Assessment of Significant Market Power in the Electronic Communications Sector in The Bahamas under Section 39(1) of the Communications Act, 2009

RESPONSE TO PUBLIC CONSULTATION AND FINAL DETERMINATION

ECS 14/2014

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1. Introduction

This document constitutes the Utilities Regulation and Competition Authority's (URCA) Final Determination on assessing Significant Market Power (SMP) in key retail communications services in The Bahamas. Within Section 1 of URCA's document reference number ECS 10/2014,[1] URCA set out the statutory requirements for SMP Determinations.

1.1 Background to this Document

On 22 May 2014, URCA released for public consultation the paper titled "*Preliminary Determination on the Assessment of Significant Market Power in the Electronic Communications Sector of The Bahamas under Section 39(1) of the Communications Act, 2009* " [ECS 10/2014] (hereinafter referred to as "the Consultation").[2] That public consultation paper outlined URCA's preliminary views and proposals arising from its market reviews of the provisioning of key retail communications services in The Bahamas under section 39(1) of the Communications Act ("the Comms Act") and any resulting *ex-ante* regulatory obligations for SMP operators. The services considered in this market review are as follows:

- Fixed voice telephony services;
- Pay TV services (including cable television services); and
- High-speed data services and connectivity (i.e., broadband and connectivity services).[3]

URCA's Initial 2010 SMP Assessment

In 2009, URCA initiated a public proceeding under section 116 and Schedule 4 of the Comms Act on the *ex-ante* remedies to be imposed on specified licensees presumed to have SMP in the provision of the following services:

- BTC in the provision of fixed voice services;
- BTC in the provision of mobile voice and mobile data services;
- CBL in the provision of high-speed data services and connectivity; and
- CBL in the provision of pay TV services.

That public proceeding culminated in the publication of URCA's 2010 Final Decision[4], in which URCA determined that the retail and wholesale markets as detailed in Table 1 below fall within the high level SMP markets applicable respectively to BTC and CBL.

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[1] http://www.urcabahamas.bs/download/023094700.pdf.
[2] Available at: http://www.urcabahamas.bs/download/023094700.pdf.
[3] Given that BTC retains a statutory exclusivity on the provisioning of mobile services in The Bahamas which does not expire until April 2014, URCA considered at the time that a review of competition in mobile voice and data services was not warranted.
[4] *"Final Decision on Obligations imposed on SMP Operators"* (ECS 11/2010), dated 22 April 2010

Table 1: BTC's and CBL's SMP Markets - Retail and Wholesale

BTC - Retail Products	BTC - Wholesale Products
(1) Fixed telephony access and local calling (2) Domestic long distance calling (DLD) (3) Domestic fixed calls to rated numbers (4) International long distance calling (5) Broadband internet access in specified areas (6) Retail National leased lines (7) Mobile access (8) Local mobile calling (9) Domestic long distance mobile calling (10) International long distance mobile calling (11) Mobile data (internet, SMS and MMS)	(1) Fixed intra-island call termination (2) Fixed inter-island call termination (3) Mobile call termination (4) SMS termination[5] (5) Termination to directory inquiries (6) Termination to ancillary services (7) Termination to local emergency numbers or services (8) Call transit (9) Termination to freephone numbers (10) Termination to operator assistance facilities (11) Access to the broadband and transmission networks (12) Wholesale national leased lines
CBL - Retail Products	**CBL - Wholesale Products**
(1) SuperBasic TV package (2) Digital TV packages (3) Retail national leased lines (4) Broadband internet access	(1) Access to the broadband and transmission networks (2) Wholesale national leased lines

As part of URCA's *"Final Decision on Obligations imposed on SMP Operators"* (ECS 11/2010), URCA also set out the specific *ex-ante* obligations applicable to each of the SMP operators. These obligations are summarised in Table 2 below and remain in place to date. These SMP obligations are in addition to the standard/non-discretionary obligations specified in Part G of the standard Individual Operating Licence (IOL) under which both BTC and CBL operate and section 40(4) of the Comms Act.

Table 2: Current Regulatory Obligations Imposed on BTC and CBL

SMP operator	Relevant products	SMP obligations
BTC		
	Retail – Fixed access and calling services	Ex- ante retail price regulation, based on Retail Pricing Rules (RPR)[6]
	Retail – Mobile access and calling services	
	Retail - Broadband internet	Geographic averaging of prices

[5] BTC does not presently provide SMS termination. However, when mobile competition is introduced, BTC will be required to provide SMS termination within its RAIO.

[6] Formerly URCA document reference (ECS 15/2010), *"Regulation of retail prices for SMP operators – Rules"*. ECS 15/2010 was subsequently revised and reissued as ECS 06/2014 on 16 April 2014, available at http://www.urcabahamas.bs/download/091501900.pdf.

	Retail – Incoming international calls to mobile numbers	Removal of charges for incoming international calls to mobile customers
	Wholesale - Call transit, call termination, entry into directory enquiries database & ancillary services, and enabling products (e.g., joining circuits and point of interconnection)	Publication of Reference Access and Interconnection Offer (RAIO) with cost-based charges
	Wholesale - Network access	Offer (end-to-end) broadband product to allow for resale of BTC's broadband products
	All SMP products	Develop separated accounts in accordance with URCA's Accounting Separation Guidelines
CBL		
	Retail – Super Basic TV	Ex- ante retail price regulation, based on RPR
	Retail - Broadband internet	Untying of broadband packages from pay TV packages
	Wholesale - Network access	Offer (end-to-end) broadband product to allow for resale of CBL's broadband products
	All SMP products	Develop separated accounts in accordance with URCA's Accounting Separation Guidelines

URCA's 2013/14 Market Reviews

Given that the SMP markets identified under the Comms Act are interim, the time that has elapsed since the establishment of the current regime, and having regard to market developments in the intervening period, URCA considered it appropriate in 2013 to carry out a further review of retail communications markets to determine which, if any, Licensees have SMP in the relevant markets. This resulted in two market review processes:

- A review of the market for **wholesale call termination services** in The Bahamas[7] which found that BTC, CBL and IP Solutions International Ltd. (iPSi) hold SMP in the market for terminating calls (and mobile voice messages) on their respective networks. The review reaffirmed the remedies applicable to BTC's call termination service pursuant to URCA's 2010 Final SMP Decision and established the need for an *ex-ante* control on CBL's and iPSi's fixed call termination charges, which control was subsequently determined by URCA (after public consultation) in June 2014.[8]

[7] ECS 13/2013, available at http://www.urcabahamas.bs/download/084131300.pdf
[8] *"Wholesale fixed call termination price control for SMP Licensees"* (ECS 12/2014), dated 20 June 2014.

- A review of the markets for **key retail services** (i.e., fixed voice, pay TV and high speed data and connectivity services) in The Bahamas, for which URCA published a Preliminary Determination (ECS 10/2014) for public consultation in May 2014.

The outcome of the market review in ECS 10/2014 will form the basis for any *ex-ante* regulation of the services offered by SMP operators going forward. In particular, the assessment will help identify whether the SMP presumptions for BTC and CBL under section 116 and Schedule 4 of the Comms Act remain valid in the current market environment. It will further allow URCA to assess whether the *ex-ante* regulatory obligations currently imposed on both SMP Licensees remain necessary and/or the need to design alternative measures to remedy any competition concerns identified in each relevant market.

Preliminary Determination on Retail Services

Based on its review of the available evidence and in line with the specified procedures in the Comms Act and the analytical framework (i.e., procedures and criteria) set forth in URCA's SMP Methodology (ECS 20/2011)[9], URCA reached the preliminary position on its SMP assessment in the provisioning of key retail communications services in The Bahamas, as summarised in Table 3 below.

Table 3: Summary of URCA's Preliminary Position as set out in ECS 10/2014

Service	Market definition	SMP findings	Proposed ex-ante remedies
Retail fixed voice services	**Product market** Fixed voice services delivered via: • a PSTN (i.e., currently BTC's Basic Home Phone, HomePhone Plus and Business Landline services)[10] • a cable network (i.e., currently CBL's REVOICE, Small/Medium Business and Enterprise Business services)[11] **Geographic market** National market	BTC has SMP	• Price cap regulation for BTC's retail fixed voice services. • BTC's retail prices for on-net and off-net fixed call services may only differ in case of justifiable cost differences in delivering these call services. • BTC prevented from introducing any new retail product bundles including fixed voice services, unless these bundles can be replicated by other providers.
Retail broadband services	**Product market** • Fixed (DSL) broadband services offered by BTC • Cable-based broadband services offered by CBL **Geographic market**	• CBL has SMP in Geographic Market 1 • BTC has SMP in Geographic Market 2	• Price cap regulation for CBL's retail broadband services. • CBL required to offer stand-alone retail broadband products. • BTC is required to offer geographic uniform prices for retail broadband services.

