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**Preliminary Determination
on the Assessment of Significant Market Power
in Call Termination Services in The Bahamas
under Section 39(1) of the Communications Act, 2009**

ECS 06/2013

Submitted to the

Utilities Regulation and Competition Authority

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Submitted by

Cable Bahamas Ltd.



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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 06/2013, "Preliminary Determination on the Assessment of Significant Market Power in Call Termination Services in The Bahamas under Section 39(1) of the Communications Act, 2009" (the "Consultation Document").

The following provides a summary of CBL's positions on the URCA's preliminary determinations set out in the Consultation Document:

- i) *Regarding the definition of the relevant market:* While CBL generally agrees with URCA's proposed relevant product and geographic call termination services market definitions, CBL submits that there are two oversights in the case of the product market definition in BTC's case. First, the definition should explicitly include BTC's transit service which is essential for new entrant operators ("NEOs") to terminate calls on BTC's mobile network. Second, CBL submits that URCA should clarify that mobile call termination explicitly includes call termination to roaming customers on BTC's network.
- ii) *Regarding licensees deemed to possess Significant Market Power ("SMP") in the defined relevant markets:* While CBL fully agrees with URCA's conclusion that BTC possesses SMP in the call termination services market (which simply reconfirms URCA's previous 2010 finding in this respect), CBL considers that the same SMP finding does not apply to NEOs, including CBL. NEOs position in the market differs significantly from the incumbent BTC who enjoys numerous market advantages stemming from its incumbency, scale, market influence and countervailing buying power, among other factors. Consequently, CBL considers that URCA's preliminary finding that NEOs, including CBL, possess SMP in the call termination services market is unfounded. If URCA nevertheless maintains that all licensed operators possess some degree of SMP in the call termination services market, CBL considers that, at a minimum, URCA should acknowledge that any degree of SMP possessed by NEOs in the defined market is significantly less than that enjoyed by BTC.
- iii) *Regarding potential competition problems that could arise in the case of licensed operators with SMP:* URCA identifies two possible problems in this respect: refusal to supply and excessive pricing. CBL considers that there is clear evidence of these specific competition problems "actually" arising in the case of the incumbent operator, BTC (CBL provides examples below). However, other than hypotheticals, no specific evidence exists or was provided by URCA of these same problems arising in the case of NEOs. Consequently, while BTC is able and, as the evidence shows, willing to exercise SMP through both excessive pricing and refusal to supply, NEOs are not able to do the same by virtue of the fact that they do not possess SMP.
- iv) *Regarding the susceptibility of the wholesale call termination services market to SMP regulation:* In CBL's view it is clear that BTC is susceptible to SMP regulation of its call termination services (as has previously been determined by URCA); however, URCA has not established that NEOs possess SMP or, even if it is assumed that they

do possess at least a limited degree of SMP, that any actual competition problems have arisen or even could arise as a result. Moreover, URCA has not shown that current reliance on market forces (together with *ex post* competition law powers if necessary) are not achieving the objectives of section 5 of the *Communications Act* ("*Comms Act*") in the case of the NEOs. Consequently, CBL submits that NEOs, including CBL, are not susceptible to SMP regulation. If URCA nevertheless considers they should be subject to some degree of SMP regulation, then there is no reason to apply an equivalent degree of regulation to both BTC and NEOs given the significant differences in their relative market positions.

- v) *Regarding URCA's first proposed obligation on SMP operators – section 40(4) of the Comms Act:* As noted, CBL does not consider that NEOs are susceptible to SMP regulation in the call termination services market. That said, CBL is not opposed to the section 40(4) obligations applying to all interconnecting licensed operators, regardless of whether or not they are deemed to possess SMP.
- vi) *Regarding URCA's second proposed obligation on SMP operators – publication of tariffs and non price terms:* Again as noted, CBL does not consider that NEOs are susceptible to SMP regulation in the call termination services market and, therefore, it is not necessary nor would it be appropriate to impose wholesale tariff obligation on NEOs. CBL considers that current regime allows NEOs negotiate their own call termination rates and related terms and conditions, and this approach has proven to be effective to date. The proposed tariffing requirement would preclude any possibility of commercial negotiation of interconnection arrangements by NEOs. In CBL's view, there is no need or reason to abandon the current market-based approach for determining rates and non-price terms for NEO's call termination services.
- vii) *Regarding URCA's third proposed obligation on SMP operators – wholesale price controls:* Once again, CBL does not consider that NEOs are susceptible to SMP regulation in the call termination services market and, moreover, CBL is strongly opposed to the introduction of price controls on NEOs' call termination services. Price controls are unnecessary and inappropriate in the case of NEOs' call termination services. CBL considers that URCA failed to correctly apply its own established regulatory impact assessment methodology in the case at hand. For instance, it failed to properly consider a range of regulatory options, including maintaining the status quo (i.e., continuing application of price controls in BTC's case, but not in the NEOs' case) or other more light-handed regulatory options.
- viii) *Regarding the method of wholesale price controls:* As noted, CBL is of the view that wholesale price controls on NEOs' call termination services are unwarranted and unnecessary. Should URCA nevertheless decide to impose such price controls, CBL agrees with URCA that they should be cost oriented. That does not imply that they should simply be set on the basis of a BTC cost study, but rather they should be set on the basis of NEOs' own call termination costs. There are factors that suggest that NEOs' call termination costs are higher than those of BTC at this time – e.g., economies of scale and IP conversion costs. Consequently, if URCA decides to impose price controls on NEOs, they should be provided with the option (where feasible) to develop their own call termination cost estimates following URCA's established guidelines. In a similar respect, BTC wholesale prices set on an interim basis using benchmarking should not automatically also apply to NEOs. To the extent

benchmarking may be used to set NEOs' call termination rates, proper benchmarks reflecting NEO scale networks and other relevant operating characteristics must be used.

CBL considers that imposition of a call termination price control on NEOs based on either one of these two approaches (i.e. BTC's accounting cost separations or BTC cost benchmarking results) would amount to little more than an arbitrary rate setting exercise. In CBL's opinion, doing so would be in a violation of section 40(3)(b) of the Comms Act which requires that URCA, before imposing obligations, "take into account the investment made by the relevant licensee and allow the licensee a reasonable rate of return on capital efficiently employed, taking into account the risks involved."

- ix) *Regarding the asymmetry versus symmetry of fixed termination rates:* Again, as noted, CBL is of the view that wholesale price controls on NEOs' call termination rates are unwarranted and unnecessary whether they are symmetric (as proposed by URCA) or asymmetric. CBL notes that, contrary to URCA's claims, European experience does not support URCA's proposal to set operators' call termination rates on a symmetric basis using the incumbent's accounting separations costs. Nor does experience in Europe or elsewhere support a flash cut to symmetric rate levels (however they may be established). In Europe, a bottom-up long run incremental cost approach is typically used for determining call termination rates, which is not the costing approach adopted by URCA. In addition, where a policy of rate symmetry has been introduced, it has typically been implemented gradually over the course of a four to five year transition period. In CBL's view, should URCA decide to adopt a symmetric call termination price control policy (contrary to CBL's position), then it should be implemented over a four to five year transition period consistent with international practice.

