



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

**STATEMENT OF RESULTS**

**ECS 05/2014**

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UTILITIES REGULATION & COMPETITION AUTHORITY

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# 1 Introduction

On 4 November 2013, the Utilities Regulation and Competition Authority (URCA) released for public consultation the paper titled *“Proposed Review and Revisions to the Regulation of Retail Prices for SMP Operators – Rules”* [ECS 16/2013] (hereinafter referred to as “the Proposed Rules”). That public consultation paper outlined URCA’s review and proposed revisions to reference document ECS 15/2010 *“Regulation of Retail Prices of SMP Operators – Rules”* (“the Rules”) issued on 22 April 2010.

Table 1 below shows the services that are currently subject to the Retail Pricing Rules. BTC and CBL were also found to have SMP in other retail services and products.<sup>1</sup> However, pursuant to section 5 of the Communications Act (Comms Act), URCA chose to forbear from price regulation of those services.

**Table 1: Summary of Services Subject to the Pricing Rules**

SMP Operators	Services subject to Price Regulation
<b>BTC</b>	Fixed Voice Retail: <ul style="list-style-type: none"> <li>○ Fixed telephony access and local calling</li> <li>○ Domestic long distance (DLD) fixed calling</li> <li>○ Domestic calls to rated numbers</li> <li>○ Outgoing international long distance (ILD) fixed calling</li> </ul>
	Mobile Voice Retail: <ul style="list-style-type: none"> <li>○ Mobile access</li> <li>○ Local mobile calling</li> <li>○ Domestic long distance (DLD) mobile calling</li> <li>○ International long distance (ILD) mobile calling</li> </ul> Mobile Data Retail: <ul style="list-style-type: none"> <li>○ Mobile data (e.g., mobile internet, SMS, MMS)</li> </ul>
<b>CBL</b>	Pay TV Retail: <ul style="list-style-type: none"> <li>○ SuperBasic</li> </ul>

## 1.1 Objectives of the Consultation

The objectives of the consultation were to:

- highlight the key issues and concerns raised by BTC and CBL in their opening written submissions on the Retail Pricing Rules;
- outline URCA’s response to the issues and concerns raised by BTC and CBL;
- set forth URCA’s proposed changes and improvements to the Retail Pricing Rules; and

<sup>1</sup>CBL in Digital TV packages, broadband internet access and retail national leased lines; and BTC in broadband internet access in specified areas and retail national leased lines.

- invite comments from stakeholders on URCA’s proposed revisions to the Rules.

## **1.2 Responses to the Consultation**

The original closing date for the receipt by URCA of responses to the consultation paper was 6 December, 2013 which was extended at the request of a prospective respondent to 3 January, 2014.

By the 3 January 2014 closing date, URCA had received three responses from the following organisations:

- Bahamas Telecommunications Company Ltd.(BTC);
- Cable Bahamas Ltd. (CBL) (and on behalf of its affiliated companies Caribbean Crossings Ltd. and Systems Resource Group Ltd.); and
- Digicel Group.

URCA thanks all respondents for their written submissions and participation in the consultation process. The participation by all three organisations was useful and constructive. Copies of all opening written submissions and responses to the consultation may be downloaded from URCA’s website at [www.urbahamas.bs](http://www.urbahamas.bs).

URCA’s lack of response to a particular comment and/or proposal should not be taken to mean that URCA agrees with the comment, has not considered the comment or that it considers the comment unimportant or without merit.

Having reviewed and considered the responses from BTC, CBL and Digicel Group, URCA now provides in this Statement of Results its comments on the responses received and its final decision on the key issues that were raised. Alongside this Statement of Results, URCA has also published the Revised Rules as ECS 06/2014.

## **1.3 Structure of the Remainder of this Document**

The remainder of this document is structured as follows:

- Section 2 - BTC’s Response to the Consultation;
- Section 3 - CBL’s Response to the Consultation;
- Section 4 – Digicel Group’s Response to the Consultation; and
- Section 5 – Conclusion and Next Steps.

## 2 BTC's Response to the Consultation

### 2.1 Summary of Comments<sup>2</sup>

BTC welcomed the opportunity to submit comments on the consultation paper. While acknowledging that the Proposed Rules contain some areas of improved clarity,<sup>3</sup> BTC raised concerns in respect of timeframes, information/data requirements and anti-competitive testing. BTC opined that it is generally disappointed in the outcome of URCA's review, noted that the Rules-based approach to price regulation is no longer fit for purpose and commented that URCA *"... should consider seriously a move to a price cap, as both BTC and Cable Bahamas Limited (CBL) have urged."*

Below, URCA summarises BTC's submission and provides responses to the issues raised. This is structured as follows:

- Firstly, URCA addresses BTC's general comments to the consultation.
- Secondly, URCA responds to BTC's comments on URCA's responses to BTC's opening written submission.
- Third, URCA responds to BTC's comments on URCA's responses to CBL's opening written submission.
- Fourthly, URCA considers BTC's Specific Comments on URCA's Revised Retail Pricing Rules document, including BTC's comments on the relevant economic tests.

### 2.2 General Comments on the Consultation

#### 2.2.1 Impact of URCA's Proposed Changes to the Rules

BTC stated that URCA's proposed changes to the current Rules are contrary to the statutory framework for regulation of electronic communications markets in The Bahamas. BTC argued that the current Rules process is time consuming for SMP operators and URCA. BTC perceived the proposed revisions to the Rules as disproportionate, and not fit for purpose, while increasing the regulatory burden on operators, and reducing operators' commercial flexibility. BTC claimed that URCA's proposed revisions make the Rules more onerous than the current Rules and imposed new burdens on operators, such as the requirements for:

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<sup>2</sup>BTC stated that it *"reserves the right to comment further on all issues and states categorically that the decision not to respond to any issue raised on this Consultation in whole or in part does not necessarily indicate agreement in whole or in part with URCA's position; nor does any position taken by BTC in this consultation mean waiver of any of BTC's rights in any way. BTC expressly reserves all rights."*

<sup>3</sup>BTC gave as examples the definition of new services, expanded definition of One Week Special Promotions and outline of the various competition tests.

- SMP operators to specify the relevant wholesale services and associated prices required by alternative operators to replicate the underlying retail offering.
- 2 years of actual and projected subscriber and revenue data broken down by month against the existing requirements for one year of actual and projected subscriber and revenue data.

URCA's response to BTC's comments

URCA notes but disagrees with BTC's envisaged impact of the Proposed Rules on SMP providers. URCA states that the substantive revisions to the Rules are based on recommendations made by BTC and CBL in their opening written submissions, in particular:

- (i) BTC's requests for:
- further guidance on the application of anti-competitive tests; and
  - greater pricing flexibility in terms of shorter timeframes for price approvals and a shorter repeat period before the SMP operator can launch a similar Full-Length Special Promotion.
- (ii) CBL's requests for:
- clarification of the Rules process for USO-related services;
  - additional safeguards in respect of on-net and off-net pricing in the mobile market;
  - a clearer definition of non-price terms and conditions that could be expected to affect the effective price paid by customers; and
  - clarification on:
    - what does "*a service [is] materially different to any existing service*" mean; and
    - the application of the *ex-post* competition provisions of the Comms Act to price approvals granted by URCA under the pricing Rules.

URCA was satisfied that the above recommendations fall within the scope of the consultation and URCA's 2010 Final SMP Decision, and are in line with:

- section 119(1) of the Comms Act requiring USPs to offer an affordable charge for USO-related services; and
- section 40(4)(a) of the Comms Act and Condition 34 of the standard Individual Operating Licence (IOL) issued to SMP operators.

For this reason, within the consultation paper, URCA proposed certain amendments to the Rules to take account of the above recommendations put forward by BTC and CBL. Consequential to this URCA proposed in the consultation paper to introduce other changes to the Rules process. URCA was motivated to make these other changes to:

- address certain shortcomings in the Rules process identified by URCA;
- ensure that the Rules process is internally consistent and transparent; and
- provide the appropriate level of guidance and clarification in the Rules requested by BTC and CBL.

It is URCA's view that incorporating the above-stated recommendations into the Rules is neither disproportionate nor imposes an undue burden on SMP providers. From URCA's viewpoint, the changes are fit for purpose having regard to current market circumstances and URCA's 2010 SMP Final Decision.

URCA clarifies that the requirement for SMP operators to specify relevant wholesale services and associated prices required by alternative operators is not a new requirement. The requirement is part of the supporting evidence the SMP operator must provide to URCA to satisfy the requirements of Paragraph 16.8.4 of the existing Rules:

*"..., data on the total costs of providing the service in question (showing separately network (wholesale) and downstream costs, and ..."*

Concerning the proposed requirement on SMP operators for more granular (i.e., monthly) data and a longer review period, URCA notes that this change is necessary in URCA's view to bring greater transparency to the review process and minimize the scope for opportunistic behaviour. URCA accepts that carrying out *ex-ante* anti-competitive tests is information intensive. However, URCA believes that in revising the Rules it has struck a reasonable balance between the need for relevant information without creating a disproportionate burden on operators.

### **2.2.2 Regulation of Price Decreases**

BTC continued its opposition to the application of predation tests to the cellular mobile markets noting that this is further evidence of URCA imposing unnecessary and irrelevant considerations in the Rules process.

BTC commented that anti-competitive tests for price predation and margin squeeze require stable and reliable costing data, and if URCA is satisfied with the costing data presently available then there is justification to move towards price cap regulation and abandon the onerous Rules based approach to regulation.

BTC emphasised that because price reductions are beneficial to customers, URCA should have greater flexibility in granting approvals for price reductions. However, BTC reiterated that rather than simplifying the approval process, URCA has added more layers of data requirement for price changes (including price reductions) to the Proposed Rules.

#### URCA's response to BTC's comments

URCA strongly disagrees with BTC that anti-competitive testing in the mobile market is unnecessary and irrelevant. URCA considers that price predation can be a viable commercial strategy in markets that are not effectively competitive. As URCA understands it, a typical predation strategy involves an operator with significant market presence deliberately pricing below costs in order to eliminate an efficient competitor, so it can then charge excessive prices

in the longer-term. Whilst in the short-run, consumers benefit from lower prices, in the longer-term they will be worse off due to reduced price competition.

URCA advises BTC that this current consultation is not the appropriate forum to debate implementation issues for a price cap. BTC is advised that although URCA generally favours price caps over the current Rules-based approach, URCA is of the view that the sector is not in an appropriate position to depart from the Rules at this time. As such, URCA will maintain a Rules-based pricing framework pending the final outcome of URCA's SMP assessment of key retail markets.

URCA agrees that it should have greater flexibility in granting approvals for price decreases relative to price increases. However, in the context of the Comms Act, URCA must, at all times, strike a reasonable balance between the desire for greater commercial flexibility by SMP providers and other equally important considerations (such as, ensuring a level playing field between the different operators). In its revisions of the pricing Rules URCA was careful to balance these considerations.

Concerning BTC's complaints about more layers of data requirements, URCA again states that in reviewing the Rules it has aimed to strike a reasonable balance between the need for relevant information to inform economic analysis without creating a disproportionate burden on operators.

### **2.2.3 Mobile Market Predation Tests**

BTC claimed that it has no economic incentive to engage in predatory pricing practices in the cellular mobile market given the ramifications for BTC's own profitability. BTC commented that it has found no evidence from other jurisdictions where there is the application of predation tests in the regulation of cellular mobile services. BTC opined that the 2009/2010 market review did not anticipate competitive entry in mobile in the projection period and in order to ensure that remedies are proportionate to the problem identified URCA should specify the kind of predatory conduct it is concerned about in the mobile market.

#### URCA's response to BTC's comments

URCA does not consider it proper for URCA to comment on BTC's incentive or lack thereof to behave predatorily in the mobile market.

URCA reminds BTC that the mobile market in The Bahamas is fairly unique so regulation elsewhere may not be an appropriate test for The Bahamas. Notwithstanding this, there are a number of countries where national regulatory authorities have imposed retail price regulation over mobile networks. In many cases, these regulations limit the ability of regulated licensees to set too low on-net prices and/or large differences between on-net and off-net prices. For example:



- The Telecom Regulating Authority of India specifies the ceiling for the price of all major mobile services on national roaming.<sup>4</sup>
- The United Arab Emirates (UAE) Telecommunications Regulatory Authority required any tariff change to be approved by it before the change could be implemented.<sup>5</sup>
- In Colombia<sup>6</sup>, Qatar<sup>7</sup> and Kenya<sup>8</sup> the regulatory authorities have imposed, at some point, a control over the on-net/off-net price differentials that can be charged by dominant providers.

URCA's primary concern is that without appropriate *ex-ante* measures, BTC might be incentivized to introduce price decreases that could potentially foreclose the mobile market to the introduction of competition. URCA considers that where BTC provides domestic mobile termination services to another mobile operator (for a fee), concerns about price or margin squeezing may arise from a reduction in BTC's retail pricing for mobile services. However, even where BTC provides domestic mobile termination at a zero-charge a price reduction may give rise to concerns about predatory behaviour. The latter is URCA's main concern at this time particularly as the end of BTC's exclusivity period in mobile communication services approaches.

#### **2.2.4 Structure of Competition in The Bahamas**

BTC perceived that retail price regulation should reflect the duopolistic structure of competition<sup>9</sup> and the different cost structures for BTC and CBL. Given this thinking, BTC proposed that:

- Tests for margin squeeze and predatory pricing should be based on the proxy costs of a Reasonably Efficient Operator (REO) test, and not the Equally Efficient Operator (EEO) test specified in the Rules.

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<sup>4</sup>Telecom Regulatory Authority of India, Telecommunication tariff order No 3/2013. The services subject to the price cap include: outgoing local voice calls while on national roaming, outgoing long distance (inter-circle) voice calls while on national roaming, incoming voice calls while on national roaming, outgoing local Short Message Services (SMS) while on national roaming and outgoing long distance (inter-circle) Short Message Services (SMS) while on national roaming.

<sup>5</sup> Telecommunications Regulatory Authority, Regulatory Policy: Price Control, 23/09/2008. Note that price controls on pre-pay mobile services have recently been relaxed.

<sup>6</sup> Comisión de Regulación de Telecomunicaciones, Resolución No 2066/ 2009.

<sup>7</sup> Supreme Council for Information and Communications Technology, Order ICTRA 2011/05/15.

<sup>8</sup> Communications Commission in Kenya, determination No 2/2010.

<sup>9</sup>According to BTC the basic structure of the fixed telephony market has settled down to two facilities-based operators and this is the pattern found elsewhere in the Caribbean. BTC added that given current Government policy only one mobile licence would be issued in 2014, thus resulting in a duopoly in fixed and mobile markets.