[9] *"Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009."* (ECS 20/2011), issued 13 October 2011 and available at http://www.urcabahamas.bs/download/063526500.pdf

[10] For the avoidance of doubt this product market includes all retail fixed voice services offered over a fixed network (i.e., irrespective of whether these services are offered on a standalone basis or as part of a product bundle).

[11] For the avoidance of doubt this product market includes all retail fixed voice services offered over a cable network (i.e., irrespective of whether these services are offered on a standalone basis or as part of a product bundle).

	• Geographic market 1 -The islands where both CBL and BTC are offering broadband services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera). • Geographic market 2 - All remaining islands (i.e., where only BTC offers broadband services)		• BTC and CBL are prevented from introducing any new retail product bundles including broadband services, unless these bundles can be replicated by other providers.
Business data connectivity services (national and international)	**<u>Product market</u>** • Traditional leased line products: These are business connectivity services provided over PSTN and Coaxial networks, thereby currently including BTC's regular leased circuits and CBL's REVON Dedicated Circuits; and • Fibre-based leased line products: These are business connectivity services provided over a fibre network, thereby currently including BTC's MPLS (leased circuits over fibre) and CBL's REVON Ethernet Circuits. **<u>Geographic market</u>** • Geographic Market 1 -The islands where CBL and BTC both have infrastructure and are offering national and international business connectivity services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera). • Geographic Market 2 - All remaining islands (i.e., where only BTC has a network infrastructure to offer these services)	Prospectively competitive	• No additional *ex-ante* obligations beyond the standard SMP obligations, any SMP obligations on wholesale services and the non-discrimination requirements as set out in the operating licence.
Pay TV services	**<u>Product market</u>** Access to pay TV content provided over a cable TV and terrestrial network infrastructure (currently offered by CBL). **<u>Geographic market</u>** National market	CBL has SMP	• Price cap regulation for CBL's access and content pay TV packages (i.e., those currently marketed as PRIME, PRIME Select, PRIME Plus and PRIME Extra). • CBL is prevented from introducing any new retail product bundles of pay TV services with any of its other retail services, unless these bundles can be replicated by other providers.

At the time, URCA invited interested parties to submit written comments to its Preliminary Determination set out in ECS 10/2014.

1.2 Responses to the Consultation

The original closing date for the submission to URCA of initial responses to the consultation paper was 11 July 2014 and the comments on initial responses were due by 8 August 2014.

These deadlines were subsequently extended to 29 August 2014 and 30 September 2014, respectively, at the request of a prospective respondent.

By the 29 August 2014 closing date, URCA had received initial responses from **BTC** and **CBL** (with CBL's response also being on behalf of its affiliated companies Caribbean Crossings Ltd. and Systems Resource Group Ltd.). Both Licensees subsequently also commented on the initial responses provided to URCA.

URCA thanks BTC and CBL for their written submissions and participation in the consultation process. The participation by both Licensees was useful and constructive. Copies of all responses and opening written submissions may be downloaded from URCA's website at www.urcabahamas.bs.

Having reviewed and considered the responses from BTC and CBL, URCA now provides in this Final Determination its comments on the responses received and its final decision on the key issues raised in the consultation.

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.

1.3 Structure of the Remainder of this Document

The remainder of this document is structured as follows:

- Section 2 - URCA's Final Determination;
- Section 3 - BTC's and CBL's Responses to the Consultation; and
- Section 4 - Conclusion and Next Steps.

2 Final Determination on SMP in Key Retail Communications Markets

WHEREAS,

(i) section 39(1) of the Communications Act, 2009 empowers URCA to determine that a Licensee has Significant Market Power (SMP) in a market where the Licensee *"… individually or with others, 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 extent independently of its competitors, consumers and subscribers"*; and

(ii) pursuant to section 39(2) of the Communications Act, 2009, URCA issued ECS 20/2011, the *"Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009"* (the "SMP Methodology") containing criteria relating to the definition of markets in the electronic communications sector, and against which market power may be assessed; and

(iii) URCA having conducted a review and issued a Preliminary Determination[12] on the competitive conditions in key retail communications markets in The Bahamas in accordance with section 39(1) of the Communications Act, 2009 and the SMP Methodology considers that it is appropriate to make determinations regarding the definition of markets, the existence of licensees with SMP in those markets, and the extent to which *ex-ante* regulation is appropriate and necessary in those markets; and

(iv) URCA having reviewed all evidence and the submissions (in Section 3 below) made by Bahamas Telecommunications Company Ltd. (BTC) and Cable Bahamas Ltd. (CBL);

URCA hereby makes the following final determination on its SMP assessment for the provision of key retail communications services in The Bahamas, as set out in the table below.

Table 4: URCA's Final Determination of SMP in the Provision of Key Retail Communications Services in The Bahamas

Service	Market definition	SMP findings	Ex-ante remedies
Retail fixed voice services	<u>**Product market**</u> Fixed access and call services irrespective of whether these services are offered on a standalone basis or as	BTC has SMP	Further to the standard SMP obligations as set out in Conditions 34, 35 and 36 of the IOL and section 40(4) of the Comms Act, and specific SMP obligations on accounting separation and cost accounting as set out in regulatory and

[12] ECS 10/2014 dated 22 May 2014.

	part of a product bundle delivered via: • a fixed network (e.g., BTC's Basic Home Phone, HomePhone Plus and Business Landline services) • a cable network (e.g., CBL's REVOICE, Small/Medium Business and Enterprise Business services) **Geographic market** National market		other measures issued by URCA, the following *ex-ante* obligations will also apply: • Price cap regulation for BTC's retail fixed access and voice services. • BTC is prohibited from introducing any new retail product bundles that includes fixed access and voice services unless these bundles can be replicated by other providers.
Retail broadband services	**Product market** • Fixed (DSL) broadband services offered by BTC • Cable-based broadband services offered by CBL **Geographic market** • Geographic Market 1 - The islands where both CBL and BTC are offering broadband services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera). • Geographic Market 2 - All remaining islands (i.e., where only BTC offers broadband services)	• CBL has SMP in Geographic Market 1. • BTC has SMP in Geographic Market 2.	Further to the standard SMP obligations as set out in Conditions 34, 35 and 36 of the IOL and section 40(4) of the Comms Act, and specific SMP obligations on accounting separation and cost accounting as set out in regulatory and other measures issued by URCA, the following ex-ante obligations will also apply: • Modified price cap regulation for CBL's retail broadband services (both residential and business services) • CBL shall continue to offer stand-alone retail broadband products • BTC is required to offer geographic uniform prices for retail broadband services. • BTC and CBL are prohibited from introducing any new retail product bundles in the geographic markets where they hold SMP that includes broadband services unless these bundles can be replicated by other providers
Business data connectivity services (national and international)	**Product market** • Traditional leased line products: These are business connectivity services provided over PSTN and Coaxial networks, thereby currently including BTC's regular leased circuits and CBL's REVON Dedicated Circuits; and • Fibre-based leased line products: These are business connectivity services provided over a fibre network, thereby currently including BTC's MPLS (leased circuits over fibre) and CBL's REVON Ethernet Circuits. **Geographic market** • Geographic Market 1 -The islands where CBL and BTC both have infrastructure and are offering national and international business connectivity services (i.e. New Providence, Abaco, Grand Bahama and Eleuthera). • Geographic Market 2 - All remaining islands (i.e. where only BTC has a network infrastructure to offer these services)	• Geographic Market 1 is prospectively competitive. • BTC has SMP in Geographic Market 2.	The standard SMP obligations as set out in Conditions 34, 35 and 36 of the IOL and section 40(4) of the Comms Act, and specific SMP obligations on accounting separation and cost accounting as set out in regulatory and other measures issued by URCA will apply to BTC.

Pay TV services	**Product market** Access to pay TV content provided over a cable TV and terrestrial network infrastructure (currently offered by CBL). **Geographic market** National market	CBL has SMP	Further to the standard SMP obligations as set out in Conditions 34, 35 and 36 of the IOL and section 40(4) of the Comms Act, and specific SMP obligations on accounting separation and cost accounting as set out in regulatory and other measures issued by URCA, the following *ex-ante* obligations will also apply: • Price cap regulation for CBL's access and content pay TV packages (e.g., those access and content pay TV packages currently marketed as PRIME, PRIME Select, PRIME Plus and PRIME Extra). • CBL is prohibited from introducing any new retail product bundles of pay TV services with any of its other retail services unless these bundles can be replicated by other providers.