The balance of CBL's response deals with the issues and questions raised in the Consultation Document in more detail.

2 Market Review Stage 1 – Market Definitions

As described in the Consultation Document, URCA's review of the call terminations services market follows the methodology set out in URCA's Final Decision on the "Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009" (the "SMP Assessment Methodology"),¹ which involves three stages:

- i) defining relevant product and geographic markets;
- ii) identifying operator(s) with SMP in each defined market(s), if any; and
- iii) where market power is identified, consideration of the appropriate SMP obligations in relation to each market.

¹ ECS 20/2011, 13 October 2011.

In the first stage of the market review URCA applied what is referred to as a "small but significant non-transitory increase in price" ("SSNIP") test or "hypothetical monopolist test" ("HMT") to determine the proposed product and geographic scope of the call termination services market.

2.1 Product Market

Applying this approach, URCA stated that it was of the preliminary view that the fixed and mobile termination services market should be defined as consisting of the following six product markets:

- i) fixed voice call termination on BTC's network;
- ii) mobile voice call termination on BTC's network;
- iii) mobile message termination on BTC's network;
- iv) fixed voice call termination on CBL's network;
- v) fixed voice call termination on Last Mile Communications' network; and
- vi) fixed voice call termination on IP Solutions International's network.

The Consultation Document included the following question regarding this proposal:

Question 1: Please provide comments on URCA's preliminary view on the relevant product market definitions for fixed and mobile termination services.

While CBL is in general agreement with URCA's proposed definition of the fixed and mobile termination services product markets, CBL considers that the proposed definition lacks specificity as to the call termination services covered in BTC's case in the following two instances:

- **BTC Transit Services.** URCA did not indicate whether BTC's transit service is included in the relevant product market for call termination services to BTC's mobile customers. Currently, NEOs must use BTC's transit service to terminate calls on BTC's mobile network. While in theory NEOs could bypass BTC's transit service if they were able to interconnect directly with BTC's mobile network – assuming doing so was determined to be technically and economically feasible – the fact of the matter is that BTC has not established any points of interconnection ("PoIs") with its mobile network. BTC's mobile call termination service is currently only available via BTC's transit services. Consequently, access to BTC's transit service is essential for the purpose of terminating calls to BTC's mobile customers and, in CBL's view, should be included in the relevant product market for mobile call termination on BTC's network. Indeed, had URCA conducted a SSNIP/HMT test on BTC's transit service, it would have found that the service should rightly be included as part of the relevant product market for mobile voice call termination on BTC's mobile network.² Just as URCA has proposed to include intra

² That is, URCA's SSNIP test logic and conclusions on pages 25 and 26 of the Consultation Document would equally apply if "mobile call termination" were replaced by "mobile call transit".

and inter-island fixed termination in the call termination services market – the latter of which includes an inter-island transit component – so too should BTC's mobile call transit service (including BTC's transit services across both one and two PoIs).

- **BTC Roaming Service.** URCA also did not indicate whether call termination to roaming mobile customers on BTC's mobile network is included in the relevant product market for call termination services. In the Consultation Document, URCA stated that "call termination assures the **any-to-any** principle of interconnection" and noted that call termination services in the case of mobile services includes "calls to **all** mobile numbers" (emphasis added).³ However, as URCA is likely aware, CBL (via its affiliate SRG) has been involved in a lengthy dispute with BTC regarding the termination of calls to roaming mobile customers on BTC's mobile network and, to date, has been unable to reach a commercial agreement with BTC to terminate such roaming mobile traffic. In effect, BTC has refused to supply call termination services to roaming customers despite the fact it is required to do so under its wholesale interconnection service obligations. In the context of its decision in this proceeding, CBL submits that URCA should confirm that mobile termination services do in fact include calls to **all** mobile numbers, including roaming mobile customers on BTC's mobile network, and direct BTC to provide the service on an economic, cost oriented basis.

2.2 Geographic Market

With respect to the geographic scope of the relevant market, URCA stated that it is of the preliminary view that the relevant market should not be narrower in geographic scope than the area in which a licensee has facilities to provide the relevant product in question.

The Consultation Document included the following question on this proposal:

Question 2: Please provide comments on URCA's preliminary view on the relevant geographic market definition in relation to fixed and mobile call termination services.

CBL is in agreement with URCA's proposal in this respect.

3 Market Review Stage 2 – SMP Assessment

3.1 Preliminary SMP Assessment and Findings

Having defined the relevant market for call termination services, URCA proceeded to the second stage of the market review process which involves an assessment of competitive conditions in the relevant market, as defined on a preliminary basis, in order to determine if any firms in the market possess SMP. In this respect, and following the SMP Assessment Methodology, URCA indicated that it took the following criteria into account in its analysis:

- the licensee's market share;

³ Consultation Document, pages 9 and 10, respectively.

- the licensee's ability to influence market conditions;
- the licensee's access to financial resources;
- the licensee's experience in providing products to the market;
- barriers to entry and expansion;
- countervailing buyer power;
- overall size of the undertaking;
- control of infrastructure not easily duplicated; and
- number of active competitors.

Based on its evaluation of these criteria, URCA indicated that it had reached the following preliminary position regarding licensees with SMP in call and mobile message termination services market:

- a) BTC has SMP in the wholesale market for fixed voice call termination on its fixed network in The Bahamas.
- b) BTC has SMP in the wholesale market for mobile voice call termination on its mobile networks in The Bahamas.
- c) BTC has SMP in the wholesale market for mobile message termination on its mobile networks in The Bahamas.
- d) CBL has SMP in the wholesale market for fixed voice call termination on its fixed networks in The Bahamas.
- e) IP Solution International Ltd. ("IPSI") has SMP in the wholesale market for fixed voice call termination on its fixed network in The Bahamas.
- f) Last Mile Communications Ltd. ("LMCL") has SMP in the wholesale market for fixed voice call termination on its fixed network in The Bahamas.

The Consultation Document included the following question regarding this proposal:

Question 3: Please provide comments on URCA's preliminary views that the licensees identified have SMP in relation to the wholesale supply of call and/or mobile message termination services on their respective networks.

CBL fully agrees with URCA's SMP conclusions as they pertain to the incumbent network operator, BTC. This finding was of course already well established through URCA's initial 2009-10 market review process.⁴ URCA has rightly reconfirmed its initial SMP findings with respect to BTC in the Consultation Document.

⁴ Concluded in URCA, *Final Decision on Obligations imposed on SMP Operator*, ECS 11/2010, 22 April 2010.

However, CBL considers that URCA simply extrapolated its SMP conclusions with respect to BTC in a broad brush fashion to all NEOs (i.e., CBL, IPSI and LMCL). URCA failed to properly take into account the relative market position (incumbent versus new entrant), experience and scale of NEOs compared to BTC in its SMP assessment in the case of the NEOs. This is the first instance in which URCA is considering the NEOs in this regard. The onus was on URCA to specifically assess whether NEOs possess SMP in the relevant market under consideration. BTC's SMP was not in doubt. Consequently, in CBL's view, URCA's assessment of SMP in the case of the NEOs is flawed and so too is its blanket SMP finding in the case of all NEOs, including CBL.

- For one, in its analysis, URCA simply glossed over the NEOs relative scale, market shares in the fixed and mobile voice markets, financial resources, experience in the markets and their respective stages of service deployment. These are important considerations under URCA's SMP Assessment Methodology, yet in CBL's view little if any consideration was given to them by URCA.
- Second, there are significant differences between the incumbent's and NEOs' abilities to influence market conditions and exert countervailing buying power ("CBP"). BTC's unique ability to influence market condition is derived from its incumbency (as a former long-standing monopoly operator in the fixed market and a current monopoly operator in the mobile market), scale and market experience. Incumbency provides significant relative market advantages and market power. NEOs obviously must interconnect with BTC to compete in the market, which is why mandated interconnection is the first step taken by regulators in order to open the voice services market to competition. In contrast, BTC has limited interest in interconnecting with a NEO.

BTC's incumbent position also allows it to dictate technological arrangements in the market since for NEOs to interconnect with BTC they must comply with BTC's network architecture and technology – not the reverse. For example, CBL operates an Internet Protocol ("IP") based network; however, to interconnect with BTC, CBL must convert its voice traffic to Time Division Multiplex ("TDM") circuit switched protocol to exchange traffic with BTC and accommodate BTC's legacy network technology. This is a significant additional interconnection cost that CBL incurs to interconnect with BTC, one that BTC can readily impose on new entrants by virtue of its incumbency.

- Third, CBL also considers that URCA's conclusion that BTC is unable to exercise CBP is unfounded and not reflective of actual market experience to date. NEOs have no choice but pay the wholesale termination rates dictated by BTC and, at the same, they are generally forced to adopt BTC's call termination rates for calls terminating on their own networks. This is clear evidence that BTC has a significant degree of CBP in the call termination services market relative to the NEOs, whereas none of the NEOs, including CBL, has CBP when negotiating with BTC.

For example, CBL notes that in its negotiations with BTC regarding the termination of calls to roaming customers on BTC's mobile network, CBL faces what amounts to a "take it or leave it" offers from BTC. But further still, as part of those offers, BTC has sought to force CBL to reduce its fixed call termination rates as a pre-condition to allowing CBL to terminate calls to roaming customers on BTC's mobile network. Here again, BTC is exercising its CBP to force reductions in CBL's termination rates, while CBL has no offsetting CBP to even compel BTC to provide a termination service to roaming

customers on BTC's mobile network, let alone set a fair and reasonable price for the termination of those calls. Consequently, contrary to URCA's preliminary conclusion, this is actual evidence of BTC's CBP and its ability to exercise it.

URCA's SMP assessment in 2009-10 as well as in the present proceeding clearly demonstrates that BTC possesses a high degree of SMP in the call termination services market. As noted, CBL fully agrees with this conclusion. However, CBL considers that URCA did not properly apply the SMP Assessment with respect to its SMP assessment in the case of the NEOs, including CBL, and therefore that URCA has not demonstrated that "CBL has SMP in the wholesale market for fixed voice call termination on its fixed networks in The Bahamas." In CBL's submission NEOs do not possess SMP in the call termination services market.

If URCA nevertheless decides to maintain its preliminary determination designating NEOs, including CBL, as having SMP, CBL is of the view that, at a minimum, NEOs should be considered to have a significantly lower degree of SMP relative to BTC because of the substantial market differences between BTC and the NEOs discussed above. CBL considers that URCA should take into account the differing degrees of SMP between BTC and NEOs when considering whether the defined markets are susceptible to SMP regulation and, further, the nature and extent any obligations imposed on BTC versus NEOs in stage 3 of the market review process.

3.2 Competition Problems

In the Consultation Document, URCA identified two competition problems or market failures that it considers could potentially arise from SMP with respect to call and/or mobile message termination services on individual networks: (i) refusal or denial to supply and (ii) excessive charging.

The Consultation Document included the following question regarding these potential competition concerns:

Question 4: Please provide comments on URCA's preliminary views on the main competition problems or market failures that could arise from a licensee having SMP in the provisioning of wholesale call and/or mobile message termination services on its own network.

CBL fully agrees that the two competition concerns identified by URCA could potentially arise in the case of call and mobile message termination services in the case of a network operator with SMP. The more important question, which was not considered by URCA, is whether these potential competition concerns apply equally to all network operators – i.e., both incumbent and NEOs. In CBL's view, they do not. Both competition concerns unquestionably apply in the case of the incumbent operator, BTC, but not in the case of NEOs.

Concerns relating to refusal to supply essential wholesale services such as call termination services apply first and foremost in the case of an incumbent network operator. The incumbent has a strong incentive to refuse supply of essential wholesale services in order to protect its dominant market position. In stark contrast, there is no rationale or incentive for a NEO to do the same. The vast majority of customers are on the incumbent's network; consequently, it is

absolutely essential for NEOs to interconnect with the incumbent to allow their customers to communicate with customers on the incumbent's network.

As discussed above, the incentive to refuse supply in the case of the incumbent is illustrated by CBL's ongoing dispute with BTC to terminate call traffic to roaming mobile customers on BTC's network. BTC has blocked call traffic to roaming mobile customers on its network which CBL has attempted to deliver and/or proposed excessive rates to terminate such traffic. Either way, the effect of BTC's actions amounts to a refusal to supply. CBL is not aware any concerns to date with refusals to supply in the case of NEOs.

Potential concerns with excessive pricing of essential wholesale services also pertain largely, if not entirely, to the incumbent network operator rather than NEOs. In the context of negotiations with an incumbent operator such as BTC, NEOs are typically forced by the incumbent's CBP to set rates for such services at or below the prevailing rates of the incumbent regardless of their actual costs. This was the case when CBL entered the fixed market and effectively had no option but to agree to fixed call termination rates equal to those of BTC. CBL's current dispute with BTC over roaming mobile call termination provides further evidence that concerns with excessive pricing pertain to the incumbent carrier, in this case BTC, not NEOs.

In CBL's view, the fact that the two competition concerns identified by URCA relate first and foremost to BTC – not the NEOs – should be taken into account in URCA's consideration of the nature and extent of any obligations imposed on the NEOs versus BTC as a result of URCA's SMP findings. As already indicated above in this respect, CBL does not agree with URCA's preliminary SMP determinations specifically in the case of NEOs, including CBL.

4 Market Review Stage 3 – Proposed SMP Remedies

4.1 Susceptibility of the Defined Markets to SMP Regulation

The third step of URCA's market review process involves the consideration and determination of appropriate obligations or remedies, as may be deemed necessary, given URCA's preliminary findings of SMP in the provision of call terminations and mobile messaging services. URCA noted in this respect that "... a preliminary finding of SMP in fixed and/or mobile termination service provisioning generally indicates to URCA the potential for competition problems to arise in the defined economic markets, thereby providing justification for the imposition of *ex-ante* regulation on SMP licensees." In the case at hand, URCA suggested that it would be appropriate to consider various regulatory remedies "to overcome, mitigate or prevent the adverse effect on competition and any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition."

Notably, URCA dismissed the possibility of relying on *ex post* competition law powers under the *Comms Act* to address identified competition problems. It stated that: "The absence of countervailing buyer power, coupled with the presence of absolute barriers to entry and expansion in URCA's view render it infeasible for existing or newcomers to the market to duplicate wholesale termination services on other fixed or mobile networks." It added that, at least on a preliminary basis, "*ex post* competition law power is unlikely to be sufficient to remedy, mitigate or overcome the market failures identified."

Consequently, URCA indicated in the Consultation Document that on a preliminary basis it considers that the identified relevant markets are susceptible to SMP regulation. In this respect, it asked parties to respond to the following question:

Question 5: Please provide comments on URCA's preliminary view that the wholesale termination markets identified are susceptible to SMP regulation.

While CBL is in agreement with URCA's proposal in this respect in the case of the incumbent network operator BTC, CBL considers that URCA has not provided clear rationale as to why *ex ante* SMP regulations are equally applicable in the case of NEOs. As discussed above, CBL considers that URCA has not properly applied the SMP Assessment Methodology in the case of the NEOs and, moreover, that URCA's preliminary determination that NEOs possess SMP in the fixed call termination service market is unfounded. Nonetheless, if URCA decides to maintain its preliminary determination designating NEOs as having SMP, CBL is of the strong view that, at a minimum, NEOs should be considered to have a significantly lower degree of SMP relative to BTC because of the substantial differences between BTC and the NEOs discussed above. CBL considers that URCA should take into account the differing degrees SMP between BTC and NEOs when considering the extent to which BTC and NEOs may be susceptible to SMP regulation, if at all in the latter case.

With respect to Question 5, URCA emphasized that "... it bears repeating that the purpose of *ex-ante* regulatory measures is to address **predictable (actual or potential) competition problems**" (emphasis added).⁵ Yet while there is clear evidence of "actual" competition problems (refusal to supply and excessive pricing) in the case of BTC, only entirely hypothetical competition concerns were raised by URCA with respect to the NEOs. The fact of the matter is that there have been no competition problems with respect to the NEOs' call termination services in the current environment where no *ex ante* SMP regulations currently apply to the NEOs. In its discussion of the potential need for SMP remedies, URCA failed to explain why *ex ante* SMP regulation of NEOs' call termination services is now necessary given there have been no identifiable competition problems in their absence to date.

In CBL's opinion, in view of the significant differences between BTC and NEOs discussed above, there are valid grounds to consider that the call termination services markets for which BTC possesses SMP are unquestionably susceptible to SMP regulation, whereas the NEOs' call termination services markets are not – even if NEOs are considered by URCA to possess some limited degree of SMP. URCA failed to demonstrate in the case of the NEOs that "*ex post* competition law power is unlikely to be sufficient to remedy, mitigate or overcome the market failures identified". In fact, CBL is of the view that, based on actual market experience, there are no identified market failures in the case of NEOs, nor are there grounds to find that NEOs are susceptible to SMP regulation. In contrast, the evidence clearly supports the need for continued *ex ante* SMP regulation of the BTC's call termination services.

CBL notes that section 5 of the *Comms Act* requires that "market forces shall be relied upon as much as possible to achieve the electronic communications policy objectives". In this instance of the susceptibility to SMP regulation for NEOs, URCA has not shown that current market forces (including reliance on *ex post* competition law powers) are not achieving such objectives.

⁵ Consultation Document, page 41.

CBL sees no evidentiary or legal basis for URCA to introduce new *ex ante* regulations on NEOs, as proposed on a preliminary basis in the Consultation Document.

4.2 Proposed Obligations on SMP Licensees

4.2.1 Section 40(4) Obligations

The first set of obligations that URCA proposes be applied to SMP licences in the case of relevant market at hand are those set out in section 40(4) of the *Comms Act*. These conditions require that SMP licensees shall:

- (a) not unduly discriminate against particular persons or a particular description of persons in relation to the electronic communications services offered;*
- (b) provide technical specifications, or other relevant information about any interconnection essential facilities or other mandated wholesale electronic communications services on a reasonable and timely basis, when the information is required by another licensee to provide its licensable services and when the information is not readily available from other sources; and*
- (c) not adopt technical specifications for a network that prevents interconnection or interoperability with a network of a competitor.*

URCA suggests that these conditions are "intended to prevent SMP operators from behaving anti-competitively by promoting transparency and non-discrimination in the supply of call termination." It also notes that these provisions already and will continue to apply to BTC by virtue of the fact that BTC has already been determined to be an SMP operator with respect to call termination services.

URCA proposes that these provisions should apply to new entrant licensees as well given its preliminary view that, like BTC, they too possess SMP in the call termination services market. In this respect, URCA asked parties to respond to the following question:

Question 6: Please provide comments on URCA's preliminary view that the SMP licensees identified should, at a minimum, be obligated to comply with the SMP obligations specified in section 40(4) of the Comms Act.

At the outset, CBL notes again that it considers that URCA has not properly applied the SMP Assessment Methodology in the case of the NEOs and, moreover, that URCA's preliminary determination that NEOs possess SMP in the fixed call termination service market is unfounded. Nonetheless, if URCA decides to maintain its preliminary determination designating NEOs as having SMP, CBL is of the strong view that, at a minimum, NEOs should be considered to have a significantly lower degree of SMP relative to BTC because of the substantial differences between BTC and the NEOs discussed above.

That said, with respect to URCA's proposal referenced in Question 6, CBL has no objection to the section 40(4) conditions being applied to CBL's and other NEOs' fixed call termination service as they are currently applied to BTC. This requirement could just as easily be considered a condition of licence for all local network operators regardless of URCA's SMP determinations resulting from this proceeding.

CBL notes, however, that with respect to the third provision, section 40(4)(c), no NEO would have an incentive to adopt technical specifications for a network that prevents interconnection or interoperability with a network of a competitor. Doing so would undermine its ability to enter and compete in the market. In CBL's view, this provision was clearly aimed at preventing the incumbent network operator from foreclosing entry or lessening competition in the market by creating technological barriers to entry or imposing additional and unwarranted costs on new entrants.

As discussed above, CBL already incurs additional IP conversion costs to interconnect and exchange voice traffic with BTC due to BTC's reliance on legacy TDM network technology. Indeed, CBL has requested that BTC provide interconnection on a Session Initiation Protocol ("SIP") basis, but BTC has refused to do so. BTC's response in this respect could potentially be interpreted as a violation of its section 40(4)(c) obligations. But, at a minimum, it is another example of its ability to dictate market conditions.

4.2.2 Publication of Tariffs and Non-Price Terms

URCA stated in the Consultation Document that it does not consider the mandatory obligations under section 40(4) of the *Comms Act*, by themselves, would be sufficient to achieve the overall objectives of the *Comms Act*. To this end, URCA considers that it would be appropriate and proportionate to impose additional SMP regulations on the SMP licensees.

In this respect, URCA noted that BTC is already required to publish a Reference Access and Interconnection Offer ("RAIO") and is also subject to price controls on BTC's wholesale termination rates by virtue of URCA's April 2010 Final Decision on SMP Obligations. URCA's preliminary findings set out in the Consultation Document would not alter these existing obligations in BTC's case.

URCA went on to note that is obligated under section 5(c) of the *Comms Act* to exercise its powers, inter alia, in a "non-discriminatory" manner and that under section 40(1)(j), it may impose "such other obligations as URCA may consider necessary in pursuance of the electronic communications policy objectives and the sector policy." On this basis, given the existing RAIO and price regulation obligations placed on BTC, URCA stated that it considers it appropriate to extend similar obligations to NEOs. URCA added in this respect that it:

... must also take notice of the costs to the industry of any remedies it proposes and ensure that the remedies it proposes are the minimum necessary to resolve the competition problems identified. In applying appropriate remedies to other SMP operators URCA therefore proposes to also take into account the principle of proportionality so as not to impose a form of regulation on a licensee which could create an unfair burden on that party, given its overall position in the broader sector.

With these qualifications in mind, URCA proposed that NEOs identified under its preliminary determination would be required to "make available wholesale termination services and publish the tariff and non-price terms and conditions on which these services are provided (i.e., by publishing such details prominently on its website and additionally making such information otherwise available in other formats upon request)."

The Consultation Document included the following question regarding this proposal:

Question 7: Please provide comments on URCA's preliminary view regarding publication of tariff and non-price terms and conditions governing supply of wholesale termination services.

At the outset, CBL notes again that it considers that URCA has not properly applied the SMP Assessment Methodology in the case of the NEOs and, moreover, that URCA's preliminary determination that NEOs possess SMP in the fixed call termination service market is unfounded. Nonetheless, if URCA decides to maintain its preliminary determination designating NEOs as having SMP, CBL is of the strong view that, at a minimum, NEOs should be considered to have a significantly lower degree of SMP relative to BTC because of the substantial differences between BTC and the NEOs discussed above.

Before commenting on URCA's proposal, CBL notes section 5(c) of the *Comms Act* states that any regulatory or other measures applied to SMP operators "shall be efficient and proportionate to their purpose and introduced in a manner that is transparent, fair and non-discriminatory." The provision does not require equal or symmetric regulatory measures be applied to different operators, nor does the term "non-discriminatory" imply any regulatory measures adopted must be symmetric.

The regulatory measures imposed on BTC's wholesale services, including call termination services, are clearly justified given BTC unquestionably enjoys a high degree of SMP by virtue of its market incumbency and dominance. As discussed above, NEOs are in far less advantageous position and, in CBL's view, do not possess SMP. Extending regulatory obligations which apply to the incumbent to all NEOs for sake of regulatory symmetry is not in CBL's view warranted or appropriate. Moreover, imposing these additional regulations would be inconsistent with the objectives of section 5 of the *Comms Act*, notably those relating to promoting efficiency, proportionality and reliance on market forces to the greatest extent possible to achieve the electronic communications policy objectives. As well, while URCA's proposed additional regulatory measures in this respect are intended to be the minimum necessary to address identified competition problems, CBL reiterates that URCA failed to identify any actual competition problems in the case of NEOs' call termination services based on actual experience in the market to date. For this reason as well, there is no basis for extending existing regulations applicable to BTC to NEOs.

With respect to its specific proposal to require NEOs to publish their wholesale termination service tariff and non-price terms and conditions, URCA stated it had considered but rejected the option of allowing new entrants to negotiate their own call termination agreements through commercial negotiation. URCA claimed that commercial interconnection negotiations are unlikely to be successful and that based on its own experience such negotiations have almost invariably failed and the matter subsequently referred to the regulator for resolution.

CBL is not aware of what specific commercial negotiation experience URCA is referring to in this respect. Based on its own experience, CBL considers that current regime allows NEOs negotiate their own call termination rates and related terms and conditions in an effective manner. In CBL's view it would be inappropriate to impose an obligation on NEOs requiring them to publish their wholesale termination service tariff and non-price terms and conditions. Any such requirement would preclude any possibility of commercial negotiation of interconnection arrangements by NEOs. Under the current regime, where parties are unable reach a mutually satisfactory agreements they have the option to file a dispute with URCA.

There is no need or reason in CBL's view to abandon this approach for NEO call termination service agreements.

4.2.3 Wholesale Price Controls

URCA indicated that given its concerns about potential excessive termination rates, it has determined on a preliminary basis that a formal system of wholesale price control is warranted. URCA stated that it reached this conclusion due to its firmly held view that "prevailing structural and behavioural factors operating in the markets are such that, absent regulation, SMP operators have weak incentives to set a tariff for termination on their respective networks at a level which could prevail in a competitive market." URCA also indicated that it was concerned that where operators possess SMP negotiated rates could potentially be excessive. Further, URCA stated that it also considers that it would be absolutely necessary for it to guard against "collusion (explicit or tacit)" in which call termination payments between operators are able to mutually increase in order to inflate consumer prices to excessive levels. On this basis, URCA proposed on a preliminary basis that NEOs, like BTC, should be subject to a wholesale price control with respect to call termination services.

The Consultation Document included the following question regarding this proposal:

Question 8: Please provide comments on URCA's preliminary view regarding price regulation of call termination services.

At the outset, CBL notes again that it considers that URCA has not properly applied the SMP Assessment Methodology in the case of the NEOs and, moreover, that URCA's preliminary determination that NEOs possess SMP in the fixed call termination service market is unfounded. Nonetheless, if URCA decides to maintain its preliminary determination designating NEOs as having SMP, CBL is of the strong view that, at a minimum, NEOs should be considered to have a significantly lower degree of SMP relative to BTC because of the substantial differences between BTC and the NEOs discussed above.

CBL agrees that wholesale price controls are fully justified in the case of BTC's call termination services; however, in CBL's view, URCA has failed to justify why this same remedy must be extended to NEOs. As explained above, there are significant differences between the incumbent operator BTC and NEOs in terms of their market positions and relative abilities to exercise market power, if at all in the latter case. Furthermore, the absence to date of a wholesale price control on new entrants call termination services has not raised any actual competition concerns, which clearly indicates that extending price control regulations to NEOs is unnecessary as well as inappropriate.

In addition, in CBL's view, URCA has not adequately followed its own established regulatory impact assessment test before adopting any new *ex ante* regulatory measures. In reaching its final decision on obligations imposed on SMP Operators in 2010, URCA indicated that it took into account several factors before adopting specific SMP remedies in BTC's case at the time, including:⁶

- i) defining the objective – market failure identification;

⁶ ECS 11/2010, 22 April 2011, page 42.

- ii) identifying options to address the objective;
- iii) conducting an impact analysis – costs, benefits and risks; and
- iv) assessing impacts and identifying a preferred solution(s).

In CBL's view, while URCA has identified what amounts to actual evidence of market failure in the case of BTC's call termination services, it has only made reference to entirely hypothetical competition concerns in the case of the NEOs. Consequently, the first criterion is not properly satisfied in the case of NEOs, including CBL.

Wholesale price controls already and correctly apply in BTC's case. Nevertheless, URCA analysis appears to have focussed solely on applying the same price controls on the wholesale call termination services of **all** operators (incumbents and new entrants) versus **no** operators – essentially an "all or nothing" approach. However, in CBL's view, the option of the "status quo" – where wholesale price controls would continue to apply to BTC while no price controls would apply to the NEOs' call termination services – was not investigated adequately if at all by URCA. Further still, other more "light-handed" regulatory options could have been considered in the case of the NEOs. Consequently, URCA did not consider any alternative options as required under its established regulatory impact assessment test noted above. Actual market evidence indicates that NEOs have significantly less market power, if any, compared to BTC in the market under consideration. That suggests that URCA should have taken into consideration other remedies in its assessment beyond heavy-handed price regulation of NEOs' call termination services.

As well, no impact analysis of the costs, benefits and risks of the extending price regulations to NEOs was conducted or, at least, presented in the Consultation Document. CBL considers that had such an analysis been conducted, URCA would have found that the proposed first-time application of wholesale price controls to NEOs would be unwarranted and disproportionate to the limited concern at issue.

CBL is strongly opposed to the extension of price controls to NEOs call termination services. CBL considers that a proper application the above-noted criteria should have included a more comprehensive range of regulatory options, including maintaining the status quo or, at a minimum, other more light-handed regulatory options.

4.2.4 Method of Wholesale Price Control

Having determined on a preliminary basis that wholesale price controls should be applied to wholesale call termination services, URCA turned to the question of the method of the price control or means to set the regulated rate level. The options discussed in the Consultation Document included:

- "bill and keep" (also known as "sender-keeps-all");
- benchmarking; and
- cost orientation.

URCA rejected bill and keep as an option, claiming that it is "not considered best practice regulation." It noted that there are instances where benchmarking may be appropriate, although added that it "does not consider this approach should be the primary basis for setting termination rates." Consequently, URCA concluded that a cost-based approach is optimal since it reflects "the economic costs of termination and is the method most compatible with competitive markets" and also serves to "encourage competitive entry and promote the overall objectives of the Comms Act."

That said, URCA noted that BTC is already required to set cost-based fixed and mobile termination rates and that URCA has specified guidelines and other inputs on a system of cost accounting for determining fixed and mobile call termination on BTC's networks – i.e., using Historical Cost Accounting (HCA) along with a Fully Distributed Cost (FDC) methodology. Consequently, URCA proposed that the current principle of cost based fixed and mobile termination rates obligation on BTC, based on a HCA-FDC methodology, would remain applicable to BTC on a going forward basis.

While there was no specific question in the Consultation Document on the wholesale price control methods discussed by URCA or its preliminary determination in this respect, CBL offers the following comments on this matter.

First, CBL notes that the discussion in this section of the Consultation Document appears to be focussed on the method URCA plans to use to set BTC's fixed and mobile call termination rates if not currently at some point in the future. However, as URCA is aware, BTC's HCA-FDC costing results have proven to date to be too unstable and unreliable for wholesale termination rate setting purposes. There is some possibility that this approach will be implemented in the near future (for instance depending on the reliability of BTC's 2012 HCA-FDC results); but, for now, there is a great deal of uncertainty around the level of BTC's call termination rates that will ultimately be approved by URCA.

In the meantime, URCA has adopted a benchmarking approach as an "interim" measure until such time that BTC is able to produce acceptable HCA-FDC costing results.⁷ As URCA has acknowledged, a benchmarking approach is not ideal for wholesale rate setting purposes.

As indicated above, CBL is of the view that wholesale price controls on NEOs' call termination rates are unwarranted and unnecessary. That said, should URCA nevertheless decide to impose wholesale price controls on NEOs' wholesale termination rates, CBL agrees with URCA that they should ideally be cost oriented. That does not imply that they should simply be set for all operators on the basis of a BTC cost study (assuming one can be produced that is found to be reliable by URCA), but rather they should be set on the basis of NEOs' actual call termination costs. There are important factors that would suggest that NEOs' call termination costs are higher than those of BTC – e.g., economies of scale and additional IP conversion costs. Consequently, if URCA decides to impose a wholesale price control on NEOs, they should be provided with the option (where feasible) to develop their own call termination cost estimates consistent with URCA's established guidelines.

In CBL's case, pursuant to other SMP obligations, it has already taken on the additional regulatory cost associated with the implementation of an accounting separations and cost

⁷ URCA, *Setting Regulated Interconnection Charges of Bahamas Telecommunications Company Limited (BTC) Going Forward*, Statement of Results and Final Decision, ECS 25/2012, 21 December 2012.

accounting obligation. CBL expects that any necessary revisions to its existing accounting separation model to determine a cost-based fixed call termination rate would involve a lower regulatory burden than having to develop such costs “from scratch” as would be the case for the other NEOs. Consequently, CBL reserves the right to produce, on an optional basis, its own call termination cost study should URCA decide to adopt, contrary to CBL's position, a price control obligation for NEOs' call termination services.

CBL adds that, as an alternative, a benchmarking approach could be adopted on an interim basis. However, any such benchmarking exercise should be based on benchmarks that are comparable to NEOs' operations in terms of scale, among other considerations. It would not be appropriate to simply apply a benchmark developed for BTC to NEOs.

Lastly, CBL considers that imposition of a call termination price control on NEOs based on either one of these two approaches (i.e., BTC's HCA-FDC results or the BTC benchmark exercise conducted by URCA) would amount to little more than an arbitrary rate setting exercise in the case of the NEOs, including CBL. In CBL's opinion, doing so would be in a violation of section 40(3)(b) of the *Comms Act* which requires that URCA, before imposing obligations, "take into account the investment made by the relevant licensee and allow the licensee a reasonable rate of return on capital efficiently employed, taking into account the risks involved." Mandating such arbitrary reductions in CBL's call termination rates would effectively represent an unlawful confiscation of CBL's revenues and return on investment. In fact, the contemplated rate reductions, if implemented on a flash cut basis, would have the effect of cutting CBL's wholesale call termination revenues by roughly 50%, which would have a significant and unjustified negative impact on CBL's financial position.

BTC's Transit Service Charges

On a separate issue, as noted above, CBL considers that BTC's transit service should also be included within the call termination market. As discussed, BTC's transit service is essential for the termination of calls to BTC's mobile customers. Moreover, being subject to a wholesale price control, CBL considers that URCA should review and reduce BTC's current transit charges to ensure they are consistent with BTC's other call termination charges.

BTC's current transit charges are 1.04¢ per minute for fixed calls terminating to a BTC mobile customer across one PoI and 2.59¢ per minute for fixed calls to a BTC mobile customer crossing two PoIs. On the other hand, BTC's currently approved fixed call termination rates are 0.938¢ for intra island calls and 1.4¢ for inter-island calls. As URCA is aware, BTC's fixed call termination rates were recently reduced as a result of URCA's December 2012 Statement of Results and Final Decision, ECS 25/2012.

The currently approved fixed call termination rates suggest that the existing transit charges are clearly excessive. First, the single PoI transit rate is now higher than BTC's fixed termination rate which suggests the transit charge is clearly overstated. Second, the difference between BTC's intra and inter-island rates is 0.42¢. This difference effectively represents a transit charge. Yet BTC's currently approved transit charge is roughly 2.5 times higher, at 1.04¢, again suggesting the BTC's current transit charge is excessive. Third, the difference between BTC's one and two PoI transit charges is 1.55¢ which is also grossly out of line with the difference between BTC's fixed intra and inter-island termination rates of 0.42¢ – again indicating that BTC's current transit charges are excessive. Consequently, CBL considers that reductions in

BTC's transit charges should be ordered by URCA to bring these rates more in line with those approved for BTC's fixed call termination rates.

4.2.5 Asymmetric versus Symmetric Fixed Termination Rates

In the Consultation Document, URCA noted that in Europe (and elsewhere) an increasing number of regulators have imposed reciprocal or symmetric termination rates where all operators are declared dominant in a market for call termination services on their network and hence face regulatory obligations. It added that reciprocal termination rates are now a key part of the European Commission's ("EC") access and interconnection framework.

In this respect, URCA suggested that non-reciprocal or asymmetric termination rates could raise potential concerns, including:

- negative impacts on operators' billing systems;
- making retail tariffs less transparent to the public;
- providing operators with weak incentives to minimize the cost of termination; and
- putting a strain on the regulator's resources to determine the costs of termination on each licensee's network.

Consequently, with a view to limiting regulatory burden on smaller SMP operators, URCA proposed that wholesale call termination charges be set equal to BTC's regulated wholesale termination charges (as determined by URCA) for all SMP operators. At the same time, URCA appeared to recognize that there are a variety of factors to consider before reciprocity of charges could be adopted in The Bahamas and, consequently, asked for feedback from interested parties on its proposed approach to reciprocal charging for fixed termination. Specifically it asked parties to respond to the following question:

Question 9: Please provide comments on URCA's preliminary proposal to set wholesale call termination charges equal to BTC's regulated wholesale termination charges for all SMP operators. If respondents consider that reciprocal charging is not appropriate, respondent should describe their preferred alternative approach, with supporting rationale.

At the outset, CBL notes again that it considers that URCA has not properly applied the SMP Assessment Methodology in the case of the NEOs and, moreover, that URCA's preliminary determination that NEOs possess SMP in the fixed call termination service market is unfounded. Nonetheless, if URCA decides to maintain its preliminary determination designating NEOs as having SMP, CBL is of the strong view that, at a minimum, NEOs should be considered to have a significantly lower degree of SMP relative to BTC because of the substantial differences between BTC and the NEOs discussed above.

As already noted above, CBL is strongly opposed to the extension of price controls to NEOs call termination services, be they symmetric or asymmetric. However, on the question of symmetry versus asymmetry, CBL considers URCA's rationale in support of symmetric rates to be flawed for a number of reasons.

First, in support of URCA's proposal to impose symmetry on all operators' fixed termination rates, CBL notes that URCA relies heavily on European Union ("EU") experience; however, URCA did not accurately characterize EU experience. CBL agrees that the EC has indeed recommended (the "2009 EC Recommendation")⁸ the adoption of a policy of symmetric call termination rates in EU member countries. However, URCA failed to note that the EC's policy recommendation is based on the adoption of a pure bottom-up long run incremental cost ("BU-LRIC") methodology and was expected to be implemented over a multi-year period of four to five years (not on a flash cut basis). There are a number of critical elements of the 2009 EC Recommendation, and the associated experience in the EU, that effectively undermine URCA's proposals:

- Fixed and mobile market conditions are very different in the EU compared to The Bahamas. From an operational perspective, the size of the markets as well as the incumbent and other alternative operators ("OAOs") in them are many times larger in the EU compared to The Bahamas. From a competition perspective, both fixed and mobile markets have been open to competition over 15 years or more in the EU. In The Bahamas mobile is still a monopoly and fixed has only been substantively open to competition for a very short period of time. Alternative operators or OAOs in EU markets are more established than in The Bahamas, where NEOs are in the start-up or early stages of operation.
- The 2009 EC Recommendation was made more than a decade after the opening of fixed markets to competition (i.e., in 1998). During this critical first decade of competition in the fixed markets, the general rule across the EU in relation to fixed termination rates was asymmetry between the incumbent operator and OAOs. Table 1 below is reproduced from the European Regulators Group (ERG) common position document adopted in 2008.⁹ The ERG (now BEREC) was established by the EC to, inter alia, give advice on request and on its own initiative to the EC and other institutions. Table 1 shows that the majority of countries (69.2%) had asymmetric fixed termination rates in place at the time.

Table 1 – Status of fixed termination rates in the EU in 2008 (ten years after fixed market liberalization)	
Are FTRs symmetrical?	Number of EU countries
No	18
Yes	8
Missing Information	2
Total	28

- In the 2009 EC Recommendation, the proposal for symmetry between incumbent and OAO termination rates was inextricably linked to the EC's associated proposal for national regulatory authorities ("NRAs") in EU member countries to adopt a "pure" BU-LRIC costing methodology to set termination rates, as the following passage from the EC's corresponding explanatory note makes clear:

^{8 8} European Commission, *Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates*, 2009.

⁹ European Regulators Group (ERG), *Common Position on symmetry of fixed call termination rates and symmetry of mobile call termination rates*, ERG (07) 83 final 080312.

As the relevant cost standard for setting termination rates should be BU LRIC which reflects the cost of an efficient operator, there should in principle be no asymmetries between the rate of the established operator(s) and the rates of later entrants to the market.

The costing approach favoured by the EC is for NRAs to build a single cost model whose results would be applicable to all operators, both incumbent and OAOs. The proposed cost methodology, pure BU-LRIC, treats as the relevant increment the wholesale call termination service itself (i.e. which includes all fixed and variable costs that would be avoided if the wholesale termination service were no longer supplied) and excludes a mark-up for those common costs which would not be avoided absent the wholesale termination service being supplied. The 2009 EC Recommendation also states that the evaluation of efficient costs should be based on current (rather than historical) costs and on the most efficient technologies available in the timeframe considered by the model. Further, the model measures costs for using a single efficient scale operator (determined based on market share). For instance, the 2009 EC Recommendations sets out the following with respect to mobile termination rates:

To determine the minimum efficient scale for the purposes of the cost model, and taking account of market share developments in a number of EU Member States, the recommended approach is to set that scale at 20% market share.

With respect to the setting of fixed termination rates, the 2009 EC Recommendation noted the following:

To determine the efficient scale of an operator for the purposes of the cost model, NRAs should take into account that in fixed networks operators have the opportunity to build their networks in particular geographic areas and to focus on high-density routes and/or to rent relevant network inputs from the incumbents. When defining the single efficient scale for the modelled operator, NRAs should therefore take into account the need to promote efficient entry while also recognising that under certain conditions smaller operators can produce at low unit costs in smaller geographic areas. Furthermore, smaller operators that cannot match the largest operators' scale advantages over broader geographic areas can be assumed to purchase wholesale inputs rather than self-provide termination services.

In sum, termination rates set pursuant to the 2009 EC Recommendation would reflect the costs incurred by an efficient operator at a particular scale and, therefore, would not necessarily be equal to those costs actually incurred by the incumbent or OAOs. This is not the costing approach URCA has adopted, which is based on a HCA-FDC model for BTC. Consequently, the basis for URCA's proposal to adopt symmetric termination rates in The Bahamas at this time is not consistent with the approach in the EU. There is no basis to assume that the application of a HCA-FDC approach for BTC to set BTC's termination rates would represent an appropriate basis for setting NEO termination rates.

- Both the ERG Common Position and the 2009 EC Recommendation provide for transition mechanisms of up to 4 or 5 years to implement symmetric termination rates. The ERG noted the following:

However, it would not be reasonable to require NRAs to move to symmetric FTRs immediately, as a transition period is justified in order to allow OAOs to reach a sufficient level of operational efficiency in the shortest time possible.

In terms of what may constitute a reasonable period of time, it must be considered that in order to set a path of convergence towards symmetry NRAs will have to undertake a market review. Therefore, it is suggested here that NRAs, in their next market 9 review, should consider setting a path to achieve symmetry in FTRs as soon as possible (e.g. over a period of four to five years taking into account the prevailing local circumstances such as: the actual and forecasted level of competition in the fixed access retail market (in terms of actual number of OAOs and their respective market shares), the date of market opening, the date when asymmetry was established by NRA and its impact on fixed voice markets fluidity, network technologies and topologies, network coverage and offered services.

Second, with respect to URCA's reference to experience "elsewhere" outside of Europe, CBL notes that URCA did not identify any specific country or set of countries on which it could support its conclusion that an "increasing number of regulators have imposed reciprocal or symmetric termination rates". URCA did not provide any evidence to support whether regulators outside of Europe have implemented a policy of termination rate symmetry in greater or lesser number than those that have not.

In this respect, CBL is aware of a number of regulators that currently maintain a policy of asymmetry. A very recent example in this respect is that of Nigeria wherein the Nigeria Communications Commission ("NCC") on March 20, 2013 continued its asymmetry policy first established in 2009¹⁰. Effective April 1, 2013 the rate for voice services provided by New Entrants and Small Operators would be 30.6% higher than for other operators. The NCC defined "New Entrant" as newly licensed operator entering an existing or new market within 0 to 3 years and a Small Operator as an existing operator with a market share of 0 – 7.5% in terms of subscriber base. The NCC determination also continued a transition mechanism, first established in its 2009 mechanism, under which symmetry would be phased in gradually. The transition period is spread over 6 years in total (starting in 2009 to ending April 2015).

Third, and more generally, CBL notes that there is economic evidence supporting the adoption of a call termination regime based on asymmetric charges. A recent study assessing the impacts of *ex-ante* asymmetric mobile termination rate regulation in the EU over the 2002-2006 period (that is, when asymmetry was the norm)¹¹ found that "asymmetric regulation plays a positive role on entrant penetration as well as the competitiveness of Europe's mobile markets". It is important

¹⁰ http://ncc.gov.ng/index.php?option=com_content&view=article&id=1029&Itemid=210.

¹¹ Edmond Baranes and Cuong Hung Vuong, *Ex-Ante Asymmetric Regulation and Retail Market Competition: Evidence from Europe's Mobile Industry*, Technology and Investment, 2011, 2, 301-310.

to note that “competitiveness” in this instance refers to average national retail prices. In this respect, the authors point out that:

...our study shows the asymmetric regulation promotes more aggressive pricing strategy among different sized MNOs. ... From the previous subsection, this is likely due to the fact that late entrants competed more aggressively in the presence of asymmetric regulation to gain market shares. Correspondingly, incumbents had to lower retail prices to avoid loss in market shares, resulting in lower retail prices at market level.

Lastly, as noted, CBL does not consider that NEOs' call termination services should be subject to a price control, regardless of whether it is symmetric or asymmetric. If URCA nevertheless decides to impose a symmetric price control on BTC and NEOs' call termination services, CBL submits that any such mandated change to CBL's call terminations rates should only be implemented on a gradual, phased-in basis over the course of four to five years consistent with practice in other jurisdictions, including Europe.

5 Conclusion

CBL encourages URCA not to adopt a broad brush approach in its SMP assessment of NEOs in the absence of excessive pricing. If call termination rates are to be regulated, then CBL believes that rates should be asymmetric and CBL should be allowed the opportunity to develop its own cost estimates. CBL urges URCA to consider the hardship which will be caused to NEOs if they are made subject to the same SMP Call Termination regulations as BTC.

Respectfully submitted,

Cable Bahamas Ltd.