Consultation on

PROPOSED REVIEW AND REVISIONS TO THE REGULATION OF RETAIL PRICES FOR SMP OPERATORS - RULES (PREVIOUSLY PUBLISHED AS ECS 15/2010)

ECS 16/2013

Submitted to the

Utilities Regulation and Competition Authority

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Submitted by

Cable Bahamas Limited

Contents

1 Introduction and Overview

Cable Bahamas Limited ("CBL"), and its affiliates Caribbean Crossings Limited and Systems Resource Group Limited ("SRG"), (collectively, "CBL") hereby responds to the Utilities Regulation and Competition Authority's ("URCA") Consultation Document ECS 16/2013, "Proposed Review and Revisions to the Regulation of Retail Prices for SMP Operators – Rules (previously published as ECS 15/2010)" (the "Consultation Document"). Details of the proposed revisions to the existing Pricing Rules (the "Rules") are presented in Annex A of the Consultation Document (the "Proposed Rules").

On April 12, 2013, CBL provided an opening written submission (the "CBL Opening Letter") to URCA outlining several ways in which CBL believed the existing retail pricing framework could be made more efficient and proportionate, and evolve in a manner more reflective of current and prospective market conditions in The Bahamas. For instance, CBL indicated that it considers price cap regulation would be a far more appropriate form of regulation relative to the existing Rules given current market conditions. To the extent the Rules were to be maintained, CBL also provided suggestions as to how they could be streamlined with the objective of lightening the regulatory burden. The Bahamas Telecommunications Company Ltd. ("BTC") also provided various suggestions its opening written submissions on ways to provide regulated operators with greater pricing flexibility.

CBL was disappointed to see that, in the Consultation Document, URCA effectively rejected all proposals to streamline the retail pricing framework in any meaningful way. Instead, URCA decided to add even more onerous regulatory requirements under its Proposed Rules. In CBL's view, the Proposed Rules increase regulatory burden significantly and are neither efficient nor proportionate pursuant to Section 5 of the Comms Act. The revisions add new requirements which will only serve to slow the review process for proposed price changes and the introduction of new bundles and services. The Proposed Rules are out of step with international best practice, as well as best practice within the Caribbean region.

While CBL has significant concerns with the Proposed Rules as a whole, its comments in this submission are limited to revisions made to the existing Rules that raise significant concerns. CBL notes that failure on its part to comment on any specific revision or existing provision in the Proposed Rules should not be taken as implying that CBL is in agreement or supports any such aspects of the Proposed Rules.

The following provides a summary of CBL's key concerns with the Proposed Rules:

- In Part A (Investigations), CBL considers that Paragraph 5 should be substantially revised to indicate clearly that any subsequent review by URCA of a decision approving a price for a Price Regulated Service would solely be subject to the Proposed Rules under Part VI of the Comms Act, rather than subject to the ex-post anti-competitive provisions set out in Part XI of the Comms Act.

- In Part C (Approval Process), CBL considers that the provisions related to the term "non-price terms and conditions" need to be revised to eliminate some remaining ambiguities.

- In Part E (Permanent price changes for "Single Price Regulated Services"), CBL considers that the Proposed Rules add substantial and unnecessary new information requirements to applications for permanent price changes. CBL considers that these proposals should be scaled back and proposes a specific amendments.

- In Part E (Permanent price changes for "Single Price Regulated Services") the Proposed Rules set out a revised declaration that should be submitted with permanent price change applications. CBL proposes that this declaratory requirement should be deleted from the Proposed Rules and proposes a specific replacement.

- In Part F (Introducing or changing Price of Bundles of Price Regulated Services), the Proposed Rules set out that such Bundles should also be shown to be replicable from an economic perspective. CBL finds the proposed new provisions confusing and ambiguous and that there is no rationale or justification for this new test requirement. CBL proposes therefore that Paragraph 36.2 be deleted.

- In Part I (Price Changes for Price Regulated Services which form part of USO) CBL urges URCA to include the criteria for assessing the affordability of USO-related services in the Proposed Rules, rather than as proposed, which would have the USO affordability criteria determined at some unspecified future date.

- In Annex 1 (Test for assessment of predatory/margin squeeze prices), CBL sets out its concerns that the details and hypothetical examples provided in the Annex are not well specified and, as a result, create confusion rather than clarity as to the nature of any predation/margin squeeze tests URCA may conduct. CBL proposes that URCA reconsider some details provided in the Annex and specifically modify the margin squeeze example.

- In Annex 2 (Assessment of Undue Discrimination) CBL considers that the details and hypothetical examples provided are misleading. CBL proposes that the two hypothetical examples in the Annex be substantially modified or deleted.

- In Annex 3 (Assessment of bundled offers including regulated services) a bundling assessment process decision tree diagram is provided. CBL notes that in relation to Part F, it proposed Paragraph 36.2 be deleted and that with such deletion, the decision tree included in Annex 3 would no longer be necessary and hence CBL recommends that it be also deleted.

The balance of CBL's response deals with the issues raised in the Proposed Rules, which are addressed on a Part-by-Part basis.

2 Part A: Investigations

There is one substantive revision included in this Part of the Proposed Rules, that related to the application of ex-post competition provisions Part XI of the Comms Act

2.1 Application of ex-post provisions of Part XI of Comms Act

Paragraph 5 of the Proposed Rules is new. CBL understands that this new Paragraph constitutes the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, "Clarify when/whether *ex-post* competition provisions of the Comms Act apply to price regulated services subject to the Retail Pricing Rules."

In the CBL Opening Letter CBL had identified as Issue 4 the need for "Clarification of when/whether ex post competition provisions apply to price regulated services subject to the ex ante retail pricing framework". CBL urged URCA to provide greater guidance as to the "ex post application of price-related competition provisions under Part XI in cases where SMP operators are subject to the Pricing Rules" Under Part VI of the Comms Act.

By way of example, CBL noted that when applying for a permanent price decrease for a price regulated service, the Rules include ex ante safeguards to protect against predatory pricing. However, URCA's Competition Guidelines[1] also address matters relating to predation and, in particular, they include a discussion of when predation occurs and the factors that URCA would consider in assessing an allegation of predation. CBL noted that there was no discussion or guidance either in the Rules or Competition Guidelines as to whether these ex post provisions would be applicable to an SMP operator that had received ex ante approval for a permanent price decrease.

The new Paragraph 5 reads as follows (includes the associated footnote in the original):

> 5. For the avoidance of doubt, any prices for Price Regulated Services approved under these Rules remain subject to the ex-post anti-competitive conduct regime set out in the Comms Act. The approvals granted pursuant to these Rules are conditional on the supporting information submitted, assumptions and prevailing circumstances at the time the application is made. In this respect, URCA reserves the right to carry out an investigation under the ex-post enforcement provisions (Part XI) of the Comms Act, if the actual outcome in the market differs from that assumed at the time the relevant approval was granted.[1]
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> ———————————

1 This may include, but is not limited to, instances where: (i) new information becomes available subsequent to the introduction of a price change; (ii) errors that come to light in any of the information previously provided to URCA either by way of another regulatory measure, an application or a notification; and (iii) evidence arising of the actual or expected impact that the price or non-price terms and conditions have on the market.

