiality;
- Fraud and misuse. The other party should have obligations to take due care to avoid fraudulent use of its network and resulting possible impairment of BTC's services or revenues;
- Technical re-refresh. Where BTC alters its technology or service and provides due notice and complies with reasonable standards, the other party should be obliged to comply with such changes. Specifically BTC will not be obliged to maintain legacy services for the convenience of other parties.

#### 4.5.3 Publication of RAIO

A Standard Offer, to include pricing schedules for the main services, should be published and be available on the BTC web site. A link to this from the URCA site is recommended.

The contracts with each access seeker will not be published. These may be copied to URCA subject to commercial confidentiality terms, to ensure transparency and non-discrimination. If URCA requires individual contracts to be published then URCA would need agreement from other parties and a jointly-agreed process to redact any commercial confidential areas.

## 5 Responses to specific questions in the Preliminary Determination on BTC

In this section, we provide answers to the specific questions asked by URCA in the Preliminary Determination on BTC.

(a)(i) Do you agree with the exclusion of products from the high level SMP markets?

### *Retail products*

While BTC is pleased to note that URCA has recognised the possibility of excluding some products from the high level retail SMP markets, BTC is concerned that URCA has not justified the exclusion of these products correctly. In particular, BTC notes that:

- Voice over Internet: VOI is not a product on its own, but rather a technology which can be used to provide local, national and international calls. As such, it should have been considered as part of the local calls, DLD and ILD calls analysis. We discussed this in further detail in Section 2.3.2 above. Had URCA done so, it would have found BTC not dominant, at least in the DLD and ILD call markets.
- Public Payphones: BTC notes that obligations related to Public Payphones are generally dealt with as part of the USO obligations imposed on BTC. Therefore, any SMP analysis on payphones is irrelevant.

### *Wholesale products*

URCA has excluded the following wholesale products from the high level SMP market:

- Fixed call origination;
- Broadband resale;
- All forms of access to the local loop (unbundled local loop);
- Wholesale line rental;
- Origination of calls to freephone numbers;
- Access to the directory enquiries database;
- Mobile wholesale regulation; and
- Direct mobile access and interconnection.

BTC agrees with URCA that the products above should be excluded from the high level SMP market. However, BTC believes that the amount of products which have been included in the high

level SMP market is excessive, considering the early stages of market liberalisation in The Bahamas. Moreover, while the analysis for inclusion/exclusion of retail products in the high level SMP market is explained in detail in the Preliminary Determination document, the same is not true for wholesale products.

BTC notes that some of the products which have not been excluded from the high level SMP market are not currently provided by BTC, nor have there been any requests for these products. This includes the following products:

- Wholesale international backhaul (this is currently only provided to BTC).
- Wholesale national leased lines.
- Wholesale international leased lines.
- Bitstream service.

In Section 8 of the Preliminary Determination URCA sets out its analysis of these markets. In addition to methodological considerations we believe URCA should consider (for example URCA's use of BTC rather than a hypothetical monopolist in the SSNIP test, as detailed in section 2.2.2) we note the following:

- In relation to international backhaul services:
  - URCA has considered national and international backhaul together. URCA states in Section 8.3 "national and international backhaul are grouped for simplicity in the following analysis because the arguments are the same for both". However, BTC does not currently offer wholesale international backhaul services to any other operator so to conclude that there are unlikely to be demand-side or supply-side substitutes to a BTC service which does not currently exist does not make sense. National and international backhaul services should be considered separately and the SSNIP should be conducted for a hypothetical monopolist, not BTC. BTC considers that this market would include both CBL and BTC services.
  - URCA appears to have concluded that the already offered CBL international backhaul services would not provide an effective substitute to the not yet offered BTC international backhaul service in reaching its conclusion that BTC has SMP in this market. BTC considers this assessment to be incorrect. Given that CBL already offers these services it is not clear why URCA does "believes it is unlikely there would be demand-side substitution for BTC's backhaul services in the time period under review".
  - URCA concludes that ex post competition law is considered insufficient because "[failure to provide these services on reasonable terms could result in a serious market failure." However, BTC considers that URCA should take into account that no operator has requested an international backhaul service from BTC and there has been no failure in commercial negotiations As noted in our response

to (a)(ii) below, to find that BTC has SMP in a market where it does not currently offer services and where no operator has requested such services, and then to impose cost-oriented regulation and a RAIO obligation to this service when there has been no failure in commercial negotiations is excessive and inconsistent with best practice.