- Price regulation should focus more on protecting consumer interests rather than on competitive effects.

#### URCA's response to BTC's comments

In view of BTC's response, URCA considers the need to clarify what is meant by adopting the EEO standard when undertaking competition tests (such as margin squeeze, predation or undue price discrimination tests), as proposed in the Rules.

Applying an **EEO standard** implies evaluating whether the SMP operator could profitably provide the set of services under consideration at the stated prices taking into account its own downstream costs, the wholesale prices that alternative operators would have to pay to the SMP operator in order to provide these retail services and any other relevant network costs incurred by the SMP operator. If none of the SMP operator's wholesale service is required to provide the retail services, the test takes into consideration the SMP operator's end-to-end cost for providing the relevant services. Hence, an EEO test is based on the information available to the SMP operator to which the test is applied.

By contrast, adopting an **REO standard** would imply asking the SMP operator to provide an estimate of the costs faced by a reasonably efficient alternative operator (i.e., the REO). URCA considers it is likely that the SMP operator may not know the relevant cost of the REO. URCA further notes that the unit service costs under an REO standard are likely to be higher than the unit service costs that would result under the EEO standard. This is because the REO standard usually implies adjusting the costs (upwards) for potential sources of inefficiencies that the alternative operator may face (such as, for example, not having reached the minimum efficient scale). Thus, all other considerations being equal, the REO standard reduces the chances of the relevant competition test being passed.

Thus, by adopting the EEO standard, URCA allows the SMP operator to base the analysis on its own cost information.

URCA also does not share BTC's view that a duopolistic market structure justifies the application of an REO test. As stated by BERC (formerly ERG), the choice between adopting an EEO or an REO approach will depend on a number of factors and, crucially, on the objectives being followed by the regulators:

"The test to be used is very dependent on the specific circumstances of the case and the objectives of the NRA. For example, if the market is mature and the main aim is to promote competition then there might be merit in using the REO test. ..., if there is a concern to protect the investment and innovation incentives for the SMP operator then the EEO test might be more suitable. This means that whichever test is chosen will ultimately depend on the market situation and NRAs objectives." <sup>10</sup>

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<sup>10</sup>ERG (09) 07 Report on the Discussion on the application of margin squeeze tests to bundles, March 2009.

On the other hand, the European Commission in its 2013 Recommendations on non-discrimination and costing principles established that an REO test can be justified:

- where market entry or expansion has been constrained in the past; or
- where other operators only have very limited number of connections, in particular if these are limited to particular (urban) areas relative to the SMP operator and that the general economic and/or operating environment seem to suggest that the alternative operators will struggle to reach a particular scale.

URCA considers that in the Bahamian context none of the criteria established by the European Commission presently obtains in either the fixed telephony or broadband markets.

Therefore, in URCA's view the margin squeeze/predatory tests shall be based on the EEO standard, unless there is a robust justification for adopting an REO standard. This is in line with international precedence as URCA understands that the EEO method is the most common approach employed by regulators around the world to perform anti-competitive tests. Examples include the regulator in Spain for the *ex-ante* analysis of retail offers by Telefónica<sup>11</sup> and the regulatory authority in Austria.<sup>12</sup> Also, a review carried out by BEREC in 2009<sup>13</sup> on the application of margin squeeze tests to bundles showed that *"For the majority of NRAs that perform an ex-ante MQS analysis the only source of information on costs is the SMP firm"*.

The Proposed Rules further make reference to a potential need for adjustments to the costs considered in the relevant economic test. URCA reminds BTC that these adjustments are not specific to the choice of the EEO vs. REO standard. Instead, the adjustments relate to the costing information available to the SMP operator. Ideally, and as stated in the Proposed Rules, the relevant competition test should be based on the long run incremental cost (LRIC) of providing these services. However, such costing data is not presently available in The Bahamas, as both SMP licensees (BTC and CBL) only develop fully allocated costing (FAC) data. Applying a margin squeeze/predatory price test based on FAC (rather than LRIC) may lead to the test not being passed since FAC-based unit costs are higher than LRIC-based unit costs. This is particularly the case when the FAC estimates are based on a historic rather than current cost basis – as currently is the case in The Bahamas. As such, there may be a case for allowing for adjustments to FAC-based costing data to approximate more closely the actually required LRIC-based costing data. However, this may only become necessary if the relevant competition test is not passed using

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<sup>11</sup>CMT decision AEM 2006/1486 at [http://www.cmt.es/c/document\\_library/get\\_file?uuid=7d351f1c-e52f-4404-b83c-63b6654cba5e&groupId=10138](http://www.cmt.es/c/document_library/get_file?uuid=7d351f1c-e52f-4404-b83c-63b6654cba5e&groupId=10138).

<sup>12</sup>Rundfunk & Telekom Regulierungs GmbH (RTR) (2010): Margin Squeeze Überprüfungen in der sektorspezifischen ex ante-Regulierung für Telekommunikationsmärkte – Kritische Punkte und neue Herausforderungen; Telekom-Control-Kommission (TKK) (2010): Bescheid M 1/10-92; TKK (2010): Bescheid M 3/09-103; TKK (2008): Bescheid R 4/07-49; Schwarz, A. (2010): Margin Squeeze – (neue) Herausforderungen, RTR; Serentschy, G. (2010): Warum das Thema Margin Squeeze und warum gerade jetzt?, RTR; Solé, E. (2010): Margin Squeeze – bisherige Überlegungen der TKK, TKK.

<sup>13</sup> ERG (09) 07.

the FAC cost standards. URCA may, if in its opinion the circumstances warrant it, dismiss any adjustments to the FAC costing data made by SMP operators if these are not fully justified and evidenced as part of the operator's submission.

Regarding the objectives of the price regulation, BTC should understand that URCA reviews each price application on its merit, taking into consideration the specific economic context of the application. In this regard, some price reviews may require greater focus on consumer protection while in other cases it is necessary to focus more on competitive effects. However, it is worth remembering that competitive effects and protecting the interest of customers are not mutually exclusive concepts. Indeed, URCA's own experience in the operation of retail price control confirms that most price applications require URCA to strike a reasonable balance between these two concepts.

### **2.2.5 Learning curve**

BTC has urged URCA to pass on the benefits of experience and additional resources in the operation of retail price control to operators in the form of faster decision making by URCA and shorter timescales in the Rules.

#### URCA's response to BTC's comments

URCA in principle agrees with BTC that operators should benefit from efficiency improvements in the operation of retail price control. However, it is worth reminding BTC that URCA does not operate independently of the industry and major licensees and URCA's productivity in retail price control is heavily dependent on the level of efficiencies or lack thereof within the regulated companies.

From URCA's viewpoint, BTC has been benefitting from efficiency improvements within URCA in the operation of the retail price control. While URCA has consistently granted price approvals over shorter timeframes than specified in the Rules, its ability to expedite price approvals is sometimes constrained by factors outside of its control.

Finally, URCA is not averse to shorter timeframes in the Rules where this would not compromise its ability to properly assess price applications.

### **2.2.6 Transparency**

BTC claimed that the consultation is deficient because *"URCA has not highlighted or justified any of the changes made to the Retail Pricing Rules"*. BTC is of the view that at the least URCA should convene a meeting with operators to *"explain the detail and justification for its changes"*. In BTC's way of thinking, *"In the absence of such a meeting this process would be devoid of the transparency upon which such regulatory procedures are usually predicated."*

#### URCA's response to BTC's comments

As previously discussed at Section 2.2.1 above, URCA's substantive revisions to the Rules are based on recommendations made by BTC and CBL in their opening written submissions. In early

2013, URCA invited BTC and CBL to make opening written submissions, along with justification, regarding proposed changes or amendments to the 2010 Retail Pricing Rules (ECS 15/2010). URCA accepted some of the recommendations made by both companies where URCA considered them to be within the scope of the consultation, URCA's 2010 SMP Final Decision, the Comms Act and relevant licence conditions. URCA made further changes to the Rules to address shortcomings in the Rules process identified by URCA, ensure that the Rules are internally consistent and transparent, and provide the appropriate level of guidance in the Rules requested by BTC and CBL. Subsequent to receiving BTC's and CBL's opening written submissions, URCA, in accordance with the Comms Act, released ECS 16/2013 for public comments. In that document, URCA highlighted the key issues and concerns raised by both companies, outlined URCA's responses to the issues and concerns raised and set out URCA's proposed changes and improvements to the Rules.<sup>14</sup>

Under section 11(1)(b) of the Comms Act, URCA is required to consult and afford “... *persons whose rights or interests may be materially adversely affected or prejudiced by the proposed regulatory and other measures ...*” a reasonable opportunity to comment on URCA's proposals. The procedures outlined above demonstrate that URCA has been both complaint and consistent with the transparency and other consultation requirements of section 11 and section 13(1) of the Comms Act. URCA therefore considers that BTC's criticisms of the process used in this proceeding have no basis in law and are therefore without merit.

## **2.3 URCA's Responses to BTC's Opening Submissions**

### **2.3.1 Exercise of Regulatory Forbearance**

BTC urged URCA to adopt light-touch regulation. Consistent with this view, BTC was of the opinion that price decreases should be subject to fewer checks and a faster decision making process than price increases. BTC proposed that only price increases, new services and bundles should be subject to the Rules process.<sup>15</sup>

#### URCA's response to BTC's comments

Concerning BTC's urging for light-touch regulation, URCA reminds BTC that URCA may refrain or forbear from *ex-ante* regulation and resort to light-touch regulation when light-touch regulation is compatible with achieving the objectives and guidance in sections 4 and 5 of the Comms Act. Consistent with section 5, URCA would resort to light touch regulation, to the extent URCA

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<sup>14</sup>URCA set out its responses to BTC and CBL's opening written submissions at Section 4 of the consultation paper, summarized the main proposed changes to ECS 15/2010 and invited comments from stakeholders on URCA's proposed revisions to the Rules.

<sup>15</sup>This means that price decreases would not be subject to the pricing Rules and URCA would address price-related concerns on an *ex-post* basis.

considers it appropriate, when there is sufficient competition to further the interests of communications users in The Bahamas.

URCA considers that BTC's proposal to remove price decreases from *ex-ante* review and approval is contrary to URCA's 2010 SMP Final Decision.

URCA is not averse in principle to fewer checks and a faster decision making process for price decreases relative to price increases. However, as stated above, in the context of the Comms Act, URCA must strike a reasonable balance between the desire for greater commercial flexibility by licensees and other equally important regulatory considerations. In particular, price reductions could lead to a distortion of competition in the medium or longer term if the proposed prices cannot be replicated, in an economic sense, by alternative operators. In such a scenario, a price decrease by an SMP operator may lead to the exclusion of existing operators or to deterring entry from potential new operators. It is important that URCA examines this possibility in reviewing price applications.

Furthermore, URCA reminds BTC that URCA can only expedite its review of applications under the Rules where all information is provided by the applicant in its initial submission and in a manner and form which complies with all the requirements of the Rules. As such, all parties in the market have a role to play in ensuring the efficient functioning of the Rules.

### **2.3.2 Greater reliance on Ex-post Competition Powers**

BTC urged URCA to place greater reliance on *ex-post* regulation, stating that this is the path taken by most regulators as competition develops. BTC again stated that URCA's proposals run counter to the international experience by imposing greater *ex-ante* regulatory burdens on operators. BTC also reminded URCA that under section 5(b)(ii) of the Comms Act, URCA must have regard to the cost and implications of regulatory measures on affected parties. BTC was of the view that URCA's review of the Pricing Rules is not compliant with this requirement.

#### URCA's response to BTC's comments

URCA again reminds BTC that the greater reliance on *ex-post* competition rules in other jurisdictions is not a justification to remove *ex-ante* regulation in The Bahamas. In other countries, regulatory authorities have progressively removed *ex-ante* regulation where competition has emerged in markets that were traditionally regulated. The market reviews undertaken by URCA to date do not support the removal of *ex-ante* regulation in certain markets. Only when effective competition develops within these markets will URCA consider the removal of the *ex-ante* obligations and instead rely more on *ex-post* competition rules.

URCA maintains its position that an appropriate level of *ex-ante* intervention is necessary to prevent undesirable conduct by an operator found to have SMP in a given market. Such regulation is in nature anticipatory and intended to shape the behaviour of SMP firms directly. In contrast, the purpose of *ex-post* regulation is to shape or modify behaviour in an "after-the-

fact" fashion through investigations and enforcement actions in response to allegations of anti-competitive conduct. From URCA's viewpoint, given current market circumstances in The Bahamas, less reliance on *ex-ante* measures poses tremendous risk for competition because significant time would elapse before an abusive behaviour can be stopped, with potential harm already being done to the market during that period. As noted by the ERG "... *the possibility of resorting to swift remedial action ... via the NRA's intervention should always remain open, and in many instances will be more capable of redressing the problem than the ex post application of the competition rules.*"<sup>16</sup> [Emphasis added].

URCA does not agree with BTC's claim that URCA has added new burdens on SMP operators in the Proposed Rules and that URCA's proposals are out of step with section 5(b)(ii) of the Comms Act. URCA previously responded to these comments at Section 2.2.1 above and there is no need to repeat those arguments here.

URCA affirms that the Proposed Rules (including incorporated recommendations from the operators) are in conformity with section 5(b)(ii) of the Comms Act and URCA's 2010 SMP Final Decision. In proposing revisions to the Rules, URCA has taken into consideration its view as expressed in the 2010 SMP Final Decision that "... *market forces are unlikely to achieve the electronic communications policy objective within a reasonable time*" and in formulating the rationale for the Rules and the Proposed Rules it has given "... *due regard to the costs and implications of those regulatory and other measures on affected parties*" as required by section 5(b) of the Comms Act.

While acknowledging that an *ex-ante* measures (such as pricing Rules) will have varying levels of compliance cost and other implications for SMP operators, URCA considers that these costs and implications will be offset to the extent that *ex-ante regulation* is necessary to protect the market from the potential harm of any anti-competitive pricing behaviour.

### **2.3.3 Greater Transparency of the Approval Process**

BTC opined that URCA should have regard to section 5(b)(ii) of the Comms Act when requesting information from SMP operators under the Rules.

#### URCA's response to BTC's comments

URCA notes BTC's reference to section 5(b)(ii) of the Comms Act which states that all policy measures to take effect shall have "...*due regard to the costs and implications of those regulatory and other measures on affected parties.*" BTC is reminded that the provisions in the current and Proposed Rules regarding the supply of information from SMP operators are counterbalanced by and consistent with provisions such as section 8(1)(k) of the Comms Act. Under section 8(1)(k), URCA has the power to require any licensee to furnish such information as URCA may require and Condition 5 of the IOL requires all holders of such licences to provide

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<sup>16</sup>ERG (09) 21.