While CBL appreciates URCA's effort to clarify whether and when it might apply ex post competition provisions to price regulated services subject to the ex ante retail pricing Rules, CBL considers that, as it stands, Paragraph 5 creates considerable regulatory uncertainty rather than clarity. The new Paragraph creates a number of significant concerns. First, it is not clear when the ex post provisions might subsequently be applied by URCA to the prices approved under the ex ante Proposed Rules. Second, if the ex post provisions are applied by URCA, it not clear how

[1] URCA Competition Guidelines, ECS COMP 7. – Abuse of a dominant position – Substantive Guidance

those provisions may be applied and, in particular, whether they would be applied differently from how the corresponding tests are applied in the ex ante Proposed Rules. Third, more generally, Paragraph 5 appears to obviate the possible existence of the well-established competition and regulatory concept of the regulated conduct exemption (also known as the regulated conduct defence), which also appears to be in direct conflict with some other provisions in the Proposed Rules.

On the first issue, CBL notes that URCA provided a non-exhaustive list of factors in the footnote to Paragraph 5 that could trigger an investigation under the ex-post enforcement provisions of the Comms Act of the price of a Price Regulated Service approved under the Rules. CBL does not question the second of the three noted factors. Where errors in the information URCA relied on in reaching a price approval decision come to light, then certainly that decision should be reviewed and possibly varied, depending on the significance of the error(s). However, becoming aware of any such errors should not trigger an ex-post abuse of dominance investigation or any other ex post provision under Part XI of the Comms Act. At most, it should trigger a review of the relevant ex ante decision under the Proposed Rules. The other two factors listed that could trigger ex-post an abuse of dominance investigation are extremely vague. They simply note that if "new information" of some unspecified form comes to light or new unspecified "evidence arising of the actual or expected impact that the price or non-price terms and conditions have on the market" becomes available an abuse of dominance investigation could be triggered. With such vague trigger conditions specified, there is no clarity or certainty for SMP Operators as to when prices approved under the Proposed Rules could subsequently been subject to an ex post investigation under Part XI of the Comms Act. Further, it is not clear why "new information" or "new evidence", if significant in nature, would not simply trigger a review of the relevant decision under the provisions set out in the Rules as opposed to triggering an ex post abuse of dominance investigation under Part XI of the Comms Act.

CBL also notes that in Paragraph 5, URCA provided another more general reason that would justify an ex post abuse of dominance investigation of a price for a Price Regulated Service – i.e., such an investigation could be launched "if the actual outcome in the market differs from that assumed at the time the relevant approval was granted." This condition is also extremely vague and problematic. This seems to suggest that if an actual market outcome differs from the "assumed market outcome" at the time of the relevant decision under the Proposed Rule, then an investigation under ex post provisions under Part XI of the Comms Act may be necessary. It is not clear whose "assumed market outcome" is at play in this respect. Is it URCA's or the applicant's assumed market outcome? In any event, this creates massive uncertainty given that it is impossible for an SMP Operator to know what could trigger an ex post abuse of dominance investigation.

On the second issue, CBL notes that while the Competition Guidelines provide guidance on the types of anti-competitive practices that would be considered reviewable by URCA under Part XI of the Comms Act, they do not provide specific assessment criteria, information requirements or tests that would be conducted by URCA in such cases. Consequently, URCA could apply different tests or standards under an ex post abuse of dominance investigation of an price for a Price Regulated Service compared to those used to approve the price in the first instance under the Rules. This would create a significant regulatory risk and uncertainty for SMP Operators given that Price Regulated Services would be subject to two sets of possibly inconsistent pricing

standards – the first set out in specific detail by URCA in the Rules and the second only loosely described by URCA in the Competition Guidelines.

On the third issue, CBL notes that Paragraph 5 appears to obviate the existence of the regulated conduct exemption, a well-established competition and regulatory concept. In a recent 2011 document[2], the OECD described the regulated conduct defence as follows:

> The regulated conduct defence allows antitrust immunity where conduct is required by federal or state regulation. The regulated conduct defence is important to ensure that the state can exercise its sovereign power to apply regulation that it deems justified for economic and/or social reasons even though the regulation may conflict with competition policy. The defence is also important to ensure firms do not face multiple and inconsistent legal demands, in particular from regulations and competition law.

Paragraph 5 appears to make no provision for the possibility and the circumstances under which an SMP Operator that is in full compliance with the Proposed Rules (and hence Part VI of the Comms Act) may be exempt from the application of ex post competition provisions under Part XI of the Comms Act. As noted above in the discussion of the first two issues, CBL considers that Paragraph 5 as included in the Proposed Rules creates unnecessary legal risk for the SMP Operator. Such legal risk has been mitigated, reduced, constrained and in some cases eliminated, in other jurisdictions via the application of the regulated conduct exemption. With a view to certainty and transparency, a number of jurisdictions have publish guidelines and other guidance documents related to the regulated conduct exemption[3].

Further, Paragraph 5 appears to be in direct conflict with some other provisions in the Proposed Rules, specifically Paragraphs 20 and 52, which both appear to provide exemptions from ex post prosecution in specific cases. Both Paragraph 20 and 52 are new.

In the context of an application for price change to Price Regulated Prices, Paragraph 20 reads as follows :

> 20 URCA notes that not all Price Regulated Services are currently priced above the cost of providing these services. Proposed price increases for these services which still do not pass the predation/margin squeeze test will not necessarily lead to a rejection of the application.

Paragraph 20 indicates under the Proposed Rules URCA may approve price increases that do not pass the predation test. What is not specifically stated is whether URCA could, after having approved the price increase under Part VI of the Comms Act, later prosecute that SMP operator under Part XI of the Comms Act for abuse of dominant position (predatory pricing).

A similar situation holds in Paragraph 52 in the case of Price Regulated Services that are part of an USO:

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[2] Organisation for Economic Co-operation and Development (OECD) (2011) Competition Committee; "The Regulated Conduct Defence" DAF/COMP(2011)3.

[3] See, for example, Competition Bureau of Canada (2010), Technical Bulletin on Regulated Conduct.

> 52 In the case of Price Regulated USO services, USPs may not pass the margin squeeze or predation test as a consequence of the USO. In this case, URCA may still consider favourably applications for proposed price increases which do meet the USO affordability requirements for these services.

While Paragraph 20 appears somewhat more neutral with respect the possibility of ex post prosecution, Paragraph 52 strongly suggests that because URCA would consider "favourably" a below cost (predatory) price for USO service to meet affordability requirements, it would not likely prosecute such a price under the abuse of dominance provisions under Part XI of the Comms Act – in effect, a form regulatory conduct exemption.