- In relation to wholesale national and international leased lines BTC has similar concerns as for international backhaul services:
  - BTC does not currently offer these services;
  - CBL currently offers these services and should be considered a demand-side substitute for any BTC service which is able to be introduced in the time period under review;
  - BTC has not been requested to offer these services and thus no market failure has taken place to indicate that ex post competition law would be insufficient.

However, we note that in relation to these services URCA (correctly) concludes that regulation is not appropriate but rather will observe developments in the leased lines markets and retain the right to mandate the introduction of retail price regulation in future if this is considered necessary.

- In relation to the Bitstream Service:
  - BTC does not currently offer these services;
  - It is not clear why a CBL service would not be considered a demand-side substitute for any BTC service which is able to be introduced in the time period under review;
  - BTC has not been requested to offer these services and thus no market failure has taken place to indicate that ex post competition law would be insufficient. It is thus excessive and inconsistent with best practice to designate BTC as having SMP in this market and to impose cost oriented regulation and a RAIO obligation on a service which is not currently offered and for which there has been no demand.

BTC is not in a position to offer these services at this time and considers that URCA has not sufficiently considered this issue.

(a)(ii) Do you agree with the proposed obligations imposed on specific products?

As set out in Section 2 of this document, BTC believes that URCA should have considered the proposed obligations in the overall context of the market liberalisation process, including the privatisation of BTC. In particular, BTC is concerned that URCA has not paid any consideration to the financial viability of BTC, especially in light of the need for BTC to finance the access deficit and its USO obligations.

The following sections outline BTC's position with respect to each of the obligations proposed by URCA.

### *Retail Obligations*

On retail products, URCA has proposed the following obligations:

- Filing of initial tariffs/prices;
- Notification for tariff/price changes;
- Notification for Special Offers or Discounts;
- Regulation on bundling of price regulated services;
- Notification for introduction of new services;
- Withdrawal or discontinuation of price regulated services.

The following sets out BTC's position with respect to each of the above.

#### **Filing of initial tariffs/prices (Ref 12.2.2.1)**

While BTC accepts the obligation to file its current tariffs and terms and conditions with URCA, BTC considers the requirement to provide the volume of sales (number of subscribers, traffic volumes) and revenues for the past two financial years excessive.

BTC notes that it is not currently possible for BTC to provide volumes for local calls. This is because these calls are not recorded in the billing system as they are provided free of charge.

#### **Notification of tariff/price changes (Ref 12.2.2.1)**

*BTC disagrees with URCA on imposing symmetric obligations for price increases and decreases. In particular, BTC notes that URCA proposes 30 day notification period for price changes. While BTC recognises that a notification period is relatively standard for price increases, BTC consider imposing the same notification period for price decreases excessive and contrary to international best practice.* It is generally recognised that imposing a notification period for price decreases:

- Makes it hard for the incumbent to compete fairly;
- Denies the consumer the positive welfare impact of an immediate reduction in price.

Therefore price declines are usually permitted immediately.

BTC recognises that it is the duty of the regulator to prevent any anti-competitive behaviour, such as margin-squeeze and predatory pricing. BTC proposes the following as an alternative obligation:

- Price reductions to be permitted immediately; but



- An obligation be imposed on BTC to provide the regulator, 24 hours prior to the price decrease coming into effect, a letter explaining (with supporting evidence) why the price reduction does not represent an anticompetitive behaviour, but that it is instead a legitimate response to competitive pressures.

The need for allowing immediate price reductions has been recognised by regulators internationally, for example, by Ofcom in the UK and the Fair Trading Commission in Barbados.

#### Figure 17: Price reductions - Ofcom decision

##### Ofcom and Openreach rebates<sup>57</sup>

Ofcom's Condition AA6(a).2(a) requires Openreach to give no less than ninety days notice before changing charges for wholesale line rental (WLR) services including the charge for the installation of a new residential analogue exchange line. On 9 April 2009, however, Openreach requested that Ofcom consent to a waiver of the notification period referred to above to enable it to give effect to a temporary price change earlier than set out in Customer briefing reference WLR019/09 and Access Charge Change Notice OR120 both of which were issued on 3 April 2009.