URCA with information whenever requested to do so. While URCA acknowledges that SMP operators will have varying levels of compliance costs and other implications in providing requested information, URCA considers that these costs and implications are minimal if not insubstantial and should be readily available given modern technology and the nature of the SMP operator's business. Moreover, the benefits to SMP operators of collating and retaining the type of information required under the Rules offset the likelihood of delays in the application process and the ensuing increased costs (expressed in terms of time and expense) of having to retrieve and compile uncollated data from the beginning.

#### **2.3.4 Predictability of the Rules**

BTC stated that it *"is obliged to URCA for the detail provided in relation to margin squeeze and bundles tests"*.

##### URCA's Response

URCA is appreciative of BTC's comment.

#### **2.3.5 Need for Greater Pricing Flexibility**

BTC proposed that price regulation of fixed and mobile services must be based on an analysis of packages, rather than individual services.

BTC again urged URCA to pass on the benefits of experience and additional resources in the operation of retail price control to operators by reducing significantly the timescales for URCA's decision and thus improving URCA's performance. BTC noted that regulatory authorities must act and have a duty to act in an efficient and responsive manner.

##### URCA's response to BTC's comments

URCA notes that the current and proposed Rules allow for analysis of packages (and bundles) and standalone services. In particular, the scope of relevant economic tests, in terms of the services included in the analysis of a proposed price change, shall ultimately be determined by the way in which the services are commercialized and acquired by customers, as well as the form of entry that may be foreclosed.

However, URCA will amend Paragraph 56 of the Proposed Rules to clarify the above (i.e., allowing for the application of the test to more than one service when this is necessary, given the characteristics of the market).<sup>17</sup>

Regarding BTC's urging for efficiency improvements in the operation of retail price control, URCA refers BTC to Section 2.2.5 above.

As stated above, URCA stresses that it is not averse to assessing applications over shorter timeframes than those set out in the Rules where this would not compromise URCA's ability to

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<sup>17</sup> See Paragraph 63 of the Revised Rules



properly evaluate price applications. In this regard, it is important to note that for URCA to be able to assess the applications within a shorter timeframe it is necessary for BTC and other SMP operators to provide more complete submissions.

### **2.3.6 Restructured Pricing Rules**

BTC commented that the reduction in the number of days between similar promotions (from 120 to 90 days) is not material given the frequency with which BTC expects to run special promotions.

BTC went further and commented that given the absence of competition in mobile there is no justification of 14 calendar days for approval of a Full-Length Promotion.

#### URCA's response to BTC's comments

URCA is satisfied that the reduction in the repeat period between similar promotions to 90 days is material and not unduly restrictive, especially when consideration is given to other changes made to the Rules process for Special Promotions (see Section 2.5.2 below).

After much deliberation of BTC's comments on the approval period for a Full Length Promotion, URCA has concluded that the current approval period should remain. This is because URCA considers that there are greater regulatory and competition risks associated with Full Length Promotions relative to promotions of shorter duration.

## **2.4 BTC's Comments on URCA's responses to CBL's Opening submission**

### **2.4.1 Existing Rules neither Efficient nor Proportionate**

BTC fully endorsed CBL's statement that the current Rules are neither efficient nor proportionate and are better suited for the monopoly environment of the past rather than the current market in which there is competition. BTC stated that there is a significant risk that the Rules are no longer proportionate to any market issues identified in the *current* market circumstances, particularly in the fixed markets where competition has developed.

#### URCA's response to BTC's comments

URCA considers that its understanding of current market circumstances in The Bahamas provides no support for BTC's risk assessment in respect of the efficiency and proportionality of the Rules in fixed or other SMP markets or BTC's assertion that the Rules might be disproportionate relative to the market issues identified in URCA's 2010 SMP Final Decision. As URCA stated and for the reasons given at Section 2.2.2 above, URCA is of the view that the sector is not in an appropriate position to depart from the Rules-based method of price control at this time.

#### 2.4.2 Treatment of Price-Regulated USO-related Services

BTC stated that URCA has imposed new responsibilities on USPs seeking to change prices for price regulated USO-services by requiring USPs to demonstrate:

- affordability; and
- that price increases are beneficial to customers and the telecommunications sector.

BTC perceived that these "... concepts are impossible to demonstrate effectively, and ... the idea that price increases can be beneficial to consumers and other operators is mistaken." BTC stated that URCA never defined the term 'affordability' or how the USP should demonstrate that price increases can be beneficial to customers. BTC was of the view that these concepts must be explicitly supported by URCA's guidelines. BTC concluded that there is no need for additional requirements when price changes are made to universal services, and proposed that Paragraphs 49-52 of the Proposed Rules should be removed.

##### URCA's response to BTC's comments

URCA contends that it has not imposed any new USO responsibilities on USPs. URCA refers BTC to its statutory obligation to provide USO-related services at an affordable price. As previously discussed above (Section 2.2.1) the current Rules are not properly aligned with section 119(1) and Schedule 5 of the Comms Act requiring USPs to offer an affordable charge for USO-related services. Therefore, as part of the current review it was important that URCA clarify in the Proposed Rules how a price application for price regulated USO-services should be filed and the requisite criteria needed for URCA's evaluation. CBL also urged URCA to address this issue when reviewing the Rules.

Referring to the need for details on the required approach for assessing affordability, URCA will be issuing for consultation and stakeholder comments, as soon as legally possible, a comprehensive set of guidelines on affordability assessment for universal service.<sup>18</sup>

URCA advises BTC that it would not be compatible with the statutory framework of the Comms Act for URCA to incorporate affordability guidelines in the pricing Rules. BTC should remember that the pricing Rules only apply to retail services, which are price controlled as a result of an SMP assessment. In the context of universal service policy in The Bahamas, some services are not price regulated and therefore fall outside the remit of the pricing Rules. For this reason, URCA is of the view that a separate document on affordability assessment for USO-related services is the correct and most efficient way to proceed on that issue.

URCA sees some merit in BTC's comment that it would be difficult for USPs to demonstrate effectively that price increases are beneficial to customers and the electronic communications sector.<sup>19</sup> URCA made this revision to the Proposed Rules to give USPs greater flexibility.

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<sup>18</sup>The document includes the factors which URCA would expect a USP to take into account when measuring the affordability of services and hence how URCA will ultimately judge such assessments.

<sup>20</sup> Section 39(1) of the Comms Act.

However, in light of BTC's comments on the issue URCA will delete this provision from the Proposed Rules.

### **2.4.3 Undue Price Discrimination in Mobile**

BTC asserted that URCA's review of the Rules in respect of off/on-net price discrimination is not supported by the 2009 market review, as competitive entry in the mobile market was not anticipated during the projection period. As such, there is no legal basis for URCA to address competition concerns related to competitive entry in the mobile market.

#### URCA's response to BTC's comments

URCA considers that BTC has been misguided in its comment on undue price discrimination testing in the mobile market. URCA reminds BTC that section 40(4)(a) of the Comms Act and Condition 34 of the standard IOL prohibit BTC and other SMP providers from unduly discriminating against particular persons or a particular description of persons in relation to their service offerings. This prohibition against undue discrimination is a non-discretionary condition and applies to all markets in which BTC has been deemed or determined to have SMP (including cellular mobile) and regardless of whether or not the service is classified as price regulated.

URCA notes but disagrees with BTC that there is no legal basis for URCA to apply anticipatory or *ex-ante* safeguards in the mobile market. URCA considers that it must ensure that a level playing field exists for competition to flourish between operators. URCA is not aware of any decision arising from its 2010 market review process and final decision, any other regulatory measure or any provision of the Comms Act limiting URCA's ability in this respect. URCA stresses that its concerns about price predation and other undesirable conduct arise so long as BTC "*... enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable degree independently of its competitors, consumers and subscribers*".<sup>20</sup> URCA notes that the statutory provision is based on what BTC is capable of doing and does not require an abuse of a dominant position for it to arise. URCA is of the view that the use of the word "appreciable" in the section means that BTC may behave at a level that may be noticeable or considered important by URCA.

### **2.4.4 Implementation of a Price Cap for BTC's Fixed Line Services**

BTC continued to express strong support for a price cap, outlined a broad set of principles for a price cap for BTC, and inquired about URCA's envisaged steps towards a price cap for BTC's fixed line business.

BTC opined that CBL's comment on price cap is contrary to international practice and stressed that The Bahamas should not deviate from international practice, which has a proven track record of successful competition.

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<sup>20</sup> Section 39(1) of the Comms Act.

### URCA's response to BTC's comments

URCA notes BTC's views on a price cap design and structure for BTC. URCA also recognizes that BTC and CBL hold opposing views on this issue.

On URCA's envisaged steps toward a price cap for BTC, BTC is reminded that URCA's preliminary thinking was outlined in the consultation paper (see Section 3.2.8 thereof) and was for guidance purposes only.<sup>21</sup> URCA is unable to provide a more detailed plan (including timeframes) or roadmap, at this time, as it must await the outcome of its assessment of competition in key retail markets.

## **2.5 Specific Comments on URCA's Proposed Retail Pricing Rules**

### **2.5.1 Public Consultation**

BTC perceived that public consultation:

- is a major uncertainty in rolling out a price change, especially as competition in mobile is introduced;
- results in significant damage to the commercial market by giving the SMP operator's competitors plenty of prior notice of price changes; and
- the public will be opposed to price increases and in favour of price decreases, and public consultation is of little value for most price changes.

BTC would like URCA to clarify when URCA thinks that public consultation is necessary on price changes. BTC proffered that public consultation should take place only when substantial changes to the underlying structure of prices is proposed such as the introduction of CPP or the withdrawal of a service. BTC then suggested that the last sentence of Paragraph 14.2 of the Proposed Rules should be reworded as *"URCA will consider undertaking public consultation when a significant change to pricing structures or a withdrawal of a service is proposed."*

### URCA's response to BTC's comments

Referring to BTC's urging for less engagement with the Bahamian public on price increases, URCA considers that this is at odds with section 11(1)(b) of the Comms Act requiring URCA to consult with persons whose *"...rights or interests may be materially adversely affected or prejudiced..."* by URCA's decision [Emphasis added]. In URCA's view, any proposal to permanently increase the price of a regulated service is a matter of public significance and in those circumstances URCA must consult with the public. Furthermore, the obligation to publicly consult on permanent price increases is reinforced by section 13(1) of the Comms Act:

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<sup>21</sup>"... Given the lapse in time since URCA's 2010 market review would be critical to a consultation on price cap regulation in The Bahamas. ... based on the outcome of URCA's upcoming study of the competitive conditions in key retail markets, URCA will consider what remedies to impose including the feasibility of alternative forms of retail pricing schemes."

*“A regulatory and other measure is likely to be of public significance if it relates to electronic communications services or networks and can lead to one or more of the following —*

- (a) involve a major change in the activities carried on by URCA under this Act*
- (b) a significant impact on persons carrying on activities in those areas where URCA has functions under this Act; and*
- (c) a significant impact on the general public in The Bahamas.”*

Furthermore, URCA considers that it would be ultra vires both the Comms Act and the Retail Pricing Rules<sup>22</sup> for it to adopt BTC’s proposal.

URCA is not disputing BTC’s argument that in all likelihood the public will be generally opposed to price increases and in favour of price decreases. However, URCA considers that this does not, in any way, mean public consultations for price increases are without merit or of little value to URCA or the Bahamian public. In their responses to URCA’s consultation on BTC’s price application for calls to local directory enquiry services, members of the public put forward a number of constructive proposals on, amongst other things, how best to minimize any adverse impact of the price change on vulnerable groups. This was also URCA’s experience in 2012 during the public consultation on CBL’s application for a price increase of its SuperBasic television service.<sup>23</sup>

URCA finds BTC’s claim that public consultation is a major uncertainty in the rolling out of a price change in SMP markets (especially cellular mobile) baseless and self-serving. BTC should remember that under the current and Proposed Rules, public consultation is required only in limited cases<sup>24</sup> and since the introduction of the Rules in April 2010, most price applications are for price decreases rather than increases. Indeed, since the inception of the Rules in 2010, URCA has conducted only two public consultations on price increases. Most applications are for price decreases and temporary price changes and URCA’s expectation is that this pattern will continue on a going forward basis.

Finally, URCA notes but disagrees with BTC’s suggested change to Paragraph 14.2 (last sentence) of the Proposed Rules. URCA considers that the proposal is unduly restrictive and is likely to remove some matters of public significance from public consultation. Given the dynamism in communications markets URCA cannot predict all of the factors that may trigger a public consultation under the Rules. At the same time URCA considers that the current wording of Paragraph 14.2 is sufficiently flexible to admit other factors (or matters of public significance)

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<sup>22</sup>This is a regulatory measure issued by URCA under section 116 imposing an obligation similar to that envisaged in section 40(1)(d) of the Comms Act.

<sup>23</sup> ECS 03/2013 dated 2 February 2013 and available at [www.urcabahamas.bs](http://www.urcabahamas.bs).

<sup>24</sup>That is permanent price increases, and the withdrawal and/or discontinuation of price-regulated services.

that might arise in the foreseeable future while remaining fit for current purposes. As such, URCA will not amend the last sentence in Paragraph 14.2 as proposed by BTC.

## **2.5.2 Relevant Timeframes within the Rules**

### **i) Timeframe for URCA's Decision - Permanent Price Applications (increases/decreases)**

BTC perceived that given experience, URCA should now be able to reduce the timescale for a response from 5 days to 3 days (para. 14.1).

#### URCA's response to BTC's comments

URCA considers that the shorter response period proposed by BTC would severely prejudice URCA's ability to properly evaluate the completeness of price applications. This is especially the case where the application gives rise to anti-competitive concerns.

### **ii) Public notification – Permanent Price or Service Changes**

BTC did not understand why a notice of a price change should take place within 30 days of URCA's decision and why the decision should lapse if this does not take place. BTC argued that the marketing of a price change is a commercial matter not a regulatory matter and this requirement should be removed. Further, the requirement to "... *publish the notice in a newspaper is archaic, ineffective and costly, and an announcement on a website should be sufficient.*"

BTC then suggested that URCA revise Paragraphs 15.1 and 15.2 of the Proposed Rules, as follows:

*"15.1 In the event of a price decrease (for either a Single Price Regulated Service or a Price Regulated Bundle), the SMP operator must, give subscribers at least fourteen (14) calendar days' notice of the price change and advertise the change prominently on its website.*

*15.2 For all other price or service changes (including the introduction of new services deemed by URCA to be Price Regulated Services), if the implementation date differs from that set out in the corresponding application, the SMP operator shall notify URCA at least five (5) calendar days before the price or service change takes effect."*

#### URCA's response to BTC's comments

URCA is not persuaded by BTC's argument that the marketing of a price change is a commercial matter not a regulatory matter and advises that the proposal for decisions to lapse after 30 days is to ensure timely implementation of URCA's decisions and minimise the scope for opportunistic behaviour which concerns are not alleviated if the SMP operator decides to issue the notice at its leisure more than 30 days after URCA's decision. URCA is satisfied that 30 days is a sufficient period for SMP operators to effectively implement URCA's decision on a price or service change.