Taking all the above into account, CBL considers that Paragraph 5 should be substantially revised to indicate clearly that any subsequent review by URCA of a decision approving a price for a Price Regulated Service would solely be subject to the Proposed Rules under Part VI of the Comms Act. URCA has the authority to conduct an investigation of a price for a Price Regulated Service when it deems necessary. However, in the case of a Price Regulated Service, the pricing rules are already specified in the Rules (including specific tests for predation, margin squeezes and undue discrimination). There is no need or justification for creating a new pricing rules for ex post investigation purposes for Price Regulated Services under Part XI of the Comms Act.

Therefore, CBL submits that Paragraph 5 should be revised. CBL suggests the following revision:

> 5. Price approvals granted pursuant to these Rules are conditional on the supporting information submitted, assumptions and prevailing circumstances at the time an application is made. Subsequent to such approvals being granted, if URCA becomes aware of any significant changes to the grounds for the approval, URCA reserves the right to review and possibly vary its previous approval. The basis for conducting such a review may include, but is not limited to, instances where: (i) new information becomes available subsequent to the introduction of a price change; (ii) errors that come to light in any of the information previously provided to URCA either by way of another regulatory measure, an application or a notification; and (iii) evidence arising out of the actual or expected impact that the price or non-price terms and conditions have on the market. Any such review would be conducted on the basis of the Rules. For the avoidance of doubt, any prices for Price Regulated Services approved under these Rules would not be subject to the ex-post anti-competitive provisions set out in Part XI of the Comms Act.

3 Part B: Information to be submitted as part of an Application

No substantive revisions are included in this Part of the Proposed Rules. However, there are provisions relating to the cost data required to support a proposed price change which have been moved up to this Part (compared to the Paragraphs 17 and 18 of the Rules) and that have been modified somewhat in the process. They include Paragraphs 7 and 8 of the Proposed Rules:

- Paragraph 7 states that: "Where possible, cost data should be provided that satisfies the Accounting Separation and Cost Accounting Guidelines issued by URCA and should

reflect the latest available Accounting Separation data available to the SMP operator, subject to the data having been approved by URCA." (footnote excluded)

- Paragraph 8 adds that in the absence of such data, "the SMP operator may provide URCA with other information to support its proposed price change including:

    - Benchmarking study of prices in comparable jurisdictions along with supporting information covering amongst others: a detailed overview of the data sources, the approach underlying the analysis, and the justification for adopting the approach; and

    - Verifiable financial management information in respect of providing the service."

While these cost data requirements listed in Paragraphs 7 and 8 are largely similar to the those set out in Paragraphs 17 and 18 of the Rules, CBL notes that URCA has also identified further potential cost data requirements in Annex 1 of the Proposed Rules (page 14). In Annex 1, which deals with the details of the test for the assessment of predatory/margin squeeze prices, URCA indicated that:

> … the tests shall be based on Fully Allocated Cost (FAC) data. However, in so doing, the SMP Operator should ensure that its cost data reflects as closely as possible the economic costs of providing the service in question, with any adjustments applied to Accounting Separation data to meet this objective being fully evidenced and justified within the application. In reviewing an application, URCA is entitled to dismiss any such adjustments if it considers such adjustments to be inappropriate or insufficiently justified.

FAC data in this instance is equivalent to Accounting Separation and Cost Accounting data referred to in Paragraph 7. However, it appears that URCA also expects SMP Operators to adjust, subject to URCA's approval, any submitted FAC data so cost data reflects as closely as possible the economic costs of providing the service in question. CBL addresses its concerns with URCA's predatory/margin squeeze test set out in Annex 1 in its comments on Annex 1. But to the extent URCA expects SMP Operators to provide both adjusted and unadjusted FAC, where available, in support of a price change application, then CBL submits that URCA should establish this requirement in Paragraph 7 and, moreover, provide some guidance and specificity regarding the types of adjustments it would consider to be appropriate.

4 Part C: Approval Process

There is one substantive revision included in this Part of the Proposed Rules, which is related to Non-Price Terms and Conditions.

4.1 Non-Price Terms and Conditions

The footnote to Paragraph 11.2 is new. CBL understands that this specific additional footnote constitutes URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, “Clarify what constitutes a ‘new services’ and ‘non-price terms’”.

In the CBL Opening Letter CBL had identified as one of the Other Issues a possible ambiguity related to the Approval Process, noting that it would be useful for URCA to provide some clarity as to how the provision in Rules related to "non-price terms and conditions" was intended to apply.

The relevant Paragraph 11.2 reads as follows (includes the associated footnote in the original):

> 11. The SMP operator must first obtain URCA's written approval before:
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> […]
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> 11.2 introducing any changes to non-price terms and conditions for Price Regulated Services that could be expected to affect either the effective price paid by consumers or the costs incurred by the SMP operator;[4]

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4 Non-price terms and conditions refer to any and all terms and conditions other than the price for the service. This may include, but are not limited to: (i) contract length (which could be used as the period over which any fixed fees are annualised in order to determine the overall effective price); (ii) quality of service (which would affect the cost of providing the service); (iii) the value of ancillary services or goods provided with the service; (iv) the time taken to provide the service (which would affect the cost of providing the service); (v) maintenance terms (which would affect the cost of providing the service); and (vi) minimum call periods for which callers are charged (which would influence the effective price of usage and hence the overall effective price).

CBL appreciates that URCA has agreed that the term "non-price terms and conditions" needs to be further developed in order to provide further guidance as to how this provision may be applied in practice. CBL, however, has some concerns with the specific manner in which URCA has revised the Proposed Rules to give this effect:

- There appears to be considerable confusion between the use of the terms "cost", "fees" and "price". For instance, following "quality of service" the following is in brackets: "which would affect the cost of providing the service". It is unclear whether this refers to the cost of providing the service by the SMP Operator, or whether it refers to the effective price faced by consumer as quality of service increases or decreases.

- CBL is unsure as to what is referred to as "ancillary services or goods" provided with the service. Are these ancillary services that are provided at zero price with the relevant service or are they non-zero price services that could be provided with the service in question.

- CBL is also unsure as to what is referred to as "the time taken to provide the service", and whether such a term and condition should be included in this list. If CBL understands correctly, the consumer would not be charged during the time in which the SMP operator is in the process of providing the service, whether (by example), the approved maximum provisioning time is two versus three days.

CBL requests that URCA further clarify its definition of non-price terms and conditions set out in footnote 11.

Moreover, CBL notes that there is no section in the Proposed Rules that specifically addresses the filing requirements for applications to change non-price terms and conditions of Price Regulated Services. CBL considers that a Part setting out these requirements would be useful and that a full definition of non-price terms and conditions could be included in that Part.