The briefing referred to announced that Openreach was introducing a scheme that would be intended to give WLR service providers the incentive to increase their wholesale residential analogue exchange line customer-base by offering rebates against the standard connection charge for a proportion of new connections made during the Offer Period. The number of new connections made during the Offer Period would be measured against new connections made in the 13 calendar weeks to 27 February 2009 (the Background Count) and the rebates available would vary to the extent to which the provider increases the average number of new customer connections.

After suitable consultation, Ofcom considered that the proposed price changes in this case were likely to be of benefit to Openreach's wholesale customers and end-users more generally. The structure of the offer was such that all wholesale customers could benefit to the extent that they increase their customer base in comparison to the Background Count. Ofcom therefore considered that it should proceed to grant consent in this case and enable Openreach to introduce the rebate earlier than it would otherwise be able to do.

In relation to price reductions, the Fair Trade Commission of Barbados noted: "The Commission agrees that where issues of anti-competitive rates are present, they should be addressed. The Commission however is of the view that rate reductions should not be held up during the period of investigation... The Commission considers that the option of delaying rate reductions may place the Company at a disadvantage when responding to price decreases introduced by its competitors.

<sup>57</sup> Ofcom, Waiver of BT's price notification requirement for wholesale residential analogue exchange line services [Footnotes removed]  
[http://www.ofcom.org.uk/consult/condocs/waiver\\_bt/statement/BTwaiverFinal.pdf](http://www.ofcom.org.uk/consult/condocs/waiver_bt/statement/BTwaiverFinal.pdf)

*The Commission therefore required that the Company advise the Commission and the public at least two business days in advance of the effective date of any price decrease.*<sup>58</sup>

Furthermore, the level of information that BTC is required to provide is overly onerous and is unusual even in Caribbean markets which have typically required a higher degree of proof than other jurisdictions. BTC suggests that this list should be reduced to be in line with other jurisdictions.

For example, the Fair Trade Commission of Barbados only requires, for price increases:

- 20 business days (one month) notification period;
- Written notification to the Commission and notification to the public by means of newspaper advertisements;
- A Rate Increase Compliance Filing, showing that the proposed change does not infringe the price cap regulation<sup>59</sup>.

#### **Special Offers or Discounts (12.2.2.4)**

Special offers or discounts are generally a response to competitive pressures in the market and can therefore be compared to the price reductions discussed above. In particular, URCA should consider that, as competition increases in the future with the entrance of new players in the market, BTC should be given sufficient flexibility to be able to respond effectively to competitors' commercial decisions.

BTC therefore believes that the same alternative obligations proposed by BTC for price reductions discussed above should apply to special offers and discounts. While BTC recognises that URCA needs to be reassured that BTC does not engage in anticompetitive actions, BTC believes that this could be achieved with a letter provided to URCA 24 hours prior to special offer coming into effect, explaining (with supporting evidence) why the special offer or discount is a legitimate response to competitive pressures.

#### **Bundling of price regulated services (12.2.2.5)**

URCA states that "a bundle, tied products or package that includes at least one price regulated service shall be subject to price regulation"<sup>60</sup>. BTC disagrees with this statement.

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<sup>58</sup> Fair Trade Commission of Barbados, Price Cap Mechanism Decision, April 2005, Page 53, emphasis added.

<sup>59</sup> Fair Trade Commission of Barbados, Price Cap Mechanism Decision, April 2005, Page 52-55.

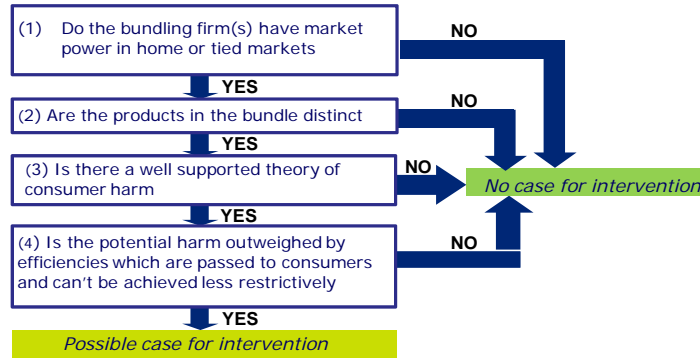
<sup>60</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 3.2.3.5, page 18.

Where regulated and non regulated services are bundled together, it should not necessarily be assumed that the service as a whole should be regulated. URCA should consider the requirement for intervention on a case by case basis.