URCA advises that although the marketing of a price or service change is largely a commercial matter, it is important for URCA to maintain regulatory oversight on when and how its decisions are implemented.

URCA is not persuaded by BTC's arguments against the requirement to "publish the notice in a newspaper". URCA considers the publishing of the notice in a newspaper to be beneficial to persons without regular access to the internet, persons residing in the Family Islands and/or persons unfamiliar with the use of or have limited or no access to the technology.<sup>25</sup>

**iii) URCA's decision period - Permanent Price Change (Single Price Regulated Services)**

BTC stated that it is opposed to the 30 business day period for a regulatory decision<sup>26</sup> and suggested that the timeframe should be reduced to 10 and 15 business days for price decreases and price increases, respectively, to enable operators with significant market presence to respond more rapidly to market changes, especially with the advent of competition in mobile.

URCA's response to BTC's comments

URCA clarifies that the Proposed Rules provide for 20 (and not 30) business days for URCA to respond to SMP operators with its decision on a price decrease. URCA considers the current 20 business days to be reasonable. In URCA's view, the shorter period (10 business days) proposed by BTC would prejudice URCA's ability to properly evaluate an application for a price decrease especially if the application gives rise to anti-competitive concerns.

Because a price increase is a matter of public significance, URCA, pursuant to section 13(1) of the Comms Act, must consult with the Bahamian public on the application. The current and Proposed Rules afford members of the public a minimum period of 30 calendar days to make written submissions to URCA on a permanent price increase request. Given the archipelagic topography of The Bahamas, the 15 business days proposed by BTC is unrealistic and would severely diminish public participation in URCA's decision-making.

**iv) Notification period - One Day Promotions**

BTC welcomed the removal of the cap on the number of single day promotions in a year. BTC is concerned that URCA's approval/disapproval of a single day promotion would be communicated only the day prior to the effective launch of the promotion. In BTC's view, this would not give an operator sufficient time to change its plans efficiently. BTC went further and suggested that URCA should notify the operator of its decision three (3) business days before the planned

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<sup>25</sup>BTC is reminded that, in addition to publishing the notice in a newspaper, BTC is required under its operating licence and other regulatory measures issued by URCA to also publish the notice on BTC's public web page, verbally provide the information to customers, send copies of the said notice (free of charge) to customers if so requested either by post or electronically and make the information available (free of charge) in all of their retail business offices. See Condition 17.3, Condition 17.4 and/or Condition 35 of the standard Individual Operating Licence and the Consumer Protection Regulations [ECS 19/2013] particularly Part 2.1.4 thereof.

<sup>26</sup> Paragraph 22 of the Proposed Rules.

launch date, and if this is not received within this timescale, the operator may deem the notification approved.

URCA's response to BTC's comments

In light of BTC's concern, URCA will amend the Proposed Rules to reflect BTC's proposal on URCA's confirmation of a notification in respect of a One Day Promotion.

URCA advises that this new notification timeframe (three (3) business days) would also apply to a special offer or discount for a Price Regulated Service 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 (**'Short Term Promotion'**).

Based on further review of BTC's comments (including comments at Section 2.5.2 (vi) below) on Special Promotions, URCA concluded that it would be appropriate to further streamline the Rules process for temporary price changes (i.e., Special Promotions). This change was deemed necessary to give SMP operators additional flexibility. As such, URCA has amended the proposed Rules to remove the distinction between One Week and One Day Promotions. This means that there will now be two (2) categories of Special Promotions: (i) Short-term Promotions (formerly One Day and One Week); and (ii) Full Length Promotions.

Readers are referred to Section 2.5.2(vi) below and Part E of the Revised Rules.

**v) Repeat period - Full-Length Special Promotions**

BTC commented that the reduction in the repeat period (from 120 to 90 days at Paragraph 27 of the Proposed Rule) should go further in anticipation of mobile competition. As special promotions will become more common in a competitive mobile environment, the repeat period should be further reduced to 60 days.

URCA's response to BTC's comments

URCA is satisfied that the reduction of the repeat period to 90 days is material, and that the revised period is not unduly restrictive, especially when consideration is given to other changes made to the Rules process for special promotions. Readers are referred to Section 2.5.2 (iv) above, and Section 2.5.2 (vi) and Section 2.5.3 (ii) below.

**vi) Decision Period for Special Promotions**

BTC contended that the decision period for special promotions at Paragraph 29 of the Proposed Rules should be reduced to 3 days for One Week Promotions (now classified as Short Term Promotions) and 5 days for Full Length Promotions.

URCA's response to BTC's comments

URCA has carefully considered BTC's comments on this issue, and has concluded that the Rules process, including minimum information requirements (see Section 2.5.3 (ii)) applicable to



short-term promotions of varying duration (e.g., One Day, Two Days, One Week) should be the same (including the reduction to a 3-day URCA notification period). As such, the SMP operator would not be required to set out how its proposed short-term promotion meets the competition tests specified in the Rules.

However, as the above decision is based on the limited duration of Short Term Promotions and, hence, the limited impact these may have on market competitiveness, URCA considers it necessary to further clarify the definition and scope of Short Term Promotions. In particular, URCA wishes to ensure that any implied benefit under these promotions only has a duration of a week (e.g., a reduction in call prices for a week would fall under this category; however, an offer which is available for customers to sign up to for one week, but which gives customers access to reduced prices for a greater period would not). URCA has amended the Rules (including related definition) to reflect the above.

On the other hand, URCA will maintain the procedures and requirements set out in the Proposed Rules for Full Length Promotions. This is because URCA believes that the regulatory and competition risks associated with Full Length Promotions are greater than Short Term Promotions.

### **2.5.3 Information and Data Requirements**

#### **i) Permanent Price Change – Single Price Regulated Services**

BTC claimed that the Paragraphs listed below from the Proposed Rules are not specified in the current Rules and represent an increased burden on operators and URCA:

- 19.2 - targeted customer segment;
- 19.4 and 19.5 - price broken down by recurrent and non-recurrent elements;
- 19.9 - data required on a monthly basis;
- 19.9.4 - data required for a two-year period rather than a one year period;
- 19.9.5 – wholesale prices required for a replicability test; and
- 19.10.2 - an undue discrimination test.

BTC stated that URCA offered no justification for these changes in the consultation and proposed that these requirements for additional information be deleted.

#### URCA's response to BTC's comments

In general, it is worth reminding BTC that economic analysis is a very information intensive exercise. As such, URCA believes that in its review of the Rules, it has struck a reasonable balance between the need for relevant information without imposing a disproportionate burden on operators.

URCA reminds BTC that the current Rules already ask for a description of the targeted customer segments (in Paragraph 16). As such, this does not represent an extension to the information requirements. Notwithstanding this, because operators design their tariff plans with a particular segment or group of customers in mind, URCA considers that the requirement at Paragraph 19.2 of the Proposed Rules will require minimal effort on the part of the SMP operator.

Paragraphs 19.4 and 19.5 of the Proposed Rules are similar to Paragraphs 16.3 and 16.4 of the current Rules and are therefore not new. Further, having detailed information on the price(s) under consideration (i.e., distinguishing between recurrent and non-recurrent elements) is important to assess the replicability of the offer. This also holds for any underlying wholesale services and prices (i.e., Paragraph 19.9.5 of the Proposed Rules). In general, whilst the SMP operator is required to undertake the relevant competition tests, URCA must validate this analysis when reviewing the overall application to ensure it is based on reasonable assumptions and information. This is why URCA asks for the underlying information the operator will use to perform the tests according to Paragraph 19 of the Proposed Rules.

The requirement for monthly data is necessary in order to provide greater transparency to the review process, as it allows URCA to assess the evolution of cash flows over the two year period, and minimize the scope for opportunistic behaviour. This requirement is also observed in other jurisdictions. For example, in Spain the previous telecommunications regulatory authority (CMT, now integrated into the CNMC) asked Telefónica to provide monthly information on costs and revenues in order to assess whether its retail offers<sup>27</sup> led to a margin squeeze or anti-competitive bundling.

Notwithstanding the above, as specified in Paragraph 59 of the Proposed Rules *“In the absence of the required monthly data to undertake a DCF analysis, the SMP operator may assess the profitability of the service on a less granular basis”*. For the avoidance of doubt, this may include quarterly or annual data. However, in case less granular data is submitted, URCA will require the SMP operator to justify why monthly data is not available.

URCA is surprised by BTC’s objection on the time period over which the competition test shall be applied. URCA would like it noted that allowing SMP operators to submit data for two years provides greater flexibility to the SMP operator to demonstrate the profitability of its retail offers under consideration. This is because certain offers may include initial discounts which are then recovered over the overall expected lifetime of the customer. In this scenario, considering a shorter period may result in the offer not passing the competition test (due to a negative overall margin for this offer over the shorter time period). Thus, while providing two-year projections is more data intensive for the SMP operator, this requirement provides a greater pricing flexibility for the SMP operator. Again, if the operator can demonstrate that the tests are

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<sup>27</sup>Including a number of services subject to the ex-ante evaluation of its prices.

passed without examining cash flows for the whole two year period, the SMP operator will not be required to show data for the whole two years.

As previously discussed, the undue discrimination test in Paragraph 19.10.2 of the Proposed Rules is not a new requirement. While the Revised Rules set forth the minimum information requirements to assess undue discrimination, URCA has provided further guidance on this test in Annex 2.

**ii) Temporary Price Change - One-week and Full-Length promotions**

BTC commented that URCA has provided no justification for the following items listed at Paragraph 28 of the Proposed Rules:

- 28.3 - launch date and duration;
- 28.4 - commercial rationale;
- 28.5 - demand data;
- 28.6 - revenue data;
- 28.7 - cost data; and
- 28.8 – replicability.

BTC claimed that these items represent an increase in the information URCA requires for temporary price changes. BTC stated that it cannot see how URCA's proposal is consistent with the requirement on URCA to exercise "light-touch regulation". BTC suggested that these requirements for additional information should be deleted.

URCA's response to BTC's comments

Paragraphs 28.3 and 28.4 of the Proposed Rules are similar to Paragraphs 30.2 and 30.3 of the current Rules and thus, they are not new. However, given that URCA will apply the same conditions for Single-Day and One-Week promotions, the Proposed Rules will be amended in order to ensure that the same information requirements apply for Single-Day and One-Week (now classified as Short Term) Promotions.

For the avoidance of doubt, the information requirements as set out in Paragraph 28 of the Proposed Rules remain applicable to Full Length Promotions.

Readers are referred to Part E of the Revised Rules on information requirements for Short Term Promotions.

**iii) Price Regulated Bundles**

BTC again commented that URCA is increasing the regulatory burden on operators by demanding additional information, namely:

- 35.9.1 - data required on a monthly basis; data required for a two year rather than a one year period.
- 35.9.2 - data required on a monthly basis; data required for a two-year period rather than a one-year period.

35.9.3 - revenue data required for a two year period rather than a one year period.

35.9.4 - cost data required for a two year period rather than a one year period.

URCA's response to BTC's comments

Readers are referred to URCA's response on a similar issue in Section 2.5.3 (i) above.

**iv) Introduction of New Services**

BTC commented that URCA is requiring monthly data, thus increasing the burden on operators.

URCA's response to BTC's comments

Readers are referred to URCA's response on a similar issue in Section 2.5.3 (i) above.

**v) New Responsibilities on USPs**

BTC reiterated a previous comment that the Rules impose new responsibilities on USPs.

URCA's response to BTC's comments

URCA repeats its response at Section 2.4.2 above.

**vi) Equally Efficient Operator Test**

BTC again stated that given the market structure in The Bahamas, the EEO test specified under Paragraph 36.2 of the Proposed Rules is inappropriate. BTC noted that the key issue is whether an alternative operator can replicate the bundle on its network, not whether it would utilize wholesale inputs from the SMP operator. BTC argued that URCA should test the bundle using the REO test, which is a proxy of the costs of the alternative operator. This approach could be done using the adjusted costs data from the separated accounts, observed OLOs prices in the market and benchmarks.

URCA's response to BTC's comments

URCA's response on the EEO vs. REO test in Section 2.2.4 is relevant.

Concerning the replicability of bundles, as set out in Paragraph 36 and Annex 3 of the Proposed Rules, where a proposed bundle is not technically replicable (i.e., an alternative operator cannot offer a similar bundle on its own network), the SMP operator needs to demonstrate to URCA that an alternative operator could replicate the proposed bundle by using wholesale inputs from the SMP operator. As such, in URCA's view, these two options represent alternative means of replicating the proposed bundles rather than mutually exclusive options. This is a common requirement for the assessment of bundles, which is also observed elsewhere. For example, the Competition Guidelines issued by the Telecommunications Regulatory Authority in Bahrain<sup>28</sup>

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<sup>28</sup> Document MCD/02/10/019.

consider both the economic replicability of bundles, but also the technical feasibility of the bundle under consideration.<sup>29</sup>

## **2.6 Relevant Economic Tests**

### **2.6.1 Differentiation of the Rules in Fixed and Mobile Markets**

#### **i) Margin Squeeze Test**

BTC claimed that no margin squeeze testing for mobile services is required in the Rules.

#### URCA's response to BTC's comment

URCA disagrees with BTC. URCA advises that a price squeeze test is required where the SMP mobile operator provides wholesale services (such as domestic mobile termination) to a second mobile company for a fee. On the other hand, a predation test is necessary where the conditions for a margin squeeze test are not present.

#### **ii) Predation Test for Temporary Price Changes**

BTC took the position that no predation testing is needed for any temporary mobile price changes (i.e., any Single Day, One Week or Full Length Promotions).

#### URCA's response to BTC's comments

As stated previously, the Revised Rules will restrict the application of the competition tests to Full Length Promotions (see Section 2.5.2 (vi)) and Permanent Price Changes only. However, for the avoidance of doubt, this will apply to all services where the relevant operator has been found to have SMP (i.e., including mobile services). This is further discussed in URCA's responses in Section 2.6.1 (i) above.