5 Part D: Implementing the proposed price or service change

No new substantive revisions are included in this Part of the Proposed Rules.

6 Part E: Permanent price changes for "Single Price Regulated Services"

There are a number of substantive revisions included in this Part of the Proposed Rules. These are discussed below.

6.1 Granularity and amount of required information

There are substantial revisions to Paragraph 19.9 of the Proposed Rules. CBL understands that such revisions constitute the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, "Clarify the information required for each type of price application and revise requirements to seek approval for new services in price regulated markets".

Paragraph 19.9 has been revised to require that the SMP operator provide all requested data on a monthly basis. This is a new requirement, in that the Rules did not specify that the data should be provided on a monthly basis. CBL is opposed to this new requirement. While by itself it may not appear overly onerous to URCA, when considered in the context of what, in CBL's view, is already burdensome Rules, such a new requirement result in Proposed Rules that are neither efficient nor proportionate pursuant to Section 5 of the Comms Act. While historical data on a month-to-month may be available for revenues, the same is not the case of FAC data. Moreover, the requirement to forecast monthly revenues and costs for the service in question would require excessive time and effort and ultimately be based on numerous assumptions that would add unnecessary and unjustified complexity to the application preparation and review process. Indeed, CBL notes that URCA appears to recognize that providing monthly data may not be practical or feasible in Paragraph 59 (Annex 1).

Paragraphs 19.9.1 to 19.9.5 have been revised to require two years of forecast data. This is also a new requirement, in that the Rules specify that forecast be for only one year. CBL is opposed to this new requirement. It is an onerous and unnecessary new requirement and, when considered in the context of what, in CBL's view, is already burdensome Rules, the new requirement is neither efficient nor proportionate pursuant to Section 5 of the Comms Act. Indeed, URCA has provided no rationale or justification for this increase in filing requirements.

Forecasting revenues and costs out two years will simply add unnecessary complexity to a price change application, especially since the forecasts would involve numerous assumptions many of

which could be considered contentious. After all, other than mobile, all segments of the communications market in the Bahamas are competitive today and the mobile is scheduled to opened to competition soon. Reviewing two year forecasts could simply serve to delay approval of rate changes.

CBL also notes that the information requirements to support a price change application set out in Paragraphs 7 and 8 and Paragraphs 19.9.1 to 19.9.5 are somewhat inconsistent. In terms of cost, applicants must provide historical FAC data approved by URCA. However, approved FAC data is typically only available for the "previous" year, not the "current" year as required under Paragraph 19.9.1. An applicant would have to forecast FAC data for the current year. For that matter it would also have to forecast current year revenues, since only partial year actual revenue would be available. Forecasting out another two years would in fact constitute a three forecast under the revised rules in Paragraphs 19.9.1 to 19.9.5.

Consequently, CBL believes that a more practical approach would be require that an applicant file its previous year's approved FAC data (i.e., Accounting Separation and Cost Accounting results), including revenue and cost data relevant to the service in question. This would form the "test year" data. The would then provide forecast revenue and cost data for the current year and the next year for the service in question. The data for these three years combined would form the basis for evaluating a price application[4].

Consequently, CBL suggests that Paragraph 19.9 be revised to state that:

19.9 Data relevant to the proposed change, on a annual basis or, where available, on a monthly basis, including the following:

19.9.1 Volume of previous year and projected current year and next year demand for the Price Regulated Service;

19.9.2 Number of existing subscribers or users that would be affected by the proposed price change and a projection of the number affected in the next year;

19.9.3 Actual previous year and projected revenues for the current and next year for the service in question;

19.9.4 Actual previous year and projected total cost for the current and next year of providing the service in question (showing separately network (wholesale) and downstream costs, and inclusive of the SMP operator's cost of capital).7

19.9.5 Specify the relevant wholesale services and associated prices (for previous, current and next years) required by alternative operators to offer a similar retail service.

[4] CBL notes that this proposal is consistent with the approach undertaken with its Application for a Permanent Price Change To Cable Bahamas Ltd's SuperBasic Service of December 1, 2011 and that approach was deemed acceptable by URCA in that respect.

6.2 Declaration to be submitted

There are substantial revisions to Paragraph 19.10 of the Proposed Rules which also involve the addition of the proposed Annexes 1 and 2. Specifically, Paragraph 19.10 states:

> 19.10 The SMP operator must submit a declaration signed by an authorised officer confirming that its application complies with these rules, the Comms Act, its operating licence, the Sector Policy and any other documents relevant to the application. This signed declaration must further state that the proposed price change is not anticompetitive and, in particular, that it:
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> 19.10.1 does not result in margin squeeze (if at least one alternative operator provides competing services using a wholesale input provided by the SMP operator) or predatory pricing (if the SMP operator does not provide a wholesale service that an alternative operator uses to provide a competing retail service to that which is under consideration);[8] and
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> 19.10.2 will not result in undue discrimination.
>
> 19.11 The declaration in Paragraph19.10 should be supported with evidence that satisfies the requirements set out in these rules. Annexes 1 and 2 specify: (i) the details of the tests that should be followed in order to assess the requirements in Paragraph 19.10.1; and (ii) the key elements to consider in the assessment of the requirement in Paragraph 19.10.2.

8 URCA notes that there may be a need to test for both a potential margin squeeze and predation in case the relevant wholesale service is priced below the cost of providing the service.

As noted in Paragraph 19.11, the required declaration should be supported with evidence complying with the requirements set out in Annexes 1 and 2. Both of those annexes are new additions to the Proposed Rules. CBL has numerous concerns with Annexes 1 and 2 which are described below. One key concern is that Annexes 1 and 2 provide broad guidelines which, in CBL's submission, still require significant clarification and refinement. As they stand, however, their subjective in nature in that URCA could decide to modify the test results in any number of ways, for instance by rejecting an applicant's proposed revenue or cost forecast, FAC adjustments or other assumptions. This makes it impossible for an authorized officer of the SMP Operator to confirm compliance with the Proposed Rules when ultimately compliance is a mater to be determined by URCA.

Consequently, in CBL's submission, this declaratory requirement should be deleted from the Proposed Rules. It should be replaced with a requirement to conduct the appropriate pricing tests as set out in Annexes 1 and 2 (revised as suggested by CBL further below). Moreover, the predation/margin squeeze tests should only be required in the case of a requested price reduction in a Price Regulated Service. And the undue price discrimination test should only be required when the structure of existing prices has been altered in a manner that raises possible undue price discrimination concerns (e.g., if prices were de-averaged).

Consequently, CBL suggest that Paragraph 19.10 and 19.11 be revised as follows:

19.10 In the case of a request to reduce the price or restructure the price of a Price Regulated Service, the SMP operator must provide evidence that price change is not anticompetitive and, in particular, that it:

19.10.1 does not result in margin squeeze (if at least one alternative operator provides competing services using a wholesale input provided by the SMP operator) or predatory pricing (if the SMP operator does not provide a wholesale service that an alternative operator uses to provide a competing retail service to that which is under consideration);[8] and

19.10.2 will not result in undue discrimination.