In particular, BTC is of the opinion that URCA should adhere to the following process:

**Figure 18: Assessing bundling**

**1. A basic four step test for determining whether regulatory action is desirable**



**2. A framework for considering in detail (3) and (4) above**

(3) Theories of consumer harm	(4) Efficiencies
<b>A. Elimination of competition</b> (1) Raising rivals' costs (2) Lowering rivals' benefits (3) Leveraging market power from home market (4) Protecting market power in the home market (5) Committing to bundle to deter entry (6) Denying network effects or scale to a rival (7) Foreclosure by bundling complements (Cournot effect)	(1) Price discrimination which benefits consumers (2) Cost savings (production, distribution, transactions) (3) Compatibility cost savings (4) Protection of intellectual property (5) "Legitimate" low prices (6) creating new products or increasing variety (7) Quality assurance
<b>B. Obscuring pricing</b>	
<b>C. Consumer harming price discrimination</b>	

URCA's position is also in contrast to precedents in other jurisdictions within the Caribbean region. For example, the Fair Trade Commission of Barbados only determined that, for bundles which include a regulated service, the implicit price for that service should not count towards price cap compliance<sup>61</sup>.

**Introduction of new services (12.2.2.6)**

BTC is of the opinion that, as long as the new service is permissible within the license granted to BTC, a notification should not be required. A notification for the introduction of new services is not common internationally. BTC also disagrees with URCA's determination that "a new service that is a combination of services comprising of at least one Price Regulated Service is a Price Regulated

<sup>61</sup> Fair Trade Commission of Barbados, Price Cap Mechanism Decision, April 2005, page 56.

Service<sup>62</sup>. BTC submits that this should be considered by URCA on a case-by-case basis, based on the same framework suggested above in the case of bundled products.

### **Withdrawal and Discontinuation of Price Regulated Services (12.2.2.7)**

BTC accepts that the obligations proposed by URCA for product withdrawals are reasonably standard. However, BTC notes that URCA has not provided sufficient clarity on the reasons why it might reject a product withdrawal. Moreover, while BTC recognises the need for customer protection, it would like URCA to explicitly state in its determination that product withdrawals will generally be allowed, as long as substitute products with comparable characteristics and comparable prices are available and the transfer of customers to these alternative services is provided by BTC free of charge to existing customers.

#### *Wholesale products*

URCA has imposed cost orientation obligations on the following wholesale products:

- Call transit (domestic, international and mobile);
- Call termination services (domestic and international);
- Wholesale national backhaul;
- Wholesale international backhaul;
- Wholesale directory enquiry and ancillary services (call termination and service provision);
- Bitstream service.

Firstly, BTC notes that it is not currently providing all of these products. Secondly, URCA does not seem to have clear policy objectives when considering the obligation it is trying to impose. Wholesale regulation is aimed at creating a level playing field and, if regulation at the wholesale level is imposed, regulation at the retail level should be lifted. *The EU explicitly notes that interventions in the wholesale market are preferable to interventions in the retail markets and that "Regulatory controls on retail services can only be imposed where relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition"*<sup>63</sup>. Moreover, BTC notes that, in line with ERG principles, it is essential that URCA reassess the appropriateness of remedies in retail markets following the implementation of wholesale remedies. This crucial reassessment has not been conducted by URCA.

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<sup>62</sup> Preliminary Determination: Types of obligations on the Bahamas Telecommunications Company Ltd. under S.116 (3) of Communications Act 2009, Section 3.2.3.6, page 18.

<sup>63</sup> As noted in ERG Common Position on the Approach to Appropriate Remedies in the New Regulatory Framework. Approved by ERG on 1st April 2004.

If URCA considers that the current number of players in the market is not sufficient to create a level playing field at the wholesale level, and that regulation at the retail level is appropriate, the level of regulation at the wholesale level should be reduced. This would be consistent with the approach taken in most jurisdictions in their early stages of market liberalisation. For example, the Office of Utilities Regulation in Jamaica, where only very few products were initially required in the RIO, as shown in the following figure.

**Figure 19: Services included in initial RIO for C&W Jamaica<sup>64</sup>**

Categories the RIO	Service name
Joining	In-span joining
Termination	a) PSTN Terminating access service b) PLMN Terminating access service c) Incoming International PLMN Terminating Access Service
Special Access	a) Emergency Services b) National DQ Service
Wholesale	a) PSTN Transit service b) PSTN Outgoing International Service

Similar requirements are also imposed in Barbados<sup>65</sup>.