#### **iii) Predation Testing in Duopolistic Mobile Market**

BTC stated that in general, it is very hard to make a realistic case for predatory behaviour in a mobile market with a duopolistic structure, therefore URCA should demonstrate what predatory pricing would look like in a duopolistic mobile market structure and how it is reflected in the remedies, particularly since remedies are based on a market review that did not anticipate competitive entry in the mobile market. BTC stated that it could not find examples from other duopolistic mobile markets where predation tests are applied.

#### URCA's response to BTC's comments

Given the prospective further entry into the mobile market, URCA considers there to be a risk of predatory behaviour by BTC either to prevent the entry of a potential competitor or to avoid the new entrant gaining market share, which may in turn discourage further entry into the market and/or distort the development of effective competition.

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<sup>29</sup> See paragraph 230 of the Guidelines (Document MCD/02/10/019).

Hence, a duopolistic market structure in itself should not, per se, mean it is not possible for a SMP mobile operator to engage in predatory pricing. Because of this risk, it is necessary for the Proposed Rules to also apply to BTC's retail mobile services.

Regarding URCA's previous SMP assessment and associated remedies, URCA refers BTC to Section 2.4.3 above.

**iv) URCA's Approach to Anti-competitive Tests is Narrow**

BTC was of the view that URCA's approach to anti-competition tests is too narrow and ignored the profitability of the customers who may be affected by such price changes. Instead, it proposes URCA should:

- Apply predation tests on mobile services that take account of profit levels across the entire mobile service portfolio, not just for the service to which the price change related.
- Apply predation tests on mobile and fixed call services that take account of the wider profitability of customers.
- Provide BTC the freedom to match the price points of the second mobile entrant and not conduct predation tests if price points remain above those introduced by the second entrant. That is, if the second mobile operator prices its services at a certain level, this should be treated as proof of replicability in a two-operator market.

URCA's response to BTC's comments

As specified in URCA's response in Section 2.3.5, there is nothing in the Proposed Rules which restrict the application of anti-competitive tests to individual services. From an economic perspective the scope of the test needs to reflect the way in which services are commercialized and acquired by customers. This means that where the alternative operator competes for a standalone service the anti-competitive test should be applied to the service in question. Similarly, where the alternative operator competes for a portfolio or basket of services, the anti-competitive test should be applied to the relevant basket considered, given the way in which services are acquired by customers.

URCA does not consider that matching the prices of the alternative operator is proof that the prices of the SMP operator pass the relevant economic tests and, hence, does not propose that this should be considered an acceptable pricing policy for an SMP operator, absent further justification. This is evident in a case where the second mobile entrant has been forced to reduce prices below a certain threshold in order to compete. In URCA's view, there is further risk that if the alternative operator offers very low prices for a limited segment of the market, the SMP operator may use this as a justification to introduce similarly low prices, but for wider target groups.

## **2.6.2 Limitations of using Fully Allocated Costs (FAC)**

BTC commented that cost estimates based on FAC have the potential to severely damage the ability of a price regulated firm, while not providing the consumer protection intended. BTC proffered that a test based on the costs of a reasonably efficient rival is appropriate to the duopolistic structure of competition in The Bahamas, whilst an approach based on the SMP operator's costs (EEO) will result in consumers enjoying fewer price decreases and hence higher bills. Given the absence of forward-looking LRIC cost estimates in The Bahamas, BTC proposed that the appropriate price floor should be based on:

- For mobile services: costs for an REO, which in BTC's case implies that accounting costs at least need to be adjusted to reflect efficiently incurred costs. Benchmarks or LRIC estimates from other markets should be used.
- For fixed services: network costs for call services should be reflective of URCA's decision on call termination rates while for other fixed services, an estimate of REO costs will be needed. Benchmarks or LRIC estimates from other markets should be used.

### URCA's response to BTC's comments

As stipulated in its response in Section 2.5.3, URCA remains of the view that the EEO test is the appropriate standard to apply in The Bahamas.

URCA agrees that the limitations of using FAC for performing anti-competitive tests are well documented. However, as set out in Section 2.2.4 above URCA reiterates that the application of the EEO test does not exclude the possibility of the SMP operator adjusting its FAC costs in order to get a better estimate of LRIC costs (see Paragraph 57 of the Proposed Rules). Any adjustments would have to be justifiable and fully evidenced to facilitate URCA's review. URCA may dismiss any adjustments made by the SMP operator in case these are not deemed to be justified.

## **2.6.3 Margin Squeeze Tests and the Length of the Projection Period**

BTC claimed that the length of the projection period is too long and URCA's requirement for monthly data is onerous, especially given the likely errors at such level of disaggregation.

BTC believed that the length of the projection period should be related to the period of time a customer is expected to stay with an operator, as this is the appropriate time-period over which to spread customer acquisition costs. URCA should allow for variation in the time period over which a test is applied, with the justification of this time-period being left to the regulated operator.

### URCA's response to BTC's comments

The Proposed Rules require relevant anti-competitive tests (such as price or margin squeeze, price predation) to be demonstrated using a multi-period dynamic approach also known as the discounted cash flow (DCF) method. As stated previously, the requirement for monthly data is to

ensure that the analysis is robust, to bring greater transparency to the review process and minimize the scope for opportunistic behaviour. Notwithstanding this, Paragraph 59 of the Proposed Rules explicitly states that *“In the absence of the required monthly data to undertake a DCF analysis, the SMP operator may assess the profitability of the service on a less granular basis”*, under proper justification.

Regarding the required projection period, as noted by the OECD, the DCF approach requires an assessment of profitability over an adequate period (in general, several years). ERG (now BEREC)<sup>30</sup> also supports this approach noting that because the DCF is generally a multi-year method the analysis of profitability usually covers a period of time that exceeds a year. This approach is also supported by the European Commission's 2013 Recommendation on non-discrimination and costing principles. Hence, against BTC's claim, URCA does not consider that a period of two years is too long to carry out a DCF analysis. As stated previously, considering a shorter period will make it more difficult for the SMP operator to pass the replicability tests. This is particularly the case in the context of evaluating (full-length) promotions which include initial discounts.

Hence, as set out above, URCA will not object to the use of a shorter time horizon if the SMP operator is able to show that in considering a period shorter than two years, the operator is able to recover the costs.

On the possibility for the SMP provider to consider a period longer than two years, any variation shall be properly justified and supported with evidence. URCA will only consider variations based on the economic life of relevant assets or average customer lifetime. The estimated average customer lifetime would need to be the period over which the customer contributes to the recovery of (i) the downstream costs that are annualized; and (ii) other downstream costs that are normally not annualized (typically the subscriber acquisition costs) and which the SMP operator incurs to gain customers and should seek to recover over the customer's average lifetime.

#### **2.6.4 Call Termination Rate Asymmetries**

BTC proposed to adjust the margin squeeze and predation formulas to reflect incremental wholesale revenues related to fixed call termination services available to OLOs and to lower relevant retail price floors for BTC.

##### URCA's response to BTC's comments

URCA's margin squeeze test aims to validate whether an equally efficient operator would be able to compete with the SMP operator, given the SMP operator's proposed retail prices and its costs of providing the end-to-end services. As stated above, this will be evaluated based on the

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<sup>30</sup> ERG (09) 07 dated March 2009.



relevant set of services. This is reflected in the common (generic) formula set out in Annex 1 of the Proposed Rules.

However, as part of its submission, the SMP operator may provide information and supporting evidence on additional revenues and costs of relevance to the particular case, which may influence an alternative operator's ability to compete against the SMP operator on the service(s) under consideration. This may include, for example, potential incremental revenues from call termination rates. URCA would then consider the extent to which this shall be reflected in its decision to approve the price change or not.

Further, URCA is separately consulting on the issue of call termination rates for other SMP operators beyond BTC. As such, it does not wish to prejudice the outcome of that process and the potential implications for fixed call termination rates going forward.

### **2.6.5 Assessment of Undue Discrimination**

BTC welcomed URCA's statement that URCA would not object to on-net/off-net price differentials if certain safeguards are met. BTC also stated that its comments at Section 2.6.3 above (length of the projection period/requirement for monthly data) apply equally to undue discrimination tests.

BTC argued that the hypothetical example presented by URCA is not relevant to The Bahamas because competition takes place across bundles of services versus separate voice services and inquired whether the hypothetical example presented *"is simply intended to demonstrate the mechanics of the test"*.

#### URCA's response to BTC's comments

URCA is appreciative of BTC's response to URCA's statement.

URCA's response to BTC's comments at Section 2.6.3 above on the length of the projection period and monthly data apply equally to undue price discrimination tests.

Referring to Annex 2 of the Proposed Rules, the aim of the hypothetical example is to illustrate the mechanisms used to evaluate a specific type of price discrimination in the fixed market - that is where a vertically integrated operator discriminates in favour of its own retail business by charging the alternative operator a different wholesale charge than it charges its own retail arm. The separate consideration of voice services in the example is for illustrative purposes only and does not necessarily imply that the tests applied to the mobile market segment shall consider the different services separately. As stated above, the scope of the test shall be ultimately determined by the way in which services are commercialised. For this reason, the example provided primarily aims to illustrate how such pricing behaviour by an SMP operator may be

evaluated. However, as set out at the end of Annex 2 in the Revised Rules, any assessment of undue discrimination needs to be undertaken on a case-by-case basis.<sup>31</sup>

#### **2.6.6 Assessment of Bundled Offers including Price Regulated Services**

BTC suggested that the Proposed Rules should be changed to allow for the inclusion of out of bundle traffic in margin squeeze and predation tests.

BTC stated that it appreciates that for bundles including mobile services (unlike for single price changes or promotions for mobile services) anticompetitive tests are necessary to ensure SMP in the mobile market does not distort competition in other retail markets. This includes testing for margin squeeze and predatory pricing.

##### URCA's response to BTC's comments

URCA agrees that out of bundle traffic should be included in margin squeeze and predation tests, subject to this data being available.

URCA confirms that anti-competitive testing is required for full-length promotions, introduction of new services, single price regulated services and price regulated bundles to prevent undesirable conduct by SMP operators. This includes testing for price squeeze, price predation and the assessment of undue discrimination.

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<sup>31</sup> The obligation of non-discrimination in the Retail Pricing Rules is in addition to, and without prejudice to, other obligations of non-discrimination placed on SMP operators in relevant wholesale markets.

### 3 CBL's Response to the Consultation

Below, URCA summarizes CBL's submissions and provides URCA's comments on each issue raised.

#### 3.1 Introduction and Overview

CBL stated that it was disappointed with URCA's consultation paper because URCA rejected all proposals to streamline the retail pricing framework in a meaningful way. Instead, URCA added:

- more onerous regulatory requirements disregarding the requirements under section 5 of the Comms Act for regulatory measures to be efficient and proportionate; and
- new requirements which will only serve to slow the review process for proposed price changes and the introduction of new bundles and services.

CBL asserted that the proposed Rules are not in line with international best practice and best practice in the Caribbean. CBL then presented a summary of CBL's key concerns with the Proposed Rules.

#### URCA's response to CBL's comments

URCA notes CBL's disappointment and concerns with the consultation paper and Proposed Rules. As stated above in response to BTC's comments at Section 2.2.1, the substantive revisions to the Rules are based on recommendations made by BTC and CBL in their opening written submissions, in particular CBL's request for:

- clarification of the Rules process for USO-related services;
- additional safeguards against price discrimination in terms of on-net and off-net pricing in mobile;
- a clearer definition of non-price terms and conditions that could be expected to affect the effective price paid by customers; and
- clarification on:
  - what does "*a service [is] materially different to any existing service*" mean; and
  - the application of the *ex-post* competition provisions of the Comms Act to price approvals granted by URCA under the pricing Rules.

CBL's other recommendations (on BTC tariff rebalancing, and single consistent "Calling Party Pays" pricing regime) were deemed outside the remit of the consultation paper.

URCA agrees that when imposing remedies, it should have due regard to relevant legal principles (including the costs and implications faced by operators) and remedies should be efficient and proportionate to their purpose. URCA must reiterate that the proposed revisions to the pricing Rules are compliant with:

- section 5 of the Comms Act;
- URCA's 2010 Final SMP Decision;
- section 119(1) of the Comms Act requiring USPs to offer an affordable charge for USO-related services; and
- section 40(4)(a) of the Comms Act and relevant licence conditions.

Regarding benchmarking, URCA advises CBL that the electronic communications sector in The Bahamas is fairly unique so regulation elsewhere may not be an appropriate test for The Bahamas. For a further explanation on this issue, CBL is referred to URCA's response to BTC at Section 2.2.3 above.

In order to ensure that the final results of the consultation are proportionate, URCA has reviewed all responses to the consultation. Where appropriate and consistent with the scope of the consultation, section 5 of the Comms Act and URCA's 2010 SMP Final Decision, URCA has amended the Proposed Rules.

### **3.2 Application of Ex-post Provisions of Part XI of Comms Act**

CBL considered Paragraph 5 of the Proposed Rules to be vague and unclear as to when and how the *ex-post* provisions (Part XI) of the Comms Act may be applied subsequently by URCA to a price approval under the Proposed Rules.

CBL is concerned that under Paragraph 5 of the Proposed Rules, Price Regulated Services may be subjected to two sets of pricing standards: (i) the *ex-ante* pricing Rules, and (ii) URCA's *ex-post* Competition Guidelines pursuant to Part XI of the Comms Act.<sup>32</sup>

CBL agreed that if new information, new evidence or inaccuracies are discovered relating to a price approval decision then that decision should be reviewed and possibly changed. However, it argued that this discovery should prompt a review of the *ex-ante* decision rather than an *ex-post* investigation under Part XI of the Comms Act. CBL's position is that a review of an *ex ante* decision under the *ex-post* provisions of the Comms Act is potentially contrary to the "... *well-established competition and regulatory concept of the regulated conduct exemption (also known as the regulated conduct defence)*".

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<sup>32</sup>CBL noted that Part XI of the Comms Act lists types of anti-competitive practices but the Act does not provide specific assessment criteria, information requirements or tests that may be used by URCA.

CBL perceived that Paragraph 5 of the Proposed Rules does not include the possible existence of the *regulated conduct exemption* and this appears to conflict with other provisions in the Proposed Rules (especially Paragraphs 20 and 52). These Paragraphs indicated instances where URCA may approve a price increase that does not pass the predation/margin squeeze test. CBL is uncertain whether URCA may later prosecute the SMP operator for abuse of dominance.

Concerning the factors (see the footnote to Paragraph 5) that could trigger an *ex-post* investigation under Part XI of the Comms Act, CBL commented that the factors relating to new information and actual or expected impact were extremely vague. CBL pointed to another more general reason in Paragraph 5 where URCA stated an investigation could be launched “*if the actual outcome in the market differs from that assumed at the time the relevant approval was granted.*” CBL is uncertain whose “assumed market outcome” is being referred to. However, for all three factors, CBL reiterated that if errors are discovered after an *ex-ante* decision has been made, then this should initiate a review of the relevant *ex-ante* decision approving the application.