19.11 The supporting evidence in this respect should comply to the greatest extent possible with the guidelines provided in Annexes 1 and 2 specify: (i) the details of the tests that should be followed in order to assess the requirements in Paragraph 19.10.1; and (ii) the key elements to consider in the assessment of the requirement in Paragraph 19.10.2.

To the extent that URCA considers that a compliance declaration from an authorised officer of the SMP Operator should accompany every price change application, then CBL considers that a more general declaration would be more appropriate. CBL suggests the following:

> The SMP Operator must submit a declaration signed by an authorised officer confirming that to the best of his/her knowledge and SMP Operator's ability that its application complies with these Rules, the Comms Act, its operating licence, the Sector Policy and any other documents relevant to the application.

7 Part E: Special Offers or Discounts ("Promotions")

There are a number of substantive revisions included in this Part of the Proposed Rules. CBL understands that such revisions constitute the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, "Revise the approach for assessing promotions to increase the flexibility to operators whilst ensuring URCA can still prevent anti-competitive promotions on an *ex-ante* basis".

7.1 Definition of Promotion

Paragraph 23 of the Proposed Rules is new and includes the following definition:

> A promotion is defined as a temporary change in the price and/or non-price terms of existing services in the market.

CBL is not opposed to the above-proposed definition.

7.2 Definition of One Week Promotion

Paragraph 23.2 is substantially revised and includes the following amended definition of a One Week Promotion:

> A special offer or discount applied to a Price Regulated Service and which is in place either for a duration of no more than seven (7) consecutive calendar days or for seven (7) non-consecutive calendar days within a period of fourteen (14) calendar days('One Week Promotion')

CBL is not opposed to the above-proposed definition.

7.3 Restrictions on Single Day Promotion

Paragraph 24.1 of the Proposed Rules is new and replaces another restriction in the Rules. Paragraph 25 of the Rules set out the following restriction:

> The SMP operator may introduce no more than ten (10) Single Day Promotions during the course of a calendar year.

Paragraph 24.1 includes the following new restriction:

> the Single Day Promotion is not similar to any other Single Day Promotion that was available from the SMP operator at any time within the previous 30 calendar days

CBL is not opposed to the above-proposed revision.

7.4 Approval of Single Day Promotion

Paragraph 25 of the Proposed Rules is amended so that it now reads that "URCA shall inform the SMP operator *whether* it may proceed with the Single Day Promotion as set out in the notification". The addition of "whether" under the Proposed Rules is of concern to CBL because it appears to grant URCA the authority to deny a Single Day Promotion, which CBL considers to be contradictory to Paragraph 6 of the Proposed Rules, which state: "With the exception of Single Day Promotions, all changes in the price of a Price Regulated Service require prior approval by URCA." In this context, CBL suggests that URCA review this Paragraph 25 for consistency with Paragraph 6.

7.5 Restrictions on Regulated Special Promotions

Paragraph 27 of the Proposed Rules is substantially revised and includes the following amended restriction on the introduction of Regulated Special Promotions:

> No Regulated Special Promotion shall be introduced if it is similar in price and/or non-price terms to another Regulated Special Promotion that was available from the SMP operator at any time within the previous Ninety (90) calendar days calculated from the expected end-date of any previous similar Regulated Special Promotion (as set out in the relevant application) or calculated from any revised actual end-date for the previous relevant Regulated Special Promotion as communicated by the SMP operator to URCA at the time such previous Regulated Special Promotion was discontinued.

The original restriction was included in Paragraph 28 of the Rules:

> Notwithstanding the above, no Regulated Special Promotion shall be introduced if it is similar to any other Regulated Special Promotion that was available from the SMP operator at any time within the previous 120 calendar days.

CBL is not opposed to the above-proposed revision.

7.6 Granularity and amount of required information

There are some substantial revisions to Paragraphs 28.1 to 28.10 of the Proposed Rules. In particular, Paragraph 28.5 has been revised to require that the SMP operator provide all requested data on a monthly basis. As well, Paragraph 28.6 is new and requires "actual and relevant projected revenues for the Price Regulated Service and proposed Regulated Special Promotion over the following year (on a monthly basis)". For the same reasons provided above with respect to Paragraph 19.9, CBL is opposed to these revisions.

8 Part F: Introducing or changing Price of Bundles of Price Regulated Services

There are a number of substantive revisions included in this Part of the Proposed Rules. These are discussed below.

8.1 Granularity and amount of required information

Paragraphs 35.1 to 35.9 of the Proposed Rules are new and mandate the provision of certain information that the SMP operator must provide URCA in support of its application to show that the terms of the bundle are not anticompetitive. These Paragraphs are substantially similar to Paragraphs 19.1 to 19.9 which relate to the information required for a Single Regulated Service approval process.

Paragraphs 35.1 to 35.9 replace Paragraph 42 of the Rules which had incorporated the requirements in Paragraphs 16 to 18 of the Rules by reference. Paragraph 16 of the Rules corresponds to Paragraph 19 of the Proposed Rules.

Paragraph 35.9 relates to the specific data requirements for applications to introduce or change prices for bundles including a Price Regulated Service. The Paragraph is very similar to 19.9 which applies to applications for a permanent change in the price of a Price Regulated Service. CBL has expressed its concerns with Paragraph 19.9 above and provided proposed revisions to the Paragraph. For the same reasons, CBL is also opposed to Paragraph 35.9 of the Proposed Rules. CBL believes that Paragraph 35.9 should be modified consistent with CBL's proposed modifications to Paragraph 19.9.

8.2 Replicability of Bundles

Paragraph 36 is substantially amended and adds a series of new requirements including that the Price Regulated Bundle be shown to be replicable from an economic perspective, as well as from a technical perspective:

> 36.2 Second, whether the Price Regulated Bundle is replicable from an economic view point. In this case, two scenarios must be distinguished:
>
> 36.2.1 Where an SMP operator is unable to demonstrate that a proposed Bundle can be replicated, it must demonstrate that the 'incremental' price of each service in the Bundle is at least equal to the incremental cost of that service, including the SMP operator's cost of capital and the wholesale prices that alternative licensed operators must incur in order to provide the relevant retail services.
>
> 36.2.2 For these purposes, the SMP operator must provide cost information for the proposed Bundle and the individual services in the Bundle consistent with the requirements of Paragraphs 7 to 9 and Paragraph 35.9.
>
> 36.2.3 Where an SMP operator has demonstrated that the proposed Bundle can be replicated by another operator, it must demonstrate that the price of the Bundle as a whole is at least equal to the cost of providing the Bundle, including the SMP operator's cost of capital and the wholesale prices that alternative licensed operators must incur in order to provide the relevant retail services.