BTC is particularly concerned that URCA has not conducted a cost/benefit analysis before imposing cost orientation at the wholesale level. As explained in section 2.2.5 above, the Impact Assessment is internationally recognised as essential to the correct definition of remedies: the lack of an appropriate cost benefit analysis before imposing regulatory remedies can expose the industry to a very real risk of regulatory error.

BTC considers it unreasonable to impose regulation on products where there has been no market failure. In particular, as noted in our answer to question (a) (i) of this consultation, it is excessive and inconsistent with best practice to impose cost orientation and RAIO obligations on services that:

- BTC does not currently offer; and for which
- There have been no requests from another operator for BTC to provide such services, and thus no failure in commercial negotiations.

<sup>64</sup> See "RIO Decision February 2001", page 13, available at <http://www.our.org.jm/images/stories/content/Telecommunications/DeterminationNotice/Decisions/RIO%20Decision%20February%202001.pdf>.

<sup>65</sup> See "Consolidated Reference Interconnection Offer (January 2009), available at [http://www.ftc.gov.bb/index.php?option=com\\_content&task=view&id=99&Itemid=82](http://www.ftc.gov.bb/index.php?option=com_content&task=view&id=99&Itemid=82).

This is the case for international backhaul services and the wholesale Bitstream service proposed. For these services, BTC considers URCA should adopt the approach it has for leased line services – that is, to observe developments in the markets and retain the right to mandate regulation in future should it consider this to be necessary.

BTC also considers it unreasonable for URCA to demand cost orientation before a full tariff rebalancing exercise is conducted. URCA should recognise BTC's financial viability as one of its objectives. Requiring BTC to provide wholesale services at cost, while it is still providing other services below cost is a direct threat to BTC's financial position. Specifically, URCA should recognise that current regulations imposed on BTC are leading to an access deficit and an under-recovery in the provision of local calls that BTC needs to recover in other markets. Similarly, URCA has not given any consideration to USO costs, which BTC should be allowed to recover from other services because an explicit mechanism is not in place. While BTC hopes to propose a rebalancing plan in the near future, URCA should recognise that a rebalancing plan is a major exercise, which will have major commercial implications for BTC and therefore BTC should be allowed sufficient time to discuss its plans with the new strategic partner, when it is appointed.

Moreover, URCA does not appear to have taken into account the Comms Act stated objective of promoting infrastructure investment<sup>66</sup>. BTC is currently investing heavily in upgrading its network to the new NGN technologies, but URCA has not considered this development at all in its assessment of the benefits that the new network will bring to the wider economy underlining the need to preserve BTC incentives to carry on such a large scale investment plan. This is in contrast with the electronic communications policy and clearly not in the interest of the wider economy of The Bahamas.

In summary, with respect to wholesale regulation, BTC believes that:

- The scope of wholesale regulation should be reduced and in particular services which are not currently provided by BTC, or for which an explicit request has been made by other operators, should not be included in any remedy (this will also be discussed later in the document in relation to the AS and RAIO obligations); and
- The obligation of cost orientation should not be imposed without consideration of other issues affecting BTC such as the level of retail regulation, USO obligations, the access deficit and the need for rebalancing.

### **Accounting separation (12.2)**

BTC does recognise that the Accounting Separation exercise is a standard regulatory requirement imposed on operators and intends to comply fully with this requirement.

However, BTC has some concerns over particular aspects of the Accounting Separation obligations and in particular BTC notes that:

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<sup>66</sup> Part II, Section 4 (a) (ii) of the Comms Act 2009, page 14, states that one of the objectives of the electronic communications policy is "to promote investment and innovation in electronic communications network and services".

- URCA has not allowed sufficient time for the preparation of the Accounting Separation model. In particular, URCA requires the AS model to be ready three months after the publication of the Final Determination. Three months is an unfeasible timeline, which is not supported by any international precedent. In the meeting with BTC on the 20th October 2009, URCA stated that BTC could have started this exercise a few months ago when it was first notified about URCA's intention to impose such a regulatory remedy. However, URCA has not considered that BTC could not possibly have started the AS exercise before the publication of the final Accounting Separation guidelines – international best practice does not support URCA's position in this regard. BTC proposes that it submits its first set of regulatory accounts by May 15<sup>th</sup>, 2010 (please see section 3.1.1 for a detailed discussion of issues)
- The list of products included in the Accounting Separation guidelines is excessive and the cost of some of the products included cannot be obtained with a top-down model, but rather require separate bottom-up analyses. Furthermore, BTC is not providing many of the wholesale products that it is required to include and therefore the costs and revenues associated with those products will automatically be zero. We refer URCA to Figure 16 for further information on those services currently provided by BTC.
- BTC notes the requirement for a regulatory audit. However BTC questions the net benefit of a regulatory audit in this particular situation. There is a relatively fixed cost of undertaking a regulatory audit, regardless of the size of the organisation. Initial estimates suggest that this may be approximately \$850,000 in the first year, reducing to approximately \$600,000 after the first couple of years. Putting these numbers in perspective, BTC notes that this would constitute around 4% of its 2008 net revenues. It would cost \$6.40 per fixed line in The Bahamas. This is a key reason why many other regulators in micro-states have not requested regulatory audits. Instead BTC suggests that URCA undertake its own review of the model and methodology, assisted by BTC who will answer any questions needed to give URCA confidence on its robustness. Alternatively, BTC would consider submitting a Chief Financial Officer's responsibility statement in lieu of an audit opinion.

BTC's position regarding the Accounting separation obligation is discussed in detail in Section 3 of this document. In this section, we provide a set of recommendations for changes to the draft AS guidelines.

### **Reference Access and Interconnection Offer (12.2.1)**

BTC accepts that the publication of the RAIO is a standard requirement for operators and intends to comply with this requirement. However, BTC has the following concerns over the RAIO requirements outlined by URCA:

- URCA's role in the preparation of interconnection agreements is too invasive. In many jurisdictions, RAIOs are commercially negotiated and the regulator only steps in when the involved operators cannot reach an agreement;

- The list of products included in the RAIO is not justified based on the SMP analysis, market needs or regulatory economics or on the currently foreseen level of demand for these services; and
- It is unreasonable for URCA to demand the publication of the RAIO before the outputs of the cost model are ready. This is contrary to international best practice. BTC accepts that if early publication is required that a price schedule is needed, but this must be interim pricing and prices must be set in a conservative manner that allows tariff-rebalancing and business transformation phases to adjust to the new competitive market. Further, prices must not be set at levels that risk inefficient market entry or distortion: where there is doubt as to cost-based levels (prior to cost modelling) then wholesale prices should be initially set at the higher end of estimates to minimise competition/market risks.

BTC's position regarding the RAIO obligations is discussed in detail in Section 3 of this document.

(a)(iii) Do you agree with the proposed compliance deadline for the implementation of the obligations?

As discussed in Section 3.1 BTC is very concerned at the short timeframe URCA has proposed for the preparation of the Accounting Separation model. BTC believes that the deadline proposed is unfeasible and not supported by international precedents and best practice. However, BTC recognises the importance of the Accounting Separation exercise and therefore will try to comply with these requirements in the shortest time possible.

As discussed in Section 3.1, operators are usually granted a minimum of 1 year to undertake AS from the point at which the AS guidelines are formally published. BTC acknowledges the importance of the AS exercise, and has set out in Section 3.1 a proposed timeline which would aim to provide AS outputs to URCA in mid May 2010. This is approximately 4-5 months after the publication of the final guidelines. BTC considers that this timeline should be viewed as ambitious and a challenge to BTC. In order to meet this timeline BTC would need to begin the AS modelling immediately and therefore BTC seeks urgent confirmation from URCA that the final AS guidelines will not differ substantially from the URCA guidelines.

As discussed in Section 4.4.5, BTC supports URCA's point (Section 8) that "The RAIO is expected to evolve over time as the Bahamian electronic communications sector evolves." The RAIO will take time to develop: in particular the technical aspects of it may need to change in parallel with the development of the service itself. Further, pricing will evolve over time but this only impacts the relevant schedule. BTC believes an initial RAIO should be available for publication at the end of Q1 2010. The time is required primarily to develop the technical aspects, business processes and service interfaces.

(a)(iv) Do you agree with the charging principles, where applicable, specified in the application of the obligations? Please refer to the relevant guidelines for further details on the principles.



BTC has explained its position with regard to the cost orientation obligations imposed on BTC in its answer to section (a) (ii) above. Please refer to this section.

(b) If you answered “No” to any of the above, please state the reasons with reference to the background material provided, relevant guidelines or any other evidence which you consider to be relevant.

BTC has stated its reasoning in its responses to the above questions. These answers include cross-references to relevant sections in this document. Please refer to these sections.