CBL went further and suggested that the following passage should replace Paragraph 5 of the Proposed Rules:

“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.”

#### URCA’s response to CBL’s comments

URCA thanks CBL for the clarity provided in respect of this issue. As URCA now understands it, CBL is seeking greater clarity on when/whether an *ex-post* investigation under Part XI of the Comms Act could apply to a price that has previously been approved by URCA under the *ex-ante* pricing Rules.

Firstly, URCA reminds CBL that *ex-ante* regulation is a forward looking form of regulation which aims to prevent any anticompetitive conduct from occurring, whilst *ex-post* competition

investigations are backward looking (i.e., they aim to assess any alleged anti-competitive behaviour by a SMP operator). This may lead to differences in the approach for both assessments (including the consideration of the relevant markets).

Further, it is URCA's role to determine a regulatory framework to limit the probability of this occurring where dominance has been established and to assist SMP operators in their pricing applications by providing clarity on the rules governing the application and review processes. However, URCA remains of the view that, overall, the responsibility remains with the SMP operator not to abuse its dominant position and for there to be the possibility to investigate any potential anti-competitive behaviour on an ex-post basis.

As such, URCA remains of the view that the ex-post provisions (Part XI) of the Comms Act remain relevant in the context of the Rules (as set out in Paragraph 5). CBL is reminded that URCA does not have any power under the Comms Act to review its own decisions and can only do so under the limited circumstances applicable to the legal doctrine of *functus officio*. As Paragraph 5 makes clear, URCA reserves the right to carry out an ex-post investigation if the actual outcome in the market differs from that assumed by URCA at the time the relevant price approval was granted. URCA further reminds CBL that, pursuant to section 7 of the Comms Act, once there is evidence of undesirable conduct by an SMP provider, URCA has the authority to apply the competition law rules in Part XI of the Comms Act. .

Concerning the phrase "*if the actual outcome in the market differs to that assumed at the time the relevant approval was granted*", URCA notes that prior to granting an approval under the Rules, it would normally evaluate the application to ensure there are no adverse impacts (including competitive effects). Where, in URCA's view, the actual outcome in the market differs from that assumed by URCA at the time approval was granted, this provides a basis for URCA to review the decision. This would further include a situation where new information becomes available to URCA or an alternative operator makes a formal complaint.

Regarding the factors in the footnote (to Paragraph 5), URCA confirms that the list is non-exhaustive and the intent is to provide a broad overview of the factors that could cause URCA to review a previous price approval. URCA wishes to state that it would be impossible for URCA to include in the Rules a pre-established list of every potential situation that may trigger subsequent investigations of a previous price approval. Given the dynamic nature of the sector and resulting service offerings, URCA considers that pre-defining such situations in the Rules could result in the Rules requiring regular updating which would result in great uncertainty in the market.

In light of the above, URCA does not consider an amendment to Paragraph 5 of the Proposed Rules to be necessary or appropriate.

### **3.3 Information to be Submitted as part of an Application**

To the extent that URCA expects SMP operators to provide both adjusted and unadjusted FAC data to support a price change application (as indicated in Annex 1 of the Proposed Rules), CBL recommended that URCA establish this requirement in Paragraph 7 where Accounting Separation and Cost Accounting is discussed. CBL also requested guidance and specificity on the types of adjustments URCA considers appropriate.

#### URCA's response to CBL's comments

URCA disagrees with CBL's proposed revisions to Paragraph 7 of the Proposed Rules. URCA reminds CBL that adjustments to an SMP operator's FAC data may not be required for all applications. As set out in its response in Section 2.2.4 above, the aim of any adjustments is to better reflect the LRIC of providing the services, which represents the most appropriate costing standard to consider in the competition tests. As such, the SMP operator may choose to present adjustments if it believes the adjusted FAC costs better reflect the economic costs. URCA would then review the merits of these adjustments based on the supporting evidence provided by the SMP operator. However, URCA notes that there would be no reason for an SMP operator to carry out such adjustments if the applicant considered the tests were unambiguously passed without making the adjustments. Referring to the request for guidance and specificity on the types of appropriate adjustments, URCA reminds CBL that section 40(5) of the Comms Act states *"where an SMP licensee is made subject to an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs...shall lie with the SMP licensee concerned."* In light of the above, URCA considers that the scope and type of adjustments will ultimately depend on the economic context of the application and it is up to the SMP operator to present credible arguments along with supporting information for any proposed adjustments to its FAC estimates. Providing prescriptive guidance in a dynamic sector would unduly restrict commercial and regulatory flexibility.

### **3.4 Non-Price Terms and Conditions**

CBL appreciated URCA's effort to clarify the "non-price terms and conditions" in Paragraph 11.2 and more specifically in its accompanying footnote. However, the revision raised concerns. CBL commented that it is confused by the use of the terms "cost", "fees" and "price". For example, CBL is uncertain whether the "quality of service (which would affect the cost of providing the service)" refers to the cost of providing the service by the SMP operator or the effective price faced by the consumer as the quality of service fluctuates. CBL is also unsure what is referred to

as “ancillary services or goods” provided with the service and “the time taken to provide the service”. CBL questioned if the latter should be included as the consumer is not charged during the time in which the SMP operator is in the process of providing a service.

Additionally, CBL suggested that URCA should include a section in the Proposed Rules detailing application requirements to change *non-price terms and conditions* of Price Regulated Services along with a full definition of these terms and conditions.

#### URCA’s response to CBL’s comments

URCA clarifies that in the context of Paragraph 11.2 of the Proposed Rules the terms:

- “*cost*” refers to the SMP operator’s cost of providing the service.
- “*Fees*” and “*price*” are used interchangeably and refer to what the customer actually pays for the service in question.
- “*Ancillary services or goods*”, which may affect the cost of providing the service, include but are not limited to CLASS features (e.g., call waiting, voicemail), a handset, or a modem.
- “*The time taken to provide the service (which would affect the cost of providing the service)*” include the time taken by the service provider’s technician or customer service representative to install the service at the customer’s premises and/or activate the service.

URCA will amend footnote 4 (Paragraph 11.2) of the Proposed Rules to reflect these clarifications.<sup>33</sup>

However, URCA reiterates that it is virtually impossible for URCA to include in the Rules a pre-established list of all relevant non-price terms and conditions. Given the dynamic nature of the sector and resulting service offerings, URCA considers that pre-defining such situations in the Rules could result in the Rules requiring regular updating which would result in great uncertainty in the market.

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<sup>33</sup> See footnote 11 of the Revised Rules



On the need to establish within the Rules the information requirements that regulated operators must provide if seeking to change non-price terms and condition of Price Regulated Services, URCA has now specified within the Rules:

- (i) The procedures (including relevant timeframes) the SMP operator must follow in respect of a temporary or permanent change to non-price terms and conditions for price regulated services.
- (ii) The minimum information requirement the SMP operator must submit to URCA by way of either notification or application, including:
  - a description of the proposed non-price terms and conditions;
  - a description of the current or previous non-price terms and conditions;
  - the proposed effective date for introducing the change;
  - the rationale or justification for the proposed change;
  - the projected impact of the proposed change, if any, on the effective price of the service or bundles; and
  - any actual or potential competitive effects of the change on the SMP operator's competitors, including an assessment of the replicability of the proposed changes by alternative operators.

Readers are referred to Part H of the Revised Rules.

### **3.5 Permanent Price Changes for “Single Price Regulated Services”**

#### **3.5.1 Granularity and amount of required information**

CBL claimed that the requirement for monthly data is onerous, inefficient, and contrary to section 5 of the Comms Act. It added that monthly forecasts require excessive time and effort and are based on assumptions thus adding unnecessary and unjustified complexity to the application process. CBL referred to Paragraph 59 (Hypothetical example presented in Annex 1) in which URCA recognizes this requirement may not be practical or feasible. CBL also opposes the new requirement to provide two years of forecast data for the same reasons listed above. CBL is concerned whether URCA's review of two year forecasts could potentially delay approvals for rate changes.

CBL perceived that inconsistencies exist between Paragraphs 7 - 8 and Paragraph 19.9 of the Proposed Rules. Applicants must provide historical FAC data approved by URCA, which includes revenue forecasts for the current year since only partial year actual revenue would be available, in addition to forecasting revenue for the subsequent two years ultimately resulting in a three year forecast.

CBL went further and suggested the following revisions for Paragraphs 19.9.3 and 19.9.4 of the Proposed Rules:

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

19.9.4 Actual previous year and project total cost for the current and next year of providing the service in question...”

#### URCA’s response to CBL’s comments

As set out in URCA’s response to BTC in Section 2.5.3 (i) above, the requirement for monthly data and the longer projection period seeks to bring greater transparency to the review process and minimize the scope for opportunistic behaviour. CBL should note that the requirement is not unusual or out of step with best practice regulation. URCA further reiterates that the Proposed Rules allow for the provision of less granular data, subject to an adequate justification (see URCA’s response in Section 2.6.3 above).

URCA remains committed to reviewing price applications within the specified timeframes of the Rules and it is incumbent on service providers to submit all relevant information and analysis to facilitate URCA’s speedy review. BTC should remember that economic analysis is a very information intensive exercise. URCA believes that in reviewing the Rules it has struck a reasonable balance between the need for relevant information without creating a disproportionate burden on operators.

URCA sees no inconsistencies between Paragraphs 7-8 and Paragraph 19.9 of the Proposed Rules:

- Paragraph 7 asks the SMP operator to provide its cost information, complying with URCA Guidelines on Accounting Separation and Cost Accounting; while Paragraph 8 states that in the absence of such information the SMP operator may use alternative sources of information.
- Paragraph 19.9 then provides more details on the specific data and cost items that shall be provided in order to carry out the relevant economic test.

#### **3.5.2 Declaration to be submitted**

In respect to Paragraphs 19.10 – 19.11, CBL disagreed that a declaration should be supported by the evidence in Annexes 1 and 2 because the tests in those annexes can be subjective as URCA could decide to modify the test results in numerous ways. CBL offered the following revisions:

“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); 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.”

If a compliance declaration is still required, CBL suggested 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.”

#### URCA's response to CBL's comments

URCA is satisfied that the current drafting of Paragraphs 19.10 and 19.11 of the Proposed Rules accomplish URCA's objectives for having the declaration as part of the application process. CBL is reminded that the declaration requires the authorised officer to:

- confirm the application's compliance with the Rules and other relevant documents to the best of their knowledge;
- state that the proposed price change is not anticompetitive, does not result in margin squeeze, predatory pricing or undue discrimination; and
- be supported by evidence satisfying the requirements in the Rules.

Contrary to CBL's suggestion, it is not for URCA to modify or manipulate the results of the tests required under Annexes 1 and 2 but for the SMP operator to conduct the test so that URCA can properly assess the application on its merits.

URCA understands that regulators around the world reserve the right to review and modify competition-related tests performed by dominant providers to ensure compliance with relevant documents as necessary. URCA sees no need to depart from the international practice.

### **3.6 Special Promotions**

CBL is not opposed to URCA's proposed definitions:

- of a Promotion and One Week Promotion (now classified as Short Term Promotions) at Paragraph 23 and Paragraph 23.2 of the Proposed Rules, respectively; and
- proposed revision in Paragraph 24.1 of the Proposed Rules.

However, it added that URCA should review Paragraph 25 for consistency with Paragraph 6. CBL noted that whereas Paragraph 6 states Single Day Promotions do not require prior approval by URCA, Paragraph 25 reads “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” implies that URCA’s approval is required prior to the SMP operator launching the promotion.

CBL went further and rejected URCA’s requirement in Paragraph 28 for monthly data for the same reasons stated earlier in Section 3.5.1 above.

URCA’s response to CBL’s comments

URCA notes CBL’s non-opposition to URCA’s proposals and revisions.

URCA sees merit in CBL’s response and will amend Paragraph 25, as set out in URCA’s response to BTC in Section 2.5.2 (iv) above.

Subject to its response in Section 2.5.2 (vi) above, URCA disagrees that it is onerous to require data on a monthly basis for a Full-Length Special Promotion. As the maximum duration for a Full Length Promotion is ninety (90) calendar days, URCA considers monthly data would be appropriate in this case.

### **3.7 Bundles including a Price Regulated Service**

#### **3.7.1 Granularity and amount of information required for Bundles**

CBL opposed Paragraph 35.9 for the same reasons stated in Section 3.5.1 above on granularity of data for single price regulated services. CBL suggested Paragraph 35.9 be modified similarly to what CBL proposed for Paragraph 19.9 in Section 3.5.1 above.

URCA’s response to CBL’s comments

As set out in URCA’s response in Section 3.5.1 above, the requirement for granular (i.e., monthly) data is in URCA’s view necessary to bring greater transparency to the review process and minimize the scope for opportunistic behaviour. URCA accepts that carrying out economic analysis is information intensive and URCA believes that in reviewing the Rules, it has struck a reasonable balance between the need for relevant information without creating a disproportionate burden on operators.

In line with its response in Section 3.5.1 above, URCA sees no inconsistencies between Paragraphs 7-8 and Paragraph 35.9. URCA addressed the issue of adjustments to FAC data in Section 3.3 above.

### **3.7.2 Replicability of Bundles**

CBL claimed that the requirement for economic replicability testing in Paragraph 36 increases regulatory burden while being inefficient and out of step with section 5 of the Comms Act. CBL perceived the Paragraph to be confusing and ambiguous.

CBL also claimed that it is uncertain whether Paragraph 36.2.3 refers to technical or economic replicability. In respect to an operator demonstrating *“the price of the Bundle as a whole is at least equal to the cost of providing the Bundle”*, CBL is unsure whose cost is being referred to as the Proposed Rules go on to state that wholesale prices incurred by alternative licensed operators should also be included. CBL added that it is impractical for an SMP operator to conduct such a test because it is unlikely to have access to all the wholesale prices required for an alternative licensed operator’s to provide the retail bundle in question. CBL mentioned that some services in a bundle may not be price regulated therefore they may not have regulated wholesale equivalents.

CBL added that URCA provided no rationale or justification for the new “economic replicability” test requirement and noted that the requirement is unnecessary given the revision in Paragraph 37 requiring SMP operators to demonstrate that the price of the proposed bundle is not anti-competitive. CBL recommends that Paragraph 36.2 be deleted. However, if this Paragraph is retained, CBL urged URCA to add an annex illustrating the replicability test.