For the avoidance of doubt, any existing SMP obligations will remain in place until all new remedies outlined above are fully implemented and URCA communicates the removal of any SMP obligation to the relevant SMP licensee.

Further, during the interim period until a price cap for CBL has been determined and fully implemented by URCA, URCA will not review any applications by CBL for price increases for its retail broadband and pay TV services which have not been notified to URCA prior to the date at which this final determination has been published.

3 Response to the Consultation

Below, URCA summarizes BTC's and CBL's submissions and provides URCA's comments on the key issues raised by the consultation and responses. Firstly, URCA addresses BTC's and CBL's general comments to the consultation. This is followed by URCA's responses to BTC's and CBL's comments on the nineteen questions set out in URCA's consultation document.

When considering the consultation responses, URCA has taken the expressed position of each respondent into consideration.

3.1 BTC's General Comments on the Consultation

BTC, in principle, supports URCA's proposal for a Price Cap in the markets for retail fixed voice, broadband and pay TV services as it believes the transition to such a regime will provide greater flexibility, predictability with respect to the rules of engagement and will enable quicker responses by BTC to competition and the needs of consumers.

However, BTC believes that within URCA's analysis to date, URCA has not sufficiently taken into consideration the impact of the convergence of services such as narrowband, broadband, fixed and mobile services. BTC considers that such an analysis would indicate how the prices of individual services are constrained by other electronic communications services, and how customers tend to buy these services as bundles and not individual services. As such, BTC believes price caps should be broad-based rather than focused on sub-baskets controlling individual prices.

BTC believes URCA has also ignored the potential impact on the markets of the second mobile licence which is to be issued in The Bahamas. BTC argues that a mobile network with national coverage would lower barriers to entry in fixed markets, including the markets for broadband, fixed voice and business connectivity services, and thus this potential market entry raises the prospect of further competition and provides an additional constraint on the behaviour of existing players.

Following the trend internationally in favour of full deregulation of retail services as opposed to retail price caps, BTC urges URCA to ensure that at a minimum any price caps would be implemented for a transitional period only, with the aim of removing retail price regulation entirely when market circumstances allow. In BTC's view, this would be shortly after the new mobile entrant enters the market, due to the competition posed by the new operator.

BTC agrees that the focus of a price cap should be on the protection of the customer against excessive pricing. BTC also believes that there is little to no threat of predatory pricing or margin squeeze currently in the Bahamian communications market, since both BTC and CBL are in a strong enough position to ensure that such behaviour would not be profitable should it be displayed by the other operator in any service market where that operator has SMP. Therefore, BTC believes replicability tests are counterproductive and would result in operators without SMP becoming subject to SMP obligations.

BTC further makes reference to its proposal to define a single geographic market for all services under consideration and the need to consider business and residential fixed voice services separately. Both of these issues are elaborated further in BTC's responses to the relevant consultation questions.

In its second-round response to CBL's comments on the Preliminary Determination, BTC supported CBL's view that there should be a more interactive consultation process with more opportunities for the operators to comment on URCA's findings as was the case in the market review in 2009. BTC also proposed that there should be further discussion on the design of the price cap to ensure that the eventual price cap mechanism is workable and efficient. Reference was made to the initial 2010 SMP Assessment where URCA also published a Position Paper, providing stakeholders with a further opportunity to comment on URCA's analysis.

URCA's response to BTC's comments

URCA notes BTC's support for the proposed remedies, in particular the suggested replacement of the Retail Pricing Rules (RPR) with a price cap.

URCA agrees that there is a trend towards the overall convergence of communications services and an increasing importance of bundled offerings. Contrary to BTC's assertion, URCA considers that it has taken this factor into account in its analysis.

Regarding the issue of a second mobile licence, URCA considers that it is too early to reasonably assess the potential impact this issue may have on the broader communications market. URCA considers that it will be in a better position to assess the impact of a second mobile operator at the next market review. In general, URCA will keep *ex-ante* obligations in place until the competitive dynamics in the relevant markets have developed sufficiently to warrant the removal of these obligations in favour of *ex-post* measures.

On replicability testing, URCA believes that BTC has misunderstood the purpose of this test. As with the replicability requirement in the fixed voice market, this requirement relates to undue bundling (rather than predation or margin squeeze). URCA confirms the details on the replicability test in its comments on the responses to Question 16 below. This test is employed to avoid a situation where an SMP licensee could leverage its market power in one market into another market. The test requires the SMP licensee to demonstrate, as part of its application for new bundle offerings which contain at least one SMP product, that the bundle can be technically and economically replicated by at least one alternative operator (either based on the alternative operator's own network infrastructure or based on regulated wholesale services provided by the SMP operator). Finally, URCA disagrees with BTC's assertion that the replicability test would lead to operators without SMP being subject to SMP obligations as the requirements set out in the Retail Pricing Rules only apply to operators designated or determined under the Comms Act to have SMP.

URCA considers BTC's assertion that the business and residential segments be defined as separate markets relies on an incorrect application of the SSNIP test. When the SSNIP test is applied correctly, URCA has found that supply-side substitutability exists between the business and residential segments and for this reason URCA has defined them as a single product market. Further details are provided in URCA's comments on operators' responses to Questions 1 and 4 below. URCA further disagrees with BTC's views on the relevant geographic market definitions for fixed voice and broadband services. This is addressed further below as part of the relevant consultation question.

URCA acknowledges BTC's (and CBL's) urging for a further round of consultation but does not consider there to be a demonstrated need for further consultation on the market review process. In URCA's view, two rounds of consultation are generally required if there is a need to consult on both the approach/methodology taken and the preliminary results. This is not the case here as URCA has followed the approach set out in its SMP Methodology which has already been the subject of a separate consultation. As part of its Preliminary Determination, URCA has therefore set out its provisional analysis and findings on all key aspects of the market review process and invited stakeholders to comment on them. As part of their responses, neither operator has introduced any evidence which, in URCA's view, significantly changes URCA's findings as set out in the Preliminary Determination. Moreover, URCA considers that it has not presented any new evidence, analysis or decisions in this document which deviate from the issues already consulted on and would require further comment from the stakeholders.

In endeavouring to support its proposal that that there should be a more interactive consultation process with more opportunities for the operators to comment on URCA's findings as was the case in the market review in 2009, BTC made reference to the initial 2010 SMP Assessment where URCA also published a Position Paper[13] providing stakeholders with a further opportunity to comment on URCA's analysis. URCA clarifies for BTC and other parties the sequence of events that led to URCA publishing the Position Paper and why, for the reasons stated in the preceding paragraph, URCA considers that further rounds of consultation are not required in this proceeding. On 15 February 2010, URCA issued ECS 04/2010 titled *"Final Determination (Closure of Original Section 100 Process and Timelines) on: Types of Obligations on Bahamas Telecommunication Company Ltd (BTC) under s. 116(3) Communications Act, 2009 and Types of Obligations on Cable Bahamas Ltd. under s.116(3) Communications Act, 2009".* This

[13] *"Position Paper – Regarding Types of Obligations on Bahamas Telecommunications Company Ltd. and Cable Bahamas Ltd. under s.116(3) of Communications Act, 2009"* [ECS 07/2010] issued on 19 March 2010.

document summarised that URCA had initially commenced the process of imposing possible SMP obligations under section 116(3) of the Comms Act on BTC and CBL by way of a Preliminary Determination process under section 100 of the Comms Act with a view to issuing orders at the end of the process under section 95 of the Comms Act. However, based on opposition to the process selected by URCA and other issues raised, URCA decided to conclude the section 100 process of determining the SMP obligations and proceed solely with the process specified in section 116(3) of the Comms Act. URCA gave notice in ECS 04/2010 that in the absence of a detailed procedure in section 116(3) for imposing SMP obligations, it would issue a further document to *"highlight any evolution in its thinking that may occur following detailed consideration of the [submitted possible obligations] and comments received to date".* Thereafter, on 19 March 2010, URCA issued the Position Paper (ECS 07/2010) and indicated therein its reasons for doing so, namely *"… to set out URCA's current thinking on the types of [SMP] obligations, and the reasons for possible changes to URCA's position"* from the time of issuing possible SMP obligations on BTC and CBL respectively in ECS 18/2009 and ECS 19/2009. URCA considers, for the reasons given above, that the prevailing circumstances in 2009/2010 regarding the possible SMP obligations do not arise in, and are different from, the current proceeding.