The CBL Opening Letter proposed that URCA streamline the Rules with the objective of lightening the regulatory burden. The addition of the requirement to show that a bundle is also replicable from an economic perspective constitutes a new requirement that increases the regulatory burden. Such an added requirement is neither efficient nor proportionate, pursuant to Section 5 of the Comms Act.

CBL finds the proposed new provisions confusing and ambiguous. For instance, Paragraph 36.2.3 states that "Where an SMP operator has demonstrated that the proposed Bundle can be replicated by another operator". This presumably refers to the earlier requirement for technical replicability? Otherwise, if it refers to economic replicability, the sentence should be rewritten for greater clarity. That same Paragraph 36.2.3 goes on to state that "it must demonstrate that the price of the Bundle as a whole is at least equal to the cost of providing the Bundle". It is unclear to CBL whose "cost" is being referred to because there is co-mingling of different costs in the remainder of the Paragraph "including the SMP operator's cost of capital and the wholesale prices that alternative licensed operators must incur in order to provide the relevant retail services". CBL notes that here may not be a practical means for the SMP operator to conduct such an assessment since it may not have access to all the wholesale prices required by alternative licensed operators to provide the relevant retail services. For instance, some of the services in the Bundle may not be price regulated and may not have regulated wholesale equivalents.

More importantly, CBL notes that URCA has provided no rationale or justification for this new "economic replicability" test requirement. Plus, the test appears to be largely, if not entirely, redundant in view of Paragraph 37 which requires that an SMP Operator demonstrate that the

proposed price of the bundle in question is not anticompetitive by conducting a predation/margin squeeze test and possibly an undue price discrimination test. In CBL's view, conducting a predation/margin squeeze test in the case of an introduction of a new bundle or decreasing the price of an existing bundle both of which include a Price Regulated Service makes Paragraph 36.2 unnecessary. Therefore, CBL recommends that it be deleted.

If, to the contrary, URCA decides to retain the Paragraph, CBL request that URCA add an Annex to set out the test in more detail and provide a relevant hypothetical illustrative example.

8.3 Declaration and Annex 1 and 2 assessment to be submitted

Paragraphs 37 and 38 are new and require that the SMP operator also submit a declaration that is analogous to that required for a Single Price Regulated Service under Paragraphs 19.10 and 19.11. For the same reasons provided above with respect to Paragraphs 19.10 and 19.11, CBL is also opposed to Paragraphs 37 and 38. CBL submits that they should be modified in a manner as proposed by CBL for Paragraphs 19.10 and 19.11. In this case, however, they should apply only to price reductions or restructurings to an existing bundle including a Price Regulated Service or the introduction of a new bundle including a Price Regulated Service.

As well, CBL recommends that the same general declaratory statement as proposed above with respect to Paragraph 19.10 also apply in the case of an applications involving bundles.

9 Part G: Introduction of New Services

There are a number of substantive revisions included in this Part of the Proposed Rules. CBL understands that such revisions constitute the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document "Clarify the information required for each type of price application and revise requirements to seek approval for new services in price regulated markets" and "Clarify what constitutes a 'new services' and 'non-price terms'".

9.1 Definition of New Service

Paragraph 39 of the Proposed Rules is new and includes the following definition:

> 39 For the purposes of these Rules, a New Service consists of a service provided by an SMP operator in a Price Regulated Market which service is materially different in features, quality and/or attributes to any existing service of the SMP operator resulting from the addition of a service offering or changes in the service concept that allow for the New Service offering to be made available. That is to say, a service which:
>
> 39.1 has not been previously commercialized by the SMP licensee; or
>
> 39.2 significantly amends any of the terms and conditions of an existing service.

CBL generally agrees with the objective of the new Paragraph 39, as it understands it. However, CBL considers that URCA should further clarify this provision to eliminate remaining ambiguity. In particular, there appears to be no specific limitation in the provision requiring that

the new service be in a market for which the operator has been designated as having SMP and that the market in question is a "Price Regulated Market". Further, the term "Price Regulated Market" is not a defined term in the Proposed Rules or in related documents. CBL considers that the term should be clearly defined to avoid any ambiguity as to when a New Service application is required.

9.2 Declaration and Annex 1 and 2 assessment to be submitted

Paragraph 40.4 has been substantially revised and now requires that in order for the new service not have the effect of lessening competition, the SMP operator must "follow(ing) the requirements set out in Paragraph 19.10 in the case of Single Services and in Paragraph 37 in the case of Price Regulated Bundled Services.

CBL notes that its comments on Paragraphs 19.10 and 37 provided above equally apply in the case of Paragraph 40.4.

10 Part H: Withdrawal and Discontinuation of Price Regulated Services

No new substantive revisions are included in this Part of the Proposed Rules.

11 Part I: Price changes for Price Regulated Services which form part of USO

Part I of the Proposed Rules is new. CBL understands that such revisions constitute the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, "Clarify the treatment of price regulated USO-related services".

In CBL Opening Letter, CBL had identified as Issue 2 the need for "Clarification of the pricing rules for USO services". CBL noted that the Rules include no reference to designated USO services and, therefore, provide no guidelines as to how a price-related application for such services should be filed and the criteria that URCA would take into account for their evaluation. CBL urged URCA to codify the price-related processes and mechanisms for the USO framework. Specifically, CBL considered that there was a need to codify the treatment of two categories of USO services. The first category includes USO services that are also price regulated services. CBL also recommended that URCA consider alternative approaches for developing and codifying the specific affordability criteria that would be used to assess proposed price changes to USO services in this category. The second category includes USO services that are not a price regulated service and CBL urged URCA that for completeness these prices should also be addressed by URCA.

Among the key provisions included in Part I is Paragraph 50 that sets out the USO-specific requirements that are additional to those that would only apply if the service in question was only a Price Regulated Service:

> 50 In addition to the requirements specified in Paragraph 49, for URCA to accept the application, the SMP operator must, within its application, demonstrate that the proposed new price remains affordable to consumers in The Bahamas, with such an assessment carried out in accordance with Guidelines URCA may publish from time to time as to how such assessments should be conducted. Where the financial information provided by the USP shows that the proposed price is above the cost the USP incurs in provisioning the service, the USP must also provide a detailed justification to URCA for the proposed price change. That is, the USP must demonstrate that the proposed price is objectively justified, taking into consideration the potential impact on consumers and showing that the price increase is beneficial to customers and the sector as a whole.

In the context of last year's USO-related consultation[5] CBL provided extensive comments that put forward its position on USO issues generally and the matter of affordability specifically. CBL will not repeat its position on these issues in the context of the current proceeding[6]. Having noted all this, however, CBL is disappointed that URCA has not included the criteria for assessing the affordability for USO-related services in the Proposed Rules[7]. Such an inclusion in the Proposed Rules would not be inconsistent with the level of detail included in Annexes 1 or 2. Further, providing such criteria now would have reduced the legal uncertainty associated with the time lag between the approval of these Proposed Rules and the consideration and approval of the USO affordability criteria at some unspecified future date.

12 Annex 1: Test for assessment of predatory/margin squeeze prices

Annex 1 of the Proposed Rules is new. CBL understands that such revisions constitute the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, "Provide details of the assessment and information on the margin squeeze, predation tests, and bundle tests, and undue price discrimination, including illustrative working examples."

CBL is concerned that the details and hypothetical examples provided in Annex 1 are not well specified and, as a result, create confusion rather than clarity as to the nature of any predation/margin squeeze tests URCA may conduct under the Proposed Rules. The following explains CBL's concerns and its proposed modifications.

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5 Framework For The Clarification And Implementation Of Existing Universal Service Obligations (USO) Under Section 119 And Schedule 5 Of The Communications Act 2009: Consultation Document (ECS 12/2012), 30 March 2012

6 This includes a clarification by CBL regarding the manner in which URCA has characterized CBL's USO. This characterization is repeated on page 7 of the Consultation Document, which states as follows:

> ii) CBL shall provide
>
> - Affordable basic television (six channels inclusive of ZNS-TV and the Parliamentary channel) to all populated areas and to specified institutions free of charge; and
> - Affordable Internet to all populated areas at a nationally uniform and affordable tariff and to specified institutions free of charge.

The first bullet should be clarified to stipulate that the "free of charge" basic televisions refers only to the specified institutions. CBL notes that the manner in which the second bullet is constructed does not suffer from this lack of clarity.

7 CBL acknowledges that in the Consultation Document URCA noted that a consultation on guidelines for assessing the affordability for USO-related services is included in URCA's Working Programme for 2013.

12.1 Predation Test

URCA sets out its proposed predation test in Paragraph 56. It requires that an SMP Operator's proposed price change for a Price Regulated Retail Service must be equal to or greater than its total "end-to-end" cost – i.e., including operating expenses, depreciation and the cost of capital. As specified by URCA, the predation test excludes Price Regulated Services which are provisioned using regulated wholesale services or facilities provisioned by the same SMP Operator. Any such service would be subject to the margin squeeze rather than predation test.

In Paragraph 57 of Annex 1, URCA discusses different cost standards that could be used to conduct the proposed predation test, including Long Run Incremental Costs ("LRIC") and Fully Allocated Cost ("FAC") data. URCA notes that since LRIC cost information is not currently available, FAC (i.e., Accounting Separations) data should be used. URCA adds that:

> …the SMP Operator should ensure that its cost data reflects as closely as possible the economic costs of providing the service in question, with any adjustments applied to Accounting Separation data to meet this objective being fully evidenced and justified within the application. In reviewing an application, URCA is entitled to dismiss any such adjustments if it considers such adjustments to be inappropriate or insufficiently justified.

In CBL's view, this provision relating to the costs to be used to assess a rate application creates confusion with the provisions set out in Paragraphs 7 to 9,which stipulate that the SMP Operator must provide the latest available approved Accounting Separations cost data (or where that is not available benchmarking and/or other verifiable financial management information). In cases where FAC or Accounting Separations cost data is available, Paragraph 57 appears to suggest that it could be "adjusted" for predation test purposes, thereby potentially creating two sets of FAC data – adjusted and unadjusted. In CBL's view, the same cost data used to support a rate application as required under Paragraphs 19, 28, 35 and 40 should also be used for the purpose of any predation test which may be required to support the application. In such case, any permissible or, for that matter, required adjustments to FAC data as may be contemplated by URCA should be identified and described in Paragraphs 7 to 9, rather than in Annex 1.

More generally, CBL submits that conducting a predation test is unnecessary and should not be required in the case of a rate application requesting an increase in a Price l Regulated Service or a bundle including a Price Retail Regulated Service. There is no reason to believe that a rate increase would raise predation concerns.

12.2 Margin Squeeze Test

URCA sets out its proposed margin squeeze test in Paragraph 61. In this case, the "end-to-end" costs, as included in the predation test, would include (i) the wholesale price(s) of any necessary input(s) for alternative operators and (ii) all other costs necessary to provide the Price Regulated Service in question, including operating expenses, depreciation and the cost of capital. CBL assumes that in this case the SMP Operator's approved tariff rate(s) of any necessary wholesale inputs would be used for the first component of this test. As well, CBL assumes that the "other costs" would be based on the SMP Operator's FAC or Accounting Separations cost data for the Price Regulated Service in question, excluding the costs of the tariffed wholesale input(s) used to provide the service.

CBL notes that URCA made no reference to whether the "other costs" data may be adjusted to reflect as closely as possible the economic costs of providing the service in question as in the case of the predation test. However, as in the case of the predation test, CBL considers that URCA should provide a single statement on the cost data requirements to support an SMP Operator's rate application in the main body of the Proposed Rules (e.g., within Paragraphs 7 to 9) and which would also be used for the purpose of a predation/margin squeeze test.

More generally, CBL submits that conducting a margin squeeze test is unnecessary and should not be a required in the case of an rate application requesting an increase in a Price l Regulated Service or a bundle including a Price Regulated Service, assuming there is no simultaneous proposed change in the tariffed prices of any wholesale input(s) used by the SMP Operator in the provision of the service or bundle in question.

CBL notes that URCA provided a hypothetical example of margin squeeze assessment in the case of a broadband service on pages 16 and 17. CBL finds this example confusing since it appears to be at complete odds with the proposed margin squeeze test set out in Paragraph 61. The proposed test compares the SMP Operator's proposed price for the Price Regulated Service in question with its cost, including the tariffed rate for any wholesale input(s) used in the provision of the service plus the SMP Operator's other costs to provide the service. In contrast, the hypothetical example conducts a margin squeeze test from the perspective of a reseller purchasing a wholesale input from an SMP Operator for the purpose of providing substitute to the Price Retail Regulated Service in question. There is no practical means for the SMP Operator to conduct such a test since it does not have knowledge of the reseller's downstream costs (i.e., the cost of the selling the service at a retail level). The SMP Operator can only conduct the margin squeeze test based on its own costs, including the tariffed rates for its regulated wholesale services used to provision the service in question. Consequently, CBL suggests URCA revise the hypothetical margin squeeze example to conform with the proposed margin squeeze test as described in Paragraph 61 or otherwise delete it. As it stands, the hypothetical example includes information and assumptions that an SMP Operator filing a rate application would not be in a position to provide to URCA.

13 Annex 2: Assessment of Undue Discrimination

Annex 2 of the Proposed Rules is new. CBL understands that such revisions constitute the specific URCA proposal to revise the Rules to, as set out on page 27 of the Consultation Document, “Provide details of the assessment and information on the margin squeeze, predation tests, and bundle tests, and undue price discrimination, including illustrative working examples.”