#### URCA’s response to CBL’s comments

URCA confirms that Paragraph 36.2.3<sup>34</sup> of the Proposed Rules refers to economic replicability and adds that this is in no way a new requirement and is not contrary to any of the legal principles established in section 5 of the Comms Act. URCA reminds CBL that Paragraph 39 of the current Rules states *“... the SMP operator must demonstrate that the Price Regulated Bundle can be replicated by other operators ...”*[Emphasis added]. In URCA’s view, Paragraph 39 of the current Rules contemplates both technical and economic replicability and considers that perhaps CBL is not aware that replicability testing has technical as well as economic requirements. The test for economic replicability (e.g., margin squeeze, price predation) is to ensure that a level playing field exists for an alternative yet efficient rival to effectively compete with the SMP provider. It is worth highlighting that the analysis of replicability from an economic perspective is a second step after assessing technical replicability, as anti-competitive pricing takes place only when the services are technically replicable. This is standard regulatory practice

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<sup>34</sup> Now Paragraph 36.3.3 of the Revised Rules.

around the world and in this regard URCA refers CBL to OFCOM's document on replicability testing.<sup>35</sup>

Within the Proposed Rules, URCA provided greater guidance on how an SMP operator can demonstrate technical and economic replicability. Both the ERG and EC advised NRAs within the EU that in order to ensure regulatory certainty, they must specify their approaches to economic replicability testing. URCA also provided alternative options in the event that replicability cannot be demonstrated in Paragraphs 36.1.2 and 36.2.1 of the Proposed Rules.

Furthermore, URCA points out that Paragraph 37 and Paragraph 36.2 of the Proposed Rules supplement each other and are not requirements.

In respect of Paragraph 36.2.3 of the Proposed Rules, URCA refers to the SMP operator's costs in the phrase *"it must demonstrate that the price of the bundle as a whole is at least equal to the cost of providing the bundle"*. This is consistent with the Rules applying to SMP operators offering price regulated bundles and the EEO approach to economic testing.

In line with CBL's request, URCA added a hypothetical illustrative example of a replicability test to Annex 3 of the Revised Rules.

### **3.7.3 Declaration and Annex 1 and 2 Assessments to be Submitted**

For the same reasons stated previously (see Section 3.5.2 above), CBL is similarly opposed to Paragraphs 37 and 38 of the Proposed Rules requiring the SMP operator to submit a declaration for the proposed Bundle similar to that required for other Price Regulated Services. CBL suggested that Paragraphs 37-38 and the declaration should be modified in the same manner as CBL proposed in Section 3.5.2 above. In the case of bundles, CBL suggested that the modified declaration should only apply 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.

#### URCA's response to CBL's comments

URCA repeats its comments at Section 3.5.2 above regarding the purpose of the signed declaration by the authorised officer and sees no reason to make the modifications to Paragraphs 37 and 38 proposed by CBL for those same reasons.

URCA wishes to add that regulators around the world reserve the right to review and modify competition-related tests performed by dominant providers to ensure compliance with relevant documents, as necessary. URCA sees no need to depart from the international practice.

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<sup>35</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/busretail/statement/statement.pdf>.

## **3.8 Introduction of New Services**

### **3.8.1 Definition of New Service**

CBL generally agrees with the objective of Paragraph 39 of the Proposed Rules but noted that 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 the market in question is a "Price Regulated Market"*". CBL also wants the term "Price Regulated Market" to be clearly defined in the Rules to avoid ambiguity.

#### URCA's response to CBL's comments

URCA confirms that the *ex-ante* pricing Rules only apply to an operator who has previously been declared by statute or URCA as having SMP in a relevant economic market and the market or service in question is classified by URCA as a Single Price Regulated Service or a Price Regulated Bundle. For the avoidance of doubt, URCA adds that the term "Price Regulated Market" refers to those SMP markets or services within SMP markets that are subject to the *ex-ante* retail price regulation.

### **3.8.2 Declaration and Annex 1 and 2 Assessments to be Submitted**

CBL opposed the revision and stated that its previous comments at Sections 3.5.2 and 3.7.3 above on Paragraphs 19.10 and 37 of the Proposed Rules equally apply in the case of Paragraph 40.4.

#### URCA's response to CBL's comments

URCA again states that the declaration is fit for purpose by requiring the authorised officer to confirm the application's compliance with the relevant documents to the best of their knowledge.

URCA also reserves the right to review and modify competition-related tests performed by dominant providers to ensure compliance with relevant documents, as necessary.

## **3.9 Price changes for Price Regulated Services which form part of USO**

CBL expressed its disappointment that URCA has not included the criteria for assessing the affordability for USO-related services and considers such an inclusion would not be inconsistent with the level of detail provided in Annexes 1 or 2 of the Proposed Rules. CBL commented that the inclusion of the criteria for assessing affordability would reduce the legal uncertainty associated with the time lag between the approval of the Proposed Rules and the consideration and approval of the USO affordability criteria at some unspecified future date.

#### URCA's response to CBL's comments

URCA is surprised by CBL's comments on URCA not including the criteria for assessing the affordability for USO-related services in the Proposed Rules.

As stated above in response to BTC’s comments at Section 2.4.2, URCA considers it would not be compatible with the statutory framework of the Comms Act for URCA to incorporate affordability guidelines in the pricing Rules. CBL should remember that the pricing Rules only apply to retail services, which are price controlled as a result of an SMP assessment. In the context of universal service policy in The Bahamas, some services are not price regulated and therefore fall outside the remit of the pricing Rules. For this reason, URCA takes the position that a separate document on affordability assessment for USO-related services is the correct and most efficient way to proceed on that issue.

URCA has developed guidelines for assessing the affordability of USO-related services but has not issued the document for public comments due to pending appeal proceedings initiated by CBL in the UAT in 2013 and 2014 challenging (inter alia) the Statement of Results and Final Decision [ECS 01/2013] issued by URCA on the Clarification and Implementation of Existing Universal Service Obligations (USO) as provided in the Comms Act. URCA intends to continue its public consultation on USO while the pending appeal proceedings progress to a resolution, though final implementation of some aspects of the USO framework may be impacted by the on-going proceedings.

### **3.10 CBL’s Comments on Annexes 1 and 2 of the Proposed Rules**

#### **3.10.1 Predation Test**

Following its comments in Section 3.3 above, CBL perceived the provision in Paragraph 57 of the Proposed Rules on cost data to be confusing in comparison to Paragraphs 7-9. CBL contended that the possible adjustment of cost data for predation test purposes may create two sets of FAC data – adjusted and unadjusted. In CBL’s view, the same cost data used to support a rate application (in Paragraphs 19, 28, 35 and 40) should also be used for a predation test. Any permissible or required adjustments to FAC data should be described in Paragraphs 7-9 rather than in Annex 1.

More generally, CBL stated a predation test is unnecessary and should not be required in the case of an application for a price increase as this would not raise predation concerns.

#### URCA’s response to CBL's comments

URCA refers CBL to its response to potential cost adjustments in Sections 2.2.4 and 3.3 above.

URCA agrees that SMP operators will not be required to conduct a predation test for a price increase application.

#### **3.10.2 Margin Squeeze Test**

CBL noted that URCA made no reference to whether the “other costs” data may be adjusted as in the case of a predation test. CBL repeated its previous recommendation at Section 3.10.1



above that URCA provide a single statement on cost data requirements in Paragraphs 7-9 of the Proposed Rules which would apply to price change applications and predation/margin squeeze tests.

CBL stated a margin squeeze test is unnecessary and should not be required for a price increase application for a Single Price Regulated Service or a bundle including a Price Regulated Service if there is no simultaneous proposed change in the price of an associated wholesale input.

CBL perceived the hypothetical example of a margin squeeze assessment on pages 16 and 17 of the Proposed Rules to be confusing and at complete odds with the proposed margin squeeze test in Paragraph 61 of the Proposed Rules. According to CBL, it is impractical for an SMP operator to conduct a margin squeeze test similar to the one in Annex 1 because the operator does not know the reseller's downstream costs. The SMP operator can only conduct this test based on its own costs including the tariffed rates for its regulated wholesale services used to provision the service in question. CBL suggested that URCA revise the hypothetical test to conform to the proposed test or otherwise delete it.

#### URCA's response to CBL's comments

URCA confirms that an SMP operator is similarly required to adjust its FAC data when conducting margin squeeze test (see Section 3.3 above). URCA again does not accept that a single statement on cost requirements for price applications and predation/margin squeeze test should be included in Paragraphs 7-9 of the Proposed Rules. URCA reserves the right to review any such adjustments made to the operator's FAC.

URCA confirms that it would not be necessary for a vertically integrated SMP operator to conduct a margin squeeze test when applying for a price increase if there is no simultaneous proposed change in the price of an associated wholesale input. However, in these circumstances, URCA requires the SMP operator to confirm within its application that the relevant wholesale prices have remained unchanged.

The hypothetical example is only one way in which a margin squeeze test may be done. In URCA's view, the example is not at odds to Paragraph 61 of the Proposed Rules. URCA does not expect the SMP operator to know the alternative operator's exact costs. Indeed, under the EEO standard, the test is carried out using cost information from the SMP operator, with potential adjustments in case FAC cost data does not fully reflect LRIC costs.

#### **3.10.3 Assessment of Undue Discrimination**

CBL has no issue with URCA's description of what constitutes price discrimination but CBL mentioned that Annex 2 of the Proposed Rules does not illustrate how URCA would determine a specific instance of price discrimination to be "undue" and therefore prohibited.

CBL considers the hypothetical example in Paragraph 64 of the Proposed Rules to be redundant and to offer no guidance on undue price discrimination. If the SMP operator in the example was discriminating based on price then this should be captured by the margin squeeze test in Annex 1. On the other hand, if the discrimination is related to non-price terms and conditions then it is a question of undue preference not price discrimination.

CBL perceived the second hypothetical example in Paragraph 65 of the Proposed Rules as puzzling, irrelevant and outside of standard regulatory practice. In CBL's view, URCA presented an analysis of whether a non-SMP operator could profitably replicate the SMP operator's on/off net call prices instead of illustrating how the on/off net call prices would constitute undue price discrimination. Furthermore, the assessment is based on information regarding a competitor's costs and demand levels which would be unknown to the SMP operator when filing the rate application. CBL went further and commented that the analysis neglected to address the impact that on/off net call pricing would have on competition in the market. According to CBL the only instance in which the replicability test was not met involved charging a below cost rate for on-net calls, however CBL asserted this would be captured in a predation test. CBL suggested that the example be deleted and replaced by a description and list of key factors that would be used to assess whether any proposed pricing differentials constitute undue price discrimination.

#### URCA's response to CBL's comments

As indicated in Paragraph 66 of the Proposed Rules, an analysis of potential undue discrimination requires an assessment on a case by case basis taking suitable account of the objective justifications provided by the SMP operators for differential pricing.

More generally, there are two key issues related to price discrimination:

i) First, price discrimination may lead to foreclosure. This is the type of discrimination considered in Paragraph 64 of the Proposed Rules. This may occur when a vertically integrated SMP operator fails to supply the wholesale services to alternative operators under the same conditions with which it provides the service to its own retail arm. This specific case of undue discrimination can be tested by undertaking a margin squeeze test. URCA also notes that some forms of price discrimination at retail level can also lead to foreclosure. For example, if the SMP operator introduces pricing discounts for certain customer groups that aim to reduce the switching between operators.

ii) Second, there is a consumer protection angle, whereby undue price discrimination may particularly harm specific consumer groups. In this case, the SMP operator shall provide an objective justification for the applied price differences.

Potential undue discrimination can also occur relating to non-price terms and conditions. The SMP operator is required to obtain URCA's written approval before introducing 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.

URCA notes that price (and non-price) discrimination can sometimes be welfare enhancing. Because of this, it considers that the evaluation of undue discrimination shall be undertaken on a case by case basis. However, the SMP operator will be expected to provide an objective justification for the proposed price changes leading to discrimination.

On the example provided in Annex 2, URCA reminds CBL that this is only one way in which an assessment can be done and the assessments vary on a case by case basis dependant on the actions of the SMP operator.

#### **3.10.4 Assessment of bundled offers including regulated services**

CBL repeated its comments that Paragraph 36 of the Proposed Rules is confusing and recommended the removal of Paragraph 36.2. This would result in the deletion of Annex 3 which is a decision tree of the process in Paragraph 36.2.

##### URCA's response to CBL's comments

URCA is satisfied with the clarity provided at Paragraph 36 and more specifically Paragraph 36.2 of the Proposed Rules. URCA reaffirms its response at Section 3.7.2 above on technical and economic replicability. Annex 3 was added to the Proposed Rules in response to BTC's urging for greater guidance on how relevant economic tests should be demonstrated. Thus, URCA disagrees with CBL's proposal and opts to keep Annex 3 in the final version of the Revised Rules. However, for illustrative purposes, URCA has now added a hypothetical example to Annex 3 on how the replicability test may be conducted.

## 4 Digicel Group's Response to the Consultation

Below, URCA summarizes Digicel's comments and provides response to the issues raised.

### 4.1 Introduction/Overview

Digicel commented that it is keen to launch services in The Bahamas and appreciates the need to ensure that pricing by SMP operators is reasonable. Digicel stated that *ex-ante* price controls are necessary to promote fair competition with a pre-existing monopoly. However, it added that once a sector becomes more competitive, it may be possible to relax a number of controls. Digicel mentioned that incentive regulation may also be useful in this context.

#### URCA's response to Digicel's comments

URCA notes and agrees with Digicel's comments on the merits of imposing *ex-ante* price controls and incentive-based regulation when markets are not sufficiently competitive. URCA agrees that ex-ante regulation is necessary to achieve the sector policy objectives if the market is unable to achieve them on its own. However, if relevant economic markets are found to be effectively competitive upon the completion of a market review, URCA must give consideration to less intrusive measures. URCA, in principle, strongly favours incentive-based regulation (e.g., a price cap) but notes that this method of price regulation is not germane to this current exercise.

### 4.2 General Comments

#### 4.2.1 Projections and Forecasts

Digicel commented that it is unsure of how practical a two year forecast would be to implement and enforce. In Digicel's view, an operator would be incentivized to present projections to the regulator that would enable it to launch a service. Digicel pointed out an operator can change its plans or withdraw the service at a later date regardless of initial projections. As such, controls should not depend on forecasts or projects. Digicel recommended that URCA impose clear limitations on the periods for which an operator can offer promotions.

#### URCA's response to Digicel's comments

URCA notes but does not accept Digicel's arguments against the use of forecasts in price controls. URCA understands that forecasts are used in economic regulation (including price caps) and competition analysis around the world. For example, the European Commission in its various regulatory directives endorse the use of forecasts when conducting economic and financial analysis.