For the avoidance of doubt, the purpose of this SMP Assessment is to define the relevant markets, to assess if any licensee has SMP in each market and if so, to determine the relevant remedies to address any competition concerns in the relevant market. In due course URCA will determine in consultation with stakeholders the detailed implementation of the SMP remedies identified in Section 2 above, in particular the price cap for BTC's retail fixed voice services, and CBL's retail pay TV services and broadband products. As part of this process, URCA will issue a separate consultation document allowing stakeholders the opportunity to comment on URCA's proposed implementation (see Section 4 below).

3.2 CBL's General Comments on the Consultation

CBL generally disagrees with URCA's proposals on the need for *ex-ante* regulation in the retail markets considered in this review. CBL believes that both the retail broadband and pay TV markets are not susceptible to *ex-ante* regulation, and that the current and proposed obligations should be withdrawn. In CBL's view, URCA should be considering deregulatory approaches in order to stimulate investment and incentivise innovation, as opposed to URCA's proposed regulations. In particular, CBL contends that URCA's proposal to extend the degree of regulation on the retail broadband market is based on incorrect factual assumptions and a flawed market review methodology. In addition, CBL disagrees with URCA's proposal to impose a price cap on pay TV services to stimulate competition, since it finds that the pay TV market is trending towards effective competition. Thus, CBL believes the retail pay TV market should be a candidate for deregulation.

In addition to the responses to the consultation questions outlined below, CBL disagrees with URCA's application of the EU three-criteria test. CBL believes that the test should be applied at the outset of the market review process as opposed to the remedy stage in order to determine whether the relevant retail markets are susceptible to *ex-ante* regulation. Instead, CBL argues that a correct application of the test would find that the retail broadband and pay TV markets are not susceptible to such regulation since neither retail markets satisfies two of the three criteria in the test, namely: (i) high barriers to entry, and (ii) the market not trending toward effective competition.

- CBL argues that there are no legal, licensing or structural barriers to entry in the retail broadband market and believes that there is already strong price and quality competition, meaning that both criteria are not met in this market.
- Similarly in pay TV, CBL argues that the possibility of introducing IPTV or providing TV services over satellite technology, coupled with comparatively lower costs of investing in such technologies, means that barriers to entry are insignificant and the further competition anticipated over the forthcoming 12-18 months indicate increasing competition. Thus, both criteria above are not met in the pay TV sector either, according to CBL.

CBL adds that the existence of strong competition in the retail broadband market and the trend towards effective competition in the pay TV market was confirmed in a report prepared for CBL by Analysys Mason (the contents of which were provided to URCA as part of CBL's confidential response to the consultation).

Furthermore, CBL argues that the correct application of the EU three-criteria test indicates that there is no need for the regulation of the wholesale broadband access market (i.e., the need for CBL to offer a resale broadband offer to interested parties) since, according to EU practice, if the corresponding retail market is found to be competitive absent *ex-ante* wholesale regulation, such wholesale regulation upstream of that market is no longer warranted. CBL argues that its existence and that of BTC is sufficient to ensure effective retail competition in the broadband market and therefore the current regulation in the wholesale market should be withdrawn, or at a minimum, current *ex-ante* obligations on the downstream retail broadband market should be withdrawn.

In addition, CBL disagrees with URCA's assessment of the proposed remedies. CBL believes that URCA has not provided adequate evidence for the existence of "excessive pricing" in broadband and pay TV, and that URCA's reliance on the benchmark study prepared by Ofcom is misunderstood in the context of The Bahamas. CBL believes that URCA is unclear as to whether *ex-ante* price regulation is aimed at addressing the risk of excessive or predatory pricing in the retail broadband and Pay TV markets. Moreover, CBL believes that the proposal to impose a replicability test is inconsistent with URCA's proposal to impose a retail price cap. Therefore, CBL suggests that URCA limit its price regulation to PRIME/SuperBasic service only. In addition, it suggests that URCA defer its decision to impose regulation over the forthcoming 12-18 months in order to take into account the strong competitive dynamic.

As was mentioned above, CBL suggested a longer consultation process with more interaction as well as further engagement on the design and implementation of the price cap remedy.

URCA's response to CBL's comments

URCA understands that CBL's proposal for deregulation is based on CBL's own assessment that the retail markets for broadband and pay TV services do not meet two out of the three criteria in the EU three-criteria test, namely: (i) high barriers to entry, and (ii) a market trend towards effective competition. However, URCA finds that CBL's assessment and conclusion are based on a misunderstanding of the purpose of the three-criteria test as well as an incorrect assessment of both the level of barriers to entry and the extent of competition in the markets for broadband and Pay TV services in The Bahamas.

URCA reminds CBL that the three-criteria test does not form part of the relevant procedures of the Comms Act or the analytical framework set out in URCA's SMP Methodology. As such, in carrying out this market review URCA has employed the analytical framework under the SMP Methodology and bolstered that process with the use of the three-criteria test.

In URCA's view, whilst the three-criteria test provides a helpful framework to ensure that *ex-ante* remedies are targeted, in practice its first two criteria (i.e., the existence of barriers to entry and no trend towards effective competition) are covered in the competition assessment (i.e., identify SMP Licensees) stage of the market review process in The Bahamas.

Consequently, the conclusions from URCA's competition assessment and assessment of the first two criteria should not diverge. The main addition of the three-criteria test in this instance therefore lies in the third criteria (i.e., whether *ex-post* competition law would be unsuitable to remedy any competition issues that may arise). For this reason, URCA has used the three-criteria test for remedy design.

On CBL's specific argument, URCA understands that CBL believes that if a market does not meet at least one of the three criteria in the three-criteria test, it is automatically exempt from any *ex-ante* regulation. In URCA's view, this is not correct. The three-criteria test is used to come to a conclusion on whether or not there is a **presumption** of dominance in the market under consideration. Even if a market does not meet one of the criteria in the test, this does not preclude the regulator from carrying out an SMP assessment if there is a risk that the market is not actually competitive. Furthermore, it is URCA's assessment that both the markets for pay TV and broadband services do in fact meet all three criteria, contrary to CBL's submissions. Further detail on this is available in URCA's response to operators' comments on Questions 6 and 15.

While it is true that there has been a trend internationally towards wholesale regulation which allows the removal of retail regulation, URCA is not aware of many jurisdictions where wholesale regulation was also fully removed (as this would require enhanced infrastructure-based competition on a national level). URCA's assessment also needs to take the current and expected market situation in The Bahamas into account. At the moment, there is limited wholesale regulation in The Bahamas and this has not resulted in further market entry and hence retail competition. As mentioned above and detailed in the comments on responses to Questions 6 and 15, URCA takes this to mean that barriers to entry in the pay TV and broadband markets remain high. As evidence of this, there has not been, to URCA's knowledge, any new entrant to date in either market. Furthermore, in URCA's view BTC currently does not compete with CBL in pay TV and there is limited competition between BTC and CBL in the broadband market, possibly pointing to there being barriers to expansion for BTC.

URCA acknowledges the evidence presented by CBL to reinforce its assertion that there is no excessive pricing in the broadband and pay TV markets. While URCA notes the improvements in the product offerings by CBL (in terms of higher download speeds, resulting in implied reductions in average prices for CBL's REVON services), URCA also observes that these have only come in the last year, after the period being considered by URCA. Further, URCA must assess the risk of excessive pricing going forward and at this point, finds that such a risk exists (in particular for pay TV services).

URCA disagrees with CBL that the replicability test and the price cap are inconsistent and asserts that they serve two independent, but complementary, purposes. Detailed responses on this are laid out in URCA's response to operators' comments on Questions 17 and 19.

Furthermore, URCA considers there to be a need to impose *ex-ante* regulation on all 'access and content' pay TV packages offered by CBL as these are essential means to gain access to pay TV services in The Bahamas.

URCA has already addressed the request for further consultation as part of its response to BTC's general comments in Section 3.1 above. Whilst URCA disagrees with the need for further consultation on the market review process, URCA accepts the need for a separate consultation with BTC and CBL on the design and implementation of the new price cap regime.