(c) If you disagree with the obligation imposed on the specific product, please submit alternative obligations which would satisfy the requirements as set out in Section 4.4.

BTC has suggested alternative obligations, where it considers they are appropriate, where the issue with the obligation imposed is identified within the document (sections 2-5).

(d) Any other comments in the consultation and supporting guidelines.

Please refer to:

- Sections 2 for comments on the Preliminary Determinations;
- Section 3 for comments on the Accounting Separation guidelines; and
- Section 4 for comments on the Access and Interconnection guidelines.

## 6 Responses to specific questions in the Preliminary Determination on CBL

In this section, we provide answers to the specific questions asked by URCA in the Preliminary Determination on CBL.

As discussed in Section 2.4, BTC notes and welcomes URCA's decision to conduct a symmetric analysis on BTC and CBL. BTC believes that imposing symmetric obligations on operators designated as having SMP is important to support a level playing field between operators.

However, all methodological considerations that have been expressed in section 2 of this document are also applicable to the analysis conducted by URCA for CBL.

(a)(i) Do you agree with the exclusion of products from the high level SMP markets?

URCA has excluded the following products from the high-level SMP market for CBL:

- Retail products :
  - Pay-per-view; and
  - HDTV packages.
- Wholesale products:
  - Broadband resale; and
  - All forms of access to the local loop (unbundled local loop).

BTC agrees with the exclusion of these products.

(a)(ii) Do you agree with the proposed obligations imposed on specific products?

As set out in Section 2 of this document, BTC believes that URCA should have considered the proposed obligations in the context of the overall market and has concerns regarding URCA's methodology, which apply both to the proposed obligations on BTC and CBL products.

BTC agrees with URCA that the national and international leased lines markets should not be subject to specific retail or wholesale regulation.

(a)(iii) Do you agree with the proposed compliance deadline for the implementation of the obligations?

While BTC appreciates that URCA has tried to be impartial and has imposed the same deadlines on both BTC and CBL, BTC would like to point out that the list of products to be included in the RAIO and AS model for CBL is substantially shorter than the list of services requested to BTC. Moreover, some of the wholesale products requested from BTC, such as joining circuits and points of interconnection, require substantially more work to cost than other products.

(a)(iv) Do you agree with the charging principles, where applicable, specified in the application of the obligations? Please refer to the relevant guidelines for further details on the principles.

BTC has methodological concerns, as outlined in Section 2 and in the response to Question (a) (ii) of the Preliminary Determination on BTC. However, BTC notes that CBL does not have the same rebalancing, USO and access deficit issues that affect BTC.

(b) If you answered “No” to any of the above, please state the reasons with reference to the background material provided, relevant guidelines or any other evidence which you consider to be relevant.

BTC has stated its reasoning in its responses to the above questions. Please refer to these sections.

(c) If you disagree with the obligation imposed on the specific product, please submit alternative obligations which would satisfy the requirements as set out in Section 4.4.

BTC has suggested alternative obligations, where it considers they are appropriate, where the issue with the obligation imposed is identified within the document (sections 2-4).

(d) Any other comments in the consultation and supporting guidelines.

Please refer to:

- Section 2 for comments on the Preliminary Determinations;
- Section 3 for comments on the Accounting Separation guidelines; and
- Section 4 for comments on the Access and Interconnection guidelines.

## 7 Conclusion

In conclusion, BTC has welcomed the opportunity for a frank and comprehensive response to the proposals of the regulator on BTC's SMP obligations. BTC views these obligations with the utmost seriousness because they will determine the manner in which BTC will be allowed to conduct its business commercially. In this regard, BTC's interest is in securing a level playing field and ensuring that it is not overly or harshly regulated so that its commercial viability is threatened. BTC therefore anticipates and expects that its submissions will be given thorough consideration by URCA and its advisors and that where positions are taken by BTC, and alternate proposals to address a requirement are made, that they will not be dismissed by URCA as being trite or of no consequence because they are critical of URCA's positions. It is indeed important to the relationship of the regulator and the operator that the operator is satisfied that its submissions on issues are given respectful review and where appropriate are acknowledged as having value and are adopted by the regulator.

BTC looks forward to the final determination on the consultation documents addressed herein.

**Legal, Regulatory and Interconnection Division**  
**The Bahamas Telecommunications Company Limited (BTC)**  
**December 17, 2009**