Referring to the periods for special promotions, Digicel is reminded that both the current and Proposed Rules include limitations on the period for which an SMP operator can offer promotions.

#### **4.2.2 Interim Decisions and Proxies**

Digicel urged the use of proxies and interim decisions to determine the reasonableness of an SMP operator's prices and whether they should be permitted or not. According to Digicel, it is better to arrive at an interim decision, within a week or two, which results in the prevention of most market damage instead of adopting an approach that lasts six months before a decision can be made, after which the damage has already occurred.

Digicel suggested using termination rates as a starting point for determining if a retail price is acceptable or not. The retail service in question would need to recover the termination rate plus the origination cost plus an additional margin, provided that an appropriate termination rate has already been determined. Another proxy would be to assess whether retail price reductions are matched by proportionate decreases in wholesale rates to competitors. Finally, Digicel suggested using benchmarks for wholesale and retail rates as evidence of reasonableness until the costs have been modelled.

Digicel added that in the event of a proxy test highlighting a potential problem, the burden of proof rests with the SMP operator to demonstrate that URCA's concerns are not warranted. For the sake of market certainty, Digicel recommended that URCA publish its SMP operator proxies and review them periodically.

#### URCA's response to Digicel's comments

URCA is not in favour of interim decisions in respect of price approvals. URCA considers that interim decisions will make the retail price review Rules process less certain and predictable for both SMP operators and their customers.

URCA does not see any conflict or inconsistencies between its approach to price review under the Proposed Rules and Digicel's comments. In conducting a price review, URCA generally considers termination rates (based on BTC's costs and benchmarks), and other information where appropriate. URCA may also rely on proxies (such as benchmarks) when conducting price reviews both at the retail and wholesale level. However, URCA's preference is to use the cost estimates of the SMP operator. URCA agrees in principle that the retail service in question would generally need to recover the cost-based termination rate plus the origination cost and a reasonable margin. URCA notes that in relation to non-voice services (e.g., SuperBasic television), termination rates are not relevant to the analysis but other cost elements would be important. However, Digicel should understand that apart from cost considerations, URCA must also consider other policy objectives. For example, in the case of price regulated USO-related services the proposed new price must be affordable. Ultimately, the list of factors to be considered will depend on the economic context of the price application. URCA agrees with Digicel that where URCA believes the intended price poses a potential problem, it is the SMP operator's obligation to demonstrate that such concerns are not warranted.

Regarding Digicel's urging for URCA to develop and publish SMP operator proxies, URCA notes that this is out of step with both URCA's 2010 SMP Final Decision and the scope of this current consultation.

#### **4.2.3 Retail Minus and Cost Based Approaches**

Digicel believed URCA should have the option to implement wholesale price controls based on retail minus as well as cost-based approaches depending on the service in question. The choice of price control used would depend on whether the wholesale service involves depreciated network assets or if it is a relatively new service.

Regarding URCA's proposal for an SMP operator to prove the economic replicability of a retail service or bundle, Digicel stated this is impractical and potentially burdensome on operators and URCA. The retail costs of non-SMP operators are unknown to the dominant operator therefore the SMP operator can only estimate its own costs. Digicel referred to the TeliaSonera case which supported the use of the equally efficient competitor (EEO) test in margin squeeze analysis. This test supports the use of the dominant operator's costs and revenues however, the Court in the TeliaSonera case stated it is appropriate to take account of a competitor's costs in certain circumstances when:

- (i) the costs of the dominant undertaking are not precisely identifiable
- (ii) the dominant competitor's costs have been written off (such as the cost of access to infrastructure); or
- (iii) "the particular market conditions of competition dictate it" such as when the dominant operator's costs are a result of its dominant position

Digicel suggested that URCA reserve the right to use elements of the retail costs of non-SMP operators where the SMP operator enjoys significantly lower retail costs for some non-replicable reason. However, if URCA determines the SMP operator to be in breach of its obligation solely by virtue of the additional costs that a non-SMP operator incurs then the SMP operator should be given a chance to comply with URCA's findings before suffering a formal adverse ruling.

#### URCA's response to Digicel's comments

On the issue of options to implement wholesale charging, URCA confirms that the various options include retail minus and cost-based approaches. However, Digicel should remember that wholesale price control is outside the scope of this current consultation.

URCA acknowledges that an SMP operator may not know all of the costs incurred by a competitor. URCA reminds Digicel that under the EEO method, the SMP operator would rely on its own cost estimates rather than cost estimates of a reasonably efficient rival (see Section 2.4.2 above for further details).

#### **4.2.4 Margin Squeeze**

When determining if there is a margin squeeze, Digicel believed URCA will have to either:

- Determine what retail margin the SMP operator would have to apply if its retail costs were efficiently incurred and use that as the basis of its calculations; or
- arrive at a price floor for retail costs.

#### URCA's response to Digicel's comments

URCA again considers that Digicel's proposals are outside of the scope of the current consultation.

#### **4.2.5 Bespoke Business Deals**

Digicel stated that operators make verbal agreements with business customers which are difficult to monitor for unreasonable levels of subsidy and anti-competitive effects. Digicel is interested to know what URCA's plans are regarding the assessment of offers made to businesses by SMP operators. Digicel suggested URCA require the SMP operator to provide a list of all its business customers so that URCA can select a random sample for a full assessment.

#### URCA's response to Digicel's comments

URCA notes the comments made by Digicel but advises that the issues raised are outside of the scope and cannot be considered in this consultation. URCA assures Digicel that URCA has wide-ranging *ex-post* investigative powers to address undesirable conduct by SMP operators. URCA's *ex-post* competition guidelines provide a structured framework for *ex-post* investigations in respect of abuse of a dominant position and anti-competitive agreements. URCA has to date not received any formal complaint from interested third parties in respect of anti-competitive pricing for commercial customers.

#### **4.2.6 Incentive Regulation**

Digicel suggested URCA consider implementing incentive regulation whenever certain price controls on the SMP operators are relaxed in exchange for the SMP operator providing access to its networks or infrastructure on a national level.

#### URCA's response to Digicel's comments

URCA again considers that Digicel's proposal raises other issues that are outside of the remit of this current exercise.

### **4.3 Specific Comments**

#### **4.3.1 Notification Periods**

With respect to Paragraph 15.1 of the Proposed Rules, Digicel stated that a 30 day period is normally required for an operator to notify the customer of a price increase. This stems from the time needed by customers to terminate their contracts. If the operator's terms and conditions in the contract stipulates the customer has 30 days to notify the operator of a termination then customers should have at least 30 days' notice from the operator of a price increase.

For Paragraph 15.2 of the Proposed Rules, Digicel suggested SMP operators notify URCA at least three (3) business days prior to a price or service change instead of five (5) calendar days. For example, URCA may find itself with insufficient time to make a decision in the event of long holiday weekends.

#### URCA's response to Digicel's comments

The notification periods specified at Paragraph 15.1 and 15.2 of the Proposed Rules apply to the implementation of a price or service change approved by URCA. Given this requirement, URCA considers that the notification periods in the current and Proposed Rules are satisfactory and fit for purpose.

#### **4.3.2 URCA's Response Time**

Regarding Paragraph 22 of the Proposed Rules, Digicel proposed URCA use the phrase "... *subject to Paragraph 14*" instead of "... *consistent with*" to avoid uncertainty whether the period of public consultation is permitted within Paragraph 14.

#### URCA's response to Digicel's comments

In order to clarify the timeframes in the instance of a public consultation, URCA will amend Paragraph 22 of the Proposed Rules to the following:

"Consistent with the procedure set out in Paragraph 14, URCA will respond to the SMP operator with its decision on the price application within **twenty (20) business days** of the date on which it received the application and which is notified by URCA to the SMP operator according to Paragraph 14. If an application must go to public consultation, the time allotted for URCA to respond with its decision on the price application will be suspended in accordance with Paragraph 14.4 until URCA has issued its final decision on the public consultation."<sup>36</sup>

#### **4.3.3 Withdrawal of Services**

In relation to Paragraph 43 of the Proposed Rules, Digicel thinks it is questionable for URCA to regulate when an SMP operator may withdraw a service. This can result in the operator subsidizing a loss inducing service thus potentially placing the business at risk and conflicting



with shareholder rights. Digicel urged URCA to clarify Paragraph 43<sup>37</sup> so that it only applies to services that are not incurring a loss. Digicel suggested the operator can prove its losses if URCA requires.

#### URCA's response to Digicel's comments

There are two basic reasons why URCA should regulate the withdrawal of a service:

- some price regulated services are also USO-related services that the USP must provide to customers; and
- given the operator's dominant position in the provisioning of a service, withdrawal of that service could be detrimental or harmful to a large segment of customers.

URCA thinks that it is unlikely a SMP operator's business would be jeopardized, to the extent suggested by Digicel, by providing a service in which it holds SMP for the 90 calendar day notice period required to inform URCA of a withdrawal. In any event, the SMP operator would likely have known for much longer than 90 days that a particular service is operating at a loss before deciding to withdraw the service. Additionally, URCA, in stipulating when an SMP operator notifies the regulator before withdrawing a service, must balance the SMP operator's business concerns against the effects on consumers subscribing to the service to be withdrawn and their alternatives to that service, if any. For these reasons, URCA rejects Digicel's proposal.

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<sup>37</sup>Now Paragraph 50 of the Revised Rules

## 5 Conclusion and Next Steps

In this consultation on URCA's revisions to the pricing Rules, URCA considered:

- the core objectives for regulation and competition as specified in section 4 of the Comms Act;
- URCA's general functions and powers under the Comms Act;
- section 119(1) and Schedule 5 of the Comms Act on universal service;
- Sections 40(3) of the Comms Act;
- relevant conditions of the standard IOL issued to SMP operators;
- URCA's 2010 SMP Final Decision on SMP obligations imposed on BTC and CBL;
- BTC's and CBL's opening written submissions; and
- responses to the consultation document by the following organisations:
  - BTC, and CBL (and on behalf of its affiliated companies Caribbean Crossings Ltd. and Systems Resource Group Ltd.); and
  - Digicel Group.

URCA provided SMP operators more flexibility by reducing the time restriction for repeating a promotion from 120 to 90 days. URCA introduced the "Short Term Promotion" which replaces the Single Day and One Week Promotion and does not require competition tests or URCA's prior approval.

URCA has added more transparency to the approval process by outlining the various competition tests and requiring more granular data, if available. The Rules process for price regulated USO-related services is also clarified. URCA intends for the operators to have a better understanding of the entire process and how the data requirements affect URCA's decision.

URCA outlines these changes along with others in Section 5.1 below.

### 5.1 Summary of Conclusions

#### 5.1.1 Pricing Rules vs Price Cap

Price cap regulation is outside the scope of this consultation. As such, URCA has maintained the existing Rules-based approach to retail price regulation pending the outcome of URCA's forthcoming consultation on assessment of the competitive conditions in key retail markets.

### **5.1.2 Ex-post vs Ex-ante Competition Tests**

URCA has concluded that regulation elsewhere may not be an appropriate test for The Bahamas. In this regard, URCA maintains that a minimum level of *ex-ante* intervention is necessary to prevent undesirable conduct by an operator found to have SMP in a given market. It remains URCA's position that less reliance on *ex-ante* intervention poses tremendous risk for competition because significant time would elapse before an abusive behaviour can be stopped, with potential harm already being done to the market during that period.

The *ex-ante* economic tests to be performed by SMP operators are: price/margin squeeze, price predation, and undue price discrimination.

### **5.1.3 EEO vs REO Test**

URCA does not believe that a duopolistic market structure justifies the use of an REO test. In the context of the Revised Rules relevant competition tests should be carried out using the EEO standard. This allows the SMP operator to base the analysis on its own information. However, the SMP operator is required to explain and justify any deviation from an EEO test.

### **5.1.4 Adjusted vs Unadjusted FAC Cost Estimates**

Relevant competition tests should be based on the LRIC of providing the services under consideration. As LRIC estimates are not presently available in The Bahamas it would be appropriate for SMP operators to use their FAC based unit cost to perform relevant competition related tests. URCA acknowledges that under FAC there may be a case for allowing for cost adjustments to FAC based unit costs to approximate more closely the actually required LRIC based costing data. However, such adjustments may only become necessary if the relevant competition test is not passed using FAC cost standards. Any adjustments to FAC must be fully justified and evidenced as part of the SMP operator's submission.

### **5.1.5 Standalone Service vs. Bundles/Packages**

The scope of the relevant economic tests, in terms of the services included in the analysis of a proposed price change or change in non-price terms and conditions shall ultimately be determined by the way in which the services are commercialized and acquired by customers, as well as the form of entry that may be foreclosed.

The relevant test must be demonstrated using the DCF method. Monthly data is required to undertake the test; however, in the absence of monthly data the SMP operator may conduct the assessment on a less granular basis (e.g., using quarterly data).

### **5.1.6 Length of the Projection Period for Competition Tests**

URCA will not object to the use of a shorter time horizon if the SMP operator is able to show that in considering a period shorter than two years, the operator is able to recover the costs.

On the possibility for the SMP provider to consider a period longer than two years, any variation shall be properly justified and supported with evidence. URCA will only consider variations based on the economic life of relevant assets or average customer lifetime.

#### **5.1.7 Rules Process for Temporary Price Change**

URCA has streamlined the Rules process for special promotions. This resulted in two categories of special promotions: Short Term Promotions, and Full Length Promotions. A Short Term Promotion is a special offer or discount for a Price Regulated Service 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. Regarding Short Term Promotions, the SMP operator:

- must notify URCA of its intention to launch such a promotion; and
- would not be required to set out how its proposed short-term promotion meets the competition tests specified in the Rules.

The SMP operator must first obtain URCA's written approval prior to bringing a Full-Length Promotion to market. The repeat period for Full-Length Promotions has been reduced from 120 days to ninety (90) days.

#### **5.1.8 Rules Process for Change in Non-price Terms and Conditions**

URCA clarifies the Rules process, timeframes, and minimum information requirements for making a change to the non-price terms and conditions for price regulated services.

#### **5.1.9 Price regulated USO-related services**

URCA clarifies the Rules process, timeframes and criteria for evaluating price regulated services which forms part of the universal service obligation. URCA will issue a separate document on how USPs may conduct an affordability assessment of USO-related services (including USO-related services subject to retail price regulation).

## **5.2 Next Steps**

URCA has published as a separate document the revised pricing Rules as ECS 06/2014. Copies of the document may be downloaded from URCA's website at [www.urbahamas.bs](http://www.urbahamas.bs). The Revised Rules will come into effect on 1 May 2014 and will repeal and replace the current Rules (i.e., ECS 15/2010). From that date going forward, all new retail pricing applications by SMP operators will be governed by and conducted under the Revised Rules.