3.3 BTC's and CBL's Responses to URCA's Consultation Questions

3.3.1 Market definition and competition assessment - Fixed Voice Services

Question 1 – "Do you agree with URCA's approach to and definition of the product market? If not, why not?"

BTC's comments

BTC had two main concerns with URCA's proposed product market definition for fixed voice services: (i) the need for separate product markets for residential and business services and; (ii) a need to define a separate market for international call service.

According to BTC, separate product markets for **residential and business fixed access and call services** should be considered. This is due to the following:

1. There is no demand side or supply side substitution for these services. In particular, the current price differential between business and residential fixed line service offerings is in excess of that used in the SSNIP test (i.e., 22% for BTC and 17% for CBL compared to the test's assumed 10% increase in prices) and yet both operators are able to maintain this price differential. BTC considers this as evidence that neither demand nor supply side substitution takes place.

2. BTC also believes that there is a difference in the competitive dynamics of the two sub-markets. In particular, the market for business access and call services has proven to be more competitive compared to the less lucrative residential access and call service market. Also, smaller competitors have planned to enter the market for business services. In addition, the distribution of market shares is significantly different between the business and residential service segments. BTC therefore believes URCA should carry out a market shares analysis in the two markets to identify any SMP.

Concerning **international call services**, BTC believes that they should be treated as a separate market from national calls and fixed access services for the following reasons:

1. Calls from The Bahamas to international locations cannot be considered substitutes for local and national call services since international destinations cannot be reached by dialling numbers based in The Bahamas. As a result, a SSNIP for international call services cannot result in any switching to national and local call services.

2. It is difficult for a provider of national and local call services to also provide international call services due to the difficulty of implementing the necessary infrastructure to connect Bahamian customers with international locations.

3. The international call market has many more providers than the market for national and local call services. International call providers include Voice over IP (VoIP) and pre-paid calling card providers. BTC believes VoIP is a close substitute for international call services over a copper or coaxial network and that URCA has underestimated the improvement in the quality of VoIP calls. In addition, BTC disagrees with URCA's observation that in the absence of declining total fixed voice traffic over its network, there is no substitution occurring to VoIP services.

Finally, BTC accepts URCA's conclusion that fixed and mobile services are currently in different markets but believes that in the future, mobile voice services will need to be considered as being in the same market as fixed voice services, and that substitution between the two will need to be taken into consideration going forward.

In conclusion, BTC suggests that URCA should consider three separate product markets, consisting of: (i) fixed access and local/national call services for residential customers, (ii) fixed access and local/national call services for business customers, and (iii) fixed call services to international destinations.

<u>CBL's comments</u>
CBL broadly agrees with URCA' proposal to define a single product market for fixed voice services. However, CBL believes that URCA should also include fixed access and calling services delivered via fixed wireless networks. CBL believes that URCA's failure to take licensed fixed wireless operators into account affects the substitution analysis as well as URCA's application of the European Commission's three-criteria test.

<u>URCA's response to BTC's and CBL's comments</u>

Business vs. residential services
URCA understands BTC's assertion on residential and business fixed access and call services but finds it to be erroneous because, in URCA's view, BTC has misunderstood the SSNIP test and applied it incorrectly in order to reach its conclusion. In particular, on the supply-side, the SSNIP test checks to see if a hypothetical monopolist were to increase its prices by 10%, could its competitors either increase its capacity or switch to the provision of this product and thus, render the price increase unprofitable. URCA notes that CBL, as part of its second round response, also concludes that BTC has misunderstood how the SSNIP test is applied in practice. CBL correctly states, in URCA's view, that the existence of a price difference between business and residential fixed line services at this point in time does not confirm that the SSNIP test would be satisfied in respect of these services.

Additionally, given the similar infrastructure necessary for both business and residential products, URCA believes that supply-side substitution exists. The existence of either demand or supply-side substitution can be sufficient to define a single product market, and for this reason, URCA has defined a single product market for business and residential products.

Furthermore, contrary to BTC's assertion, URCA has found no evidence to suggest that the competitive dynamics differ between the business and residential fixed voice service segments in The Bahamas. The competitive assessment, even when carried out on the sub-segments separately, indicate to URCA that BTC has market power because of factors such as market shares, barriers to entry, and so on. Specifically, the market shares for BTC remain well above 40% (URCA's presumption of dominance threshold)[14] for both sub-segments in the period considered by URCA. URCA had requested further data on business and residential customers in order to gather more evidence for its decision. However, operators did not provide the requested information and URCA has concluded based on the available evidence that a single market for business and residential customers is appropriate for fixed voice services. URCA acknowledges that competition could develop differently in the future. Consequently, URCA will continue to monitor the development of competition in each sub-segment subject to the availability of data.

Market for international call services

URCA agrees with BTC that there is no demand side substitutability between local/national and international calls as these call services are location specific. That is, in the event of a SSNIP for an international call, a customer cannot substitute that for a national call and still reach the same person. However, for the following reasons, URCA remains of the view that it is appropriate to consider all three call services jointly within a single product market:

- Both CBL and BTC currently offer fixed voice packages that include international, local and national call minutes and fixed access services.[15] For these reasons, URCA is of the view that competition tends to focus on packages of fixed voice services rather than offering individual call services to customers. Further, in its submissions on this consultation as well as comments on other regulatory proceedings, BTC acknowledged that competition in the fixed telephony market takes place for bundles rather than individual services.

- Whilst the provision of international call services does require access to international connectivity capacity, URCA remains of the view that there is no difference in the number of licenced service providers in The Bahamas for the international, national and local call services. In particular, both BTC and CBL have the infrastructure necessary to provide all three types of call services and there are no licenced operators in The Bahamas that provide only local and national calling services. While there are providers of international calls in the form of pre-paid calling cards, in The Bahamas these cards are only provided by BTC and CBL and URCA maintains that pre-paid calling services are not substitutable for fixed voice services.

[14] ECS 20/2011

[15] With both operators offering national and international call bundles as add-ons to the retail fixed access products which include unmetered local calls.

- URCA does not agree with BTC's assertion that an **"unmanaged" VoIP service** (i.e., VoIP services offered by international providers, such as Skype, which require a separate internet connection and can then be accessed via an over-the-top application on a laptop, PC, smartphone or tablet) is a close substitute for international calls for the following reasons:

    - Broadband access is a necessary requirement to use unmanaged VoIP services. Broadband service take-up in The Bahamas is not universal,[16] thereby meaning that unmanaged VoIP services are not a viable substitute for several fixed voice users.

    - VoIP would impose an additional cost in terms of both money and convenience on customers. This is because current fixed voice offerings in The Bahamas include a number of national, international and local call minutes each month. It would therefore be fairly inconvenient for consumers to use their computers to make international calls when the alternative is to use their existing landline.

    - URCA further notes that BTC has not provided any evidential support for the alleged substitution of international calls from a fixed line to VoIP services by Bahamian customers. Consequently, URCA has to rely on its observation from operator-provided data that average international call traffic per fixed voice subscriber has increased between 2010 and 2012 with a compound annual growth rate of 2.8%. Whilst URCA recognises that Bahamian customers may still use unmanaged VoIP services for international or other call services, given the relative prices of call services of unmanaged VoIP services versus the prices of BTC's residential HomePhone and CBL's REVOICE packages, URCA considers this to indicate that Bahamian consumers do not consider unmanaged VoIP services and BTC's HomePhone/CBL's REVOICE services to be good substitutes.

Fixed wireless networks

With regards to services provided over **fixed wireless networks**, URCA believes that the technology could, in theory, be a substitute for BTC's fixed voice offering. However, URCA considered CBL/SRG's fixed wireless network in its analysis and did not find CBL/SRG's particular offering to be an adequate substitute. As URCA is not aware of any other existing service providers using fixed wireless infrastructure to provide fixed voice services in The Bahamas, URCA does not think it appropriate to include fixed wireless in the product market definition at the time of this market review.

URCA's Final Determination – Relevant Product Market for Fixed Voice Services

[16] In 2012, circa 60% of total households had a broadband connection. As such, more than a third of all households did not have access to broadband and thus, unmanaged VoIP services. This compares to over 90% of all households having subscribed to a fixed voice service in 2012.

URCA determines that the relevant market for fixed voice services includes the following products:

- All fixed access and call services delivered via a fixed network irrespective of whether these services are offered on a standalone basis or as part of a product bundle (e.g., BTC's Basic Home Phone, HomePhone Plus and Business Landline services)

- All fixed access and call services delivered via a cable network irrespective of whether these services are offered on a standalone basis or as part of a product bundle (e.g., CBL's REVOICE, Small/Medium Business and Enterprise Business services)

URCA does not consider it necessary or appropriate at this time to define a separate market for international calls.