CBL is concerned that the details and hypothetical examples provided in Annex 2 is not well specified and, as a result, create confusion rather than clarity as to the nature of any undue price discrimination test URCA may conduct under the Proposed Rules. The following explains CBL's concerns and its proposed modifications to Annex 2.

URCA provides a definition of price discrimination in the context of a dominant or SMP Operator. Specifically, URCA states that "price discrimination arises when a dominant licensee applies dissimilar prices to similar retail or wholesale customers for the same product" and,

moreover, that such a practice may be deemed "exclusionary when a dominant licensee uses discriminatory pricing structures which have the effect of foreclosing the market."

As well, in Paragraph 63, URCA states that price discrimination can take two basic forms:

- charging different prices to different customers for the same products; or
- charging different customers the same price even though the costs of supplying the product are in fact very different.

CBL has no issue with URCA's description of what constitutes price discrimination. However, CBL is concerned that URCA provides no guidance in Annex 2 on the means through which it would assess whether a specific instance of price discrimination would be deemed "undue" by URCA and, therefore, prohibited.

Furthermore, the hypothetical examples provided in Annex 2 also provide no guidance on this question and, in fact, stray well off subject.

In Paragraph 64, for instance, URCA considers the case of a vertically integrated SMP Operator that hypothetically attempts to provide a tariffed wholesale input to competitors on less favourable terms and conditions, including price, relative to its own downstream operation. If the example is assumed to be a matter of price alone, then this type of anticompetitive strategy should be captured by the margin squeeze test addressed in Annex 1. On the other hand, if it relatives to non-price terms and conditions then it is a question of undue preference not price discrimination and, therefore, should not be subject to an assessment of undue price discrimination. Indeed, this type of issue would presumably not be brought forward in the context of a rate application.

Consequently, CBL considers the hypothetical example provided in Paragraph 64 to be redundant given Annex 1 and, furthermore, of no guidance to the question of how URCA plans to assess a price application which raises undue price discrimination concerns.

URCA also includes a second hypothetical example under Paragraph 65 which involves on/off net price differentials. CBL finds this example to be particularly puzzling, especially the unorthodox basis that URCA uses to assess whether the on/off net price differentials may be considered "undue" (i.e., anticompetitive).

The hypothetical example involves an SMP Operator that sets its off-net calling rates at double the level of its on-net calling rates (i.e., 6 to 3). Given URCA's cost assumptions in the example, the SMP Operator's mark-up on off-net calls is also double that of its on-net calls (100% and 50%, respectively). According to the example, the SMP Operator also accounts for the vast majority of the market, whereas the non-SMP Operator has a relatively small market share (and is the lone entrant in the market). Consequently, there is a high degree of price discrimination assumed in the hypothetical example. However, rather than conducting an assessment of whether the SMP Operator's on/off net calling prices constitute "undue" price discrimination – having the effect of substantially lessening or foreclosing the market to competition – URCA instead conducts an analysis of whether the entrant or non-SMP Operator could "profitably replicate" the SMP Operator's on/off net call prices. URCA simply assumes that the entrant

could charge the same on/off net call prices and, in doing so, profitably capture a 20% market share. The example is static in nature, so timeframe assumptions are provided. Consequently, the SMP Operator's on/off net call price differentials would not be considered "undue" or anticompetitive since the non-SMP Operator is assumed by URCA to be in position to profitably replicate the same prices.

URCA goes one step further in the hypothetical example to demonstrate how on/off-net price discrimination could, in contrast, be deemed "undue" or anticompetitive. URCA notes that if the SMP Operator set its on-net calling rate to zero, for instance, then the entrant would no longer be able to "profitably replicate" the SMP Operator's on/off net call prices and, therefore, the price differentials would be considered "undue" or anticompetitive.

In CBL's view, the approach to assessing "undue" price discrimination in this hypothetical example is highly unusual and does not reflect standard practice by other regulators. For one, it would be impossible for a SMP Operator proposing to introduce or change existing on/off-net call prices in the context of a rate application to conduct such an price discrimination "replicability" analysis. It is based on information regarding competitors' current and forecast costs and demand levels which would be unknown to the SMP Operator filing the rate application. Consequently, the hypothetical example is irrelevant from the perspective of the Proposed Rules.

More importantly, the analysis provided in the hypothetical example misses the point of an assessment of "undue" price discrimination. The pertinent question should be what effect would the SMP Operator's proposed on/off net call prices have on the development of competition in the market. For instance, with the mobile market in the Bahamas soon open to competition, BTC could employ a pricing strategy similar to the scenario described in URCA's hypothetical example. Such a price discrimination strategy would be expected to create significant barriers to switching service provider and, as a result, serve to lessen competition in mobile competition in The Bahamas. Indeed, this is a concern explicitly noted in the URCA's Competition Guidelines – i.e.,

> In mobile communications a common form of price differentiation is between the prices for on-net and off-net calls. Such differential pricing can be observed in competitive markets and may be efficient. However, it may be used anticompetitively by larger operators to attempt to exclude smaller operators from the market.[8]

The pricing "replicability" analysis provided in URCA's hypothetical example has no apparent bearing on the assessment of anticompetitive effects of a price discrimination proposal filed with URCA under the Proposed Rules. Also, based on the example, it appears that the only instance URCA provided which violated the "replicability" test involved a predatory pricing strategy (i.e., charging a below cost rate for on-net calls). Consequently, such a pricing proposal would presumably be denied under the predation test. The undue price discrimination test would have been unnecessary in such a case.

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[8] URCA Competition Guidelines, ECS COMP 7. – Abuse of a dominant position – Substantive Guidance, Section 5.4.1, Paragraph 58.

In CBL's submission, the hypothetical example provided under Paragraph 65 in Annex 2 should be deleted. Rather than adding further potentially misleading hypothetical examples, CBL suggests that URCA simply include a description and list of the key factors which it would use to assess whether any proposed pricing differentials may constitute "undue" price discrimination – i.e., which would likely have the effect of substantially lessening or foreclosing competition.

14 Annex 3: Assessment of bundled offers including regulated services

Annex 3 of the Proposed Rules is new and provides a "decision tree" that "summarizes the approach that should be taken to assess bundled offers which include at least one Price Regulated Service.

While there is no specific reference to Annex 3 in the main body of the Proposed Rules, and Annex 3 does not refer back to any particular provision in the main body, CBL understands that Annex 3 is a graphical representation of the process included in Paragraph 36 (in Part F) related to the assessment of bundles.

In our comments above on Part F, CBL notes that the proposed new provisions in Paragraph 36 to be confusing and ambiguous and considers that Paragraph 36.2 is unnecessary. Therefore, CBL recommends that Paragraph 36.2 be deleted. With such a deletion, the decision tree included in Annex 3 would no longer be necessary and hence CBL recommends that it be deleted.

Respectfully submitted.

Cable Bahamas Ltd.