Question 2 – "Do you agree with URCA's approach to and definition of the geographic market? If not, why?"

<u>BTC's comments</u>

BTC considers it inconsistent for URCA to define two geographical markets for broadband services and a single, national market for fixed voice services. BTC believes that both BTC's and CBL's footprint for broadband services mirrors that of their respective fixed voice footprints, so there should be a consistency between the geographic markets for both product markets.

<u>CBL's comments</u>

CBL agrees with the approach to and definition of the geographic market.

<u>URCA's response to BTC's and CBL's comments</u>

URCA notes that while the footprint for broadband services mirrors that for fixed voice services, the competitive dynamics at the geographic level differ in the two product markets. For broadband services, CBL was found to have significant market power in Geographic Market 1 while BTC was found to have significant market power in Geographic Market 2. In the fixed voice market, however, BTC was found to have market power in both geographic markets. Thus, defining separate geographic markets for fixed voice services would have no impact on the outcome of the competitive assessment. Defining a separate geographic market, in URCA's view, requires the competitive dynamics to be significantly different in the relevant sub-segment. Given the difference in BTC's and CBL's market shares in what would be Geographic Market 1, URCA consider it necessary to define two separate geographic markets for broadband services.

URCA further notes that, as part of its second response, CBL rebuts BTC's assertion that the geographic scope of each relevant retail market should be "consistent" on two grounds:

- Firstly, CBL points to European evidence that for the purposes of both *ex-post* competition law and *ex-ante* regulation, the geographic scope of a service market consists of the geographic area in which the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. As outlined earlier, URCA's analysis did not find the competitive dynamics to be different in the two geographic markets.
- Secondly, CBL highlights that the criteria set out in URCA's SMP Methodology do not make any reference to the need to ensure that the geographic scope of the various service markets defined is "consistent".

Given the above, URCA maintains the view that it is appropriate to define a single geographic market for fixed voice services.

URCA's Final Determination – Relevant Geographic Market for Fixed Voice Services

URCA determines that the retail market for fixed voice services is national in scope.

Question 3 – "Do you agree with URCA's SMP findings in the market for fixed voice services? If not, why not?"

<u>BTC's comments</u>
BTC does not believe it can comment on URCA's findings until a market share analysis has been carried out across its proposed separate markets of business and residential services, and national and international calls.

<u>CBL's comments</u>
CBL believes that URCA has overlooked the ability of fixed wireless networks to provide fixed access and call services which are more cost effective in terms of initial investment and service deployment. It therefore believes that potential time and resource requirements to start operations are different for fixed wireless operators.

<u>URCA's response to BTC's and CBL's comments</u>
URCA notes with regret BTC's decision not to comment on URCA's preliminary competition assessment.

URCA notes CBL's reference to fixed wireless network operators' potential ability to provide fixed access and call services in a timely and cost efficient manner. URCA encourages such further entry to the fixed voice market and any potential enhancement in competition resulting from it. However, excluding the SRG network, URCA has not seen any evidence of such entry occurring in The Bahamas and, as such, remains of the view that if such entry would occur, the impact on competition in the fixed voice market is likely to be limited within the period considered in this market review.

URCA's Final Determination – SMP findings in the Relevant Market for Fixed Voice Services

URCA determines that the market definition for the market for fixed voice services is unchanged therefore the competitive assessment and its outcome are also unchanged.

As such, URCA further determines that BTC has SMP in the national market for retail fixed voice services, covering access, local call, long distance and international call services from a fixed location.

3.3.2 Market definition and competition assessment - Broadband Services

Question 4 – "Do you agree with URCA's definition of the product market? If not, why not?"

BTC's comments

BTC does not consider it necessary to distinguish its fixed (DSL) broadband from the cable based broadband services offered by CBL, especially considering URCA has only distinguished between narrowband and broadband services in the past. BTC also believes that cable based broadband should be the focal point of the analysis, as opposed to DSL.

BTC believes that, as with fixed voice services, separate markets should be identified for broadband business and broadband residential services, citing similar reasons for those set out for fixed voice services. BTC does not believe the lack of customer data on switching to be an adequate rationale for a conclusion on demand side substitution, especially since operators provide different packages to business customers in order to prevent switching.

In addition, BTC believes that the current price difference with business services between 2 and 4 times the price of residential services demonstrates that a price increase would not be constrained by supply side substitution.

CBL's comments

CBL agrees with URCA's definition of the product market.

URCA's response to BTC's and CBL's comments

URCA considers that the focal product is traditionally that product which is provided by the incumbent operator. For the purpose of this market review, defining the focal product as cable or DSL would not affect the outcome of the market assessment. This is in line with URCA's preliminary conclusions set out on pages 57 and 58 of the consultation document.

Business vs. residential services

As was the case in the fixed voice market, URCA considers that BTC has misunderstood the methodology for the application of the SSNIP test. Given the similar infrastructure necessary for both business and residential broadband products, URCA believes that supply-side substitution exists. As mentioned previously, the existence of either demand or supply-side substitution can be sufficient to define a single product market, and for this reason, URCA has defined a single product market for business and residential products. URCA notes that a similar position was again taken by CBL in its second round response, where it argued that BTC has misunderstood how the SSNIP test is applied and the existence of a price difference between business and residential services does not confirm that a SSNIP test would be satisfied in respect of these services.

URCA's Final Determination – Relevant Product Market for Broadband Services

Given the above, URCA's final determination is to define a single market for business and residential customers, including the following products:

- Fixed (DSL) broadband (currently offered by BTC); and
- Cable-based broadband services (currently offered by CBL).

Question 5 – "Do you agree with URCA's definition of the geographic market? If not, why not?"

<u>BTC's comments</u>

BTC believes that Geographic Market 2 (i.e., all islands other than the four largest) is too small a market to be considered separate to the other geographic market. By BTC's estimates, only 5% of the national broadband market is situated in that region and so that demographic becomes an unlikely target for geographical de-averaging.

<u>CBL's comments</u>

CBL agrees with URCA's definition of the geographic market.

<u>URCA's response to BTC's and CBL's comments</u>

Whilst URCA notes BTC concern about the merits of defining separate geographic markets based on the difference in BTC's and CBL's network coverage, as a regulatory authority, URCA has a statutory duty to protect the interests of all customer segments, irrespective of the size of the segment. URCA's assessment of differences in supply factors has led it to conclude that the competitive dynamics in Geographic Market 2 differ to a sufficient extent to warrant a separate market definition. For this reason, URCA continues to define Geographic Market 2 separately from Geographic Market 1.

URCA's Final Determination – SMP findings in the Relevant Market for Fixed Voice Services

URCA determines that the market definition for the market for fixed voice services is unchanged therefore the competitive assessment and its outcome are also unchanged.

As such, URCA further determines that BTC has SMP in the national market for retail fixed voice services, covering access, local call, long distance and international call services from a fixed location.

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Question 6 – "Do you agree with URCA's SMP findings in the markets for broadband services? If not, why?"

BTC's comments
BTC states it cannot comment on the SMP assessment until URCA has carried out an analysis of factors giving rise to SMP for separate business and residential markets.

CBL's comments
CBL disagrees with URCA's SMP findings on the grounds that it believes URCA has not correctly applied the EU three-criteria test to the retail broadband market and as such has not taken into account that the market is not susceptible to *ex-ante* regulation. CBL argues that the test fails because the first two criteria of the test are not satisfied and so, SMP cannot be said to exist.

CBL believes that the strong competition in the retail broadband market and the absence of high barriers to entry have not been taken into account in the competitive assessment. CBL argues that there are no constraints that would prevent or obstruct new market entry as there are no licensing restrictions on the number of broadband providers and spectrum is available in a number of bands that could be used to provide broadband services in The Bahamas.

In addition, CBL believes that URCA is incorrect in concluding that the existence of only two broadband providers implies little to no competition. CBL believes that between itself and BTC there is substantial downstream retail competition in broadband services. CBL draws on a 2007 review by the Malta Communications Authority which concluded that, in spite of the existence of only two Maltese infrastructure based operators, several factors confirmed the presence of strong retail broadband competition, including "not low" broadband penetration rates, price competition at a retail level, the existence of a "variety" of retail broadband offers and evidence of service and technology innovation.

URCA's response to BTC's and CBL's comments

URCA again notes with regret BTC's decision not to comment on URCA's preliminary competition assessment.

URCA is of the view that CBL's understanding of how the **three-criteria** test is applied is incorrect. URCA notes that the three-criteria test was used in the European Union (EU) in order to bring about consistency in how the markets are regulated. In particular, the European Commission's original intention in 2002 was to identify a set of markets that justified regulation in most, if not all, Member States. This was undertaken at a time when most National Regulatory Authorities (NRAs) had relatively little experience in the application of competition law methodology. Without clear guidance from the Commission, there would have been a risk of considerable divergence of approach across Europe. The Three Criteria Test provided a sound rationale for the inclusion of markets on the recommended list. However, there now seems to be a step away from this process in Europe as a one-size-fits-all rule may no longer apply. For example, in a recent report, Ecorys suggests an alternative approach where the Commission identifies the factors that need to be weighed by NRAs in assessing each Criterion, but not generally to reach a conclusion on the need for *ex ante* regulation.[17]

As mentioned in URCA's response to the CBL's general comments (Section 3.2 above), the three-criteria test is useful as an intellectual framework but URCA does not consider it a substitute to its competition assessment. URCA considers that the main addition of the test lies in the third criteria (i.e., the application of competition law alone would not adequately address the market failure(s) identified), which is most applicable to the remedy design stage.

URCA further notes that BTC's response to CBL's comments on the Preliminary Determination provides support for URCA's position. BTC points to examples, such as Ofcom's fixed access market reviews[18], where the three-criteria test follows the market definition process rather than precedes it. BTC then asserts that in any case, the outcome of the test should be the same whether it is carried out before or after the process of market definition. Additionally, BTC states that it comes to a different conclusion to CBL when it carries out the three-criteria test in the retail broadband market.

Further, URCA disagrees with CBL's argument that **barriers to entry** in the broadband market are low. Whilst there may be limited regulatory barriers to entry (in terms of licence restrictions for fixed wireless network operators), there has been limited entry to the market in recent years. URCA takes this as a sign that structural barriers to entry (in terms of the fixed costs required to provide broadband services, taking into account the overall market size, existing

[17] Ecorys, "Future electronic communications markets subject to ex-ante regulation", dated 18 September 2013

[18] Ofcom, *"Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30",* dated 3 July 2013. Available at http://stakeholders.ofcom.org.uk/binaries/consultations/fixed-access-market-reviews/summary/fixed-access-markets.pdf

market players and current take-up of broadband services) may exist. Furthermore, even if an operator (based on, for example, a fixed wireless network as alluded to by CBL) were to enter the market, it remains uncertain if its service offering would be considered a substitute to the current broadband offerings and thus, to potentially constrain CBL's and/or BTC's behaviour on the broadband market. This would remain to be determined in the next market review, should entry occur.

URCA further notes that there has also been no further entry based on BTC's/ CBL's regulated end-to-end wholesale broadband product which would constitute a less capital intense entry strategy.

BTC also finds that the barriers to entry in the retail broadband market are still significant for both fixed wireless and fixed wireline networks because of the upfront investment required. BTC makes reference to the WiMAX provider Last Mile Communications in The Bahamas which required approximately three years to begin offering services.

It is also not apparent to URCA that there has been intense competition between BTC and CBL since the last market review in 2009. This could, in part, be as a result of BTC's recent upgrade of its core network to an NGN in order to be able to offer similar speeds as those on CBL's coaxial network.[19] Given the above, coupled with CBL's prevailing high and stable market share in the retail broadband market and the absence of countervailing buying power, URCA remains of the view that CBL holds market power in this market and thus is in a position to price these services above the competitive level. Whilst URCA recognises CBL's evidence that its broadband prices are in line with those elsewhere and thus not excessive, given the current and prospective market environment, URCA remains of the view that CBL still has the ability to set prices above a competitive level going forward (due to prevailing barriers to entry or expansion). This, in URCA's view, warrants the need for *ex-ante* regulation on CBL's broadband services going forward.

BTC's cross-response is supportive of URCA's preliminary position. BTC notes that CBL's economies of scale and scope may mean that CBL has scope to reduce its retail prices and that CBL's pricing policy in the past does not guarantee that it will not raise retail prices in the future. BTC proposes that, given CBL's prevailing market shares of broadband connections, a price cap is an acceptable way of constraining CBL's SMP.

Finally, URCA has considered CBL's evidence on the Maltese broadband market but does not consider it relevant for the Bahamian broadband market. This is because the market characteristics in Malta at the time of that review in 2007 are different to the market situation in The Bahamas today. For example:

[19] However, URCA notes that BTC may still face constraints in its ability to compete effectively with CBL, since not having (fully) upgraded its access network with fiber.

- In Malta, total internet subscribers grew 7% per annum in 2006 while total broadband subscribers grew by approximately 20% that year. This compares to an annual growth of broadband connections of approximately 3% in The Bahamas during the period 2010-12.

- Whilst both DSL and cable-based broadband subscribers were growing in Malta at that time, the cable operator's market share increased from 43% to 48% within 2006 alone, and both operators report similar market shares since then. In contrast, BTC's market share of broadband connections has remained stable and significantly lower than CBL's market share since 2009.

URCA's Final Determination – SMP findings in the Relevant Market for Broadband Services

URCA determines that:

- CBL has SMP in the market for broadband services in the areas where it offers these services (i.e., Geographic Market 1); and

- BTC has SMP in the market for broadband services in all remaining areas (i.e., Geographic Market 2).

3.3.3 Market definition and competition assessment - National Business Connectivity Services

Question 7 – "Do you agree with URCA's definition of the product market? If not, why?"

<u>BTC's comments</u>

BTC agrees with URCA's product market definition on the whole, but notes that the analysis concerning traditional and fibre-based leased lines does not consider the fact that one is a technological upgrade of the other, and that both services fulfil the same basic need for customers. BTC also asserts that a distinction of services by technology platforms conflicts with the basic presumption of technology neutrality. BTC claims that future network upgrades could therefore lead to separate service markets, with legacy technology as one market and new technology as another. If the former is considered a separate market, it could potentially inhibit operators in phasing out old technology from their networks as a result of regulatory restrictions.

<u>CBL's comments</u>

CBL agrees with URCA's definition of the product market.

URCA's response to BTC's and CBL's comments

URCA notes both BTC's and CBL's agreement on its preliminary conclusions on the product market definition for National Business Connectivity Services.

However, URCA does not agree with BTC's assertion that because fibre-based leased lines are an upgrade of traditional leased lines means that URCA should not analyse whether or not fibre-based lines should be included in the same product market as the traditional leased lines. In contrast to retail broadband services, BTC's and CBL's retail leased line services are differentiated by network technology (i.e., traditional vs. fibre-based leased line services). As such, this requires URCA to consider both product offerings independently for its substitutability with the focal product (i.e., traditional leased lines).

URCA also disagrees that considering traditional leased lines as a separate product market would inhibit operators from phasing out this service in the future. URCA understands that there is no precedent for this having been the case. For instance, DSL could be considered an upgrade of dial-up services. Even though dial-up services were not defined to be part of the broadband market in 2009/10, BTC appears to be slowly phasing out dial-up internet with the take-up of dial-up having declined significantly since 2011.

URCA's Final Determination – Relevant Product Market for National Business Connectivity Services

URCA's determination is to continue to define the market for national business connectivity services as per the Preliminary Determination to include:

- Traditional leased line products: These are national business connectivity services provided over PSTN and Coaxial networks, thereby currently including BTC's regular leased circuits and CBL's REVON Dedicated Circuits; and
- Fibre-based leased line products: These are national business connectivity services provided over a fibre network, thereby currently including BTC's MPLS (leased circuits over fibre) and CBL's REVON Ethernet Circuits.

Question 8 – "Do you agree with URCA's definition of the geographic market? If not, why?"

BTC's comments

BTC believes that Geographic Market 2 is too small to merit a separate market definition. As evidence for this, BTC cites that 94% of national leased circuits are located on the islands of New Providence and Grand Bahama (i.e., within Geographic Market 1), and that 81% of DSL connections are on the islands where both CBL and BTC are active.

CBL's comments

CBL agrees with URCA's definition of the geographic market.

URCA's response to BTC's and CBL's comments

URCA notes CBL's agreement with URCA's preliminary conclusions on the geographic market definition for National Business Connectivity Services.

As stated in its response to Question 5 above, URCA has a statutory duty to protect the interests of all customer segments, irrespective of the size of the segment. URCA's assessment has found that the competitive dynamics in Geographic Market 2 differ to a sufficient extent from Geographic Market 1 to warrant a separate market definition. For this reason, URCA continues to define Geographic Market 2 separately.

URCA's Final Determination – Relevant Geographic Market for National Business connectivity Services

URCA's determination is to continue to define two separate geographic markets as per the Preliminary Determination:

- Geographic Market 1 -The islands where CBL and BTC both have infrastructure and are offering national business connectivity services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera).
- Geographic Market 2 - All remaining islands (i.e., where only BTC has a network infrastructure to offer these services) inclusive of all national leased line services that originates or terminates within this geographic area.

Question 9 – "Do you agree with URCA's SMP findings in the retail national business connectivity services market? If not, why?"

BTC's comments

BTC agrees with the finding that no licensee has SMP in Geographic Market 1. However, as stated above, it does not believe the two geographical sub-markets merit splitting apart as it results in an SMP monopolistic provider in the market where there is only one network. Thus, it disagrees with the finding that there is an SMP operator in Geographic Market 2.

CBL's comments

CBL agrees with URCA's SMP findings in the retail national business connectivity services market.

URCA's response to BTC's and CBL's comments
URCA notes CBL's agreement on its preliminary conclusions on the SMP findings in the retail national business connectivity services market.

URCA continues to find that the competitive dynamics in the two sub-markets are sufficiently different to define separate markets. As BTC rightly pointed out, the competitive dynamics are different in Geographic Market 2 *because* BTC is the only provider there (in absence of wholesale remedies and access seekers). Consequently, the conclusions from the competitive assessment remain unchanged with BTC having SMP in Geographic Market 2.

URCA's Final Decision – SMP findings in the Relevant Market for National Business Connectivity Services

URCA's determination is that BTC has SMP in the market for retail national business connectivity services in Geographic Market 2 (i.e., all areas where CBL has no network coverage).

3.3.4 Market definition and competition assessment - International Business Connectivity Services

Question 10 – "Do you agree with URCA's definition of the product market? If not, why?"

BTC's comments
BTC agrees with URCA's definition of the product market but makes the same point as in its response to Question 7 (i.e., URCA disregards the fact that fibre-based leased lines are a technological upgrade of traditional leased lines and that if legacy technologies are considered a separate market, it could potentially inhibit operators in phasing out old technology from their networks as a result of regulatory restrictions).

CBL's comments
CBL agrees with URCA's definition of the product market.

URCA's response to BTC's and CBL's comments
URCA has addressed BTC's comments on Question 7 there and, as such, does not repeat them here.

URCA's Final Determination –Relevant Product Market for International Business connectivity Services

URCA's determination is to continue to define the product market as per the Preliminary Determination to include:

- Traditional leased line products: These are international business connectivity services provided over PSTN and Coaxial networks, thereby including BTC's regular leased circuits and CBL's REVON Dedicated Circuits; and
- Fibre-based leased line products: These are international business connectivity services provided over a fibre network, thereby including BTC's MPLS (leased circuits over fibre) and CBL's REVON Ethernet Circuits.

Question 11 – "Do you agree with URCA's definition of the geographic market? If not, why?"

<u>BTC's comments</u>
BTC makes the same point as in its response to Question 8 above.

<u>CBL's comments</u>
CBL agrees with URCA's definition of the geographic market.

<u>URCA's response to BTC's and CBL's comments</u>
URCA has addressed BTC's comments on Question 8 and, as such, does not repeat them here.

URCA's Final Determination –Relevant Geographic Market for International Business connectivity Services

URCA determines that there are two separate geographic market definition as per the Preliminary Determination:

- Geographic Market 1 -The islands where CBL and BTC both have infrastructure and are offering international business connectivity services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera).

- Geographic Market 2 - All remaining islands (i.e., where only BTC has a network infrastructure to offer these services)

Question 12 – "Do you agree with URCA's SMP findings in the retail international business connectivity services market? If not, why?"

BTC's comments

BTC makes the same point as in its response to Question 9 above.

CBL's comments

CBL agrees with URCA's SMP findings in the retail international business connectivity services market.

URCA's response to BTC's and CBL's comments

URCA has addressed BTC's comments on Question 9 and, as such, does not repeat them here.

URCA's Final Decision – SMP findings in the Relevant Market for International Business Connectivity Services

URCA determines that BTC has SMP in the market for retail international business connectivity services in all areas where CBL has no network coverage (i.e., Geographic Market 2).

3.3.5 Market definition and competition assessment - Pay TV

Question 13 – "Do you agree with URCA's definition of the product market? If not, why?"

BTC's comments

While BTC believes that there may be some need to separate the market into business and residential Pay TV markets as before, it also believes that such a separation would have no effect on SMP findings or applying remedies. Therefore, it agrees with the definition of the product market.

CBL's comments

CBL disagrees with URCA's proposed product market definition for pay TV services. In particular, CBL believes the market should be defined in a broader manner so as to include satellite TV, IPTV and Over-The-Top (OTT) and internet streaming services since such services represent emerging substitutes for cable TV services. CBL argues that barriers to entry in the pay TV market are low because IPTV or OTT services could be used to provide local content and there is no licensing or spectrum restriction on procuring a satellite licence. Furthermore, CBL claims that the market is trending toward competition because BTC is due to enter the market with its IPTV offering and there is evidence from other countries that once IPTV enters the market, there is a dynamic shift in market shares towards IPTV. Additionally, CBL has conducted a survey which shows that 19% of broadband subscribers surveyed were either "likely" or "very likely" to switch to a BTC IPTV service while 37% of those surveyed by CBL were "undecided".

URCA's response to BTC's and CBL's comments

As stated in URCA's response to Question 1 above, URCA considers that BTC has misunderstood the application of the SSNIP test. URCA does not repeat its arguments here but reiterates that the correct application of the SSNIP test leads to a conclusion of a single market for business and residential users based on supply-side substitution. URCA further remains of the view that adopting a more granular product market for pay TV services would not alter its conclusions.

URCA also disagrees with CBL's assertion that satellite TV, IPTV, OTT or internet streaming services should be included in the relevant product market for pay TV services.

- CBL has provided no new evidence to support its argument that satellite TV services should be included in the same product market.[20] Based on the evidence set out in Table 5 below, URCA remains of the view that **satellite TV services** do not represent an effective substitute to CBL's pay TV services.

- While it may be true that **IPTV** has led to dramatic changes in the market shares in the pay TV market in other countries, BTC has not yet launched its IPTV services in The Bahamas and URCA is not aware of any concrete plans of BTC or other licensees to launch these services in the immediate future. URCA has further reviewed CBL's evidence on the impact of IPTV service launches elsewhere. Whilst it agrees with CBL's observation that IPTV may evolve into a viable alternative to cable based pay TV offerings, the IPTV providers appear to URCA to only reach a sizeable market share after several years. For example, based on the evidence provided by CBL on the take-up of IPTV services in a range of regional markets, IPTV services had less than 15% market share within two years of service launch. The time horizon for the SSNIP test is generally twelve months and so, URCA does not consider it feasible that even if IPTV were to enter the market, take-up would change dramatically enough to affect the competitive assessment. BTC's cross-response also pointed out that in none of the countries included in CBL's evidence on the apparent rapid growth of IPTV (Figure 10, page 26 of CBL's response) had an IPTV provider gained a market share of more than 10% two years after entry. Further, across a sample of six European and American countries cited by CBL in its report from Analysys Mason, the highest reported market share of IPTV services was 30% in Belgium, with all other markets reporting market shares of 20% or less. In any case, the evolution of market shares post-hypothetical entry is irrelevant for

[20] Within its response, CBL's main argument on satellite TV services is the lack of barriers to entry resulting in the three criteria test not being passed. This has been already addressed by URCA in the context of CBL's general comments on this matter (see Section 3.2 above).

the purpose of market definition. URCA cannot include a product that is not yet in the market as part of the market definition.

Furthermore, the results of CBL's customer survey (submitted to URCA as part of its response to this consultation) reveal that 44% of all respondents stated that they were either "unlikely" or "very unlikely" to switch to an IPTV offering by BTC.

- **Streaming** is more similar to a video-on-demand service than a complete TV package of the kind that CBL offers. While CBL's survey does point out that several of the respondents have used streaming services, it does not emerge that they use streaming as a complete substitute for their TV package. Indeed, it seems more likely to URCA that they use streaming services as a complement to their TV subscription, for instance to watch a certain sports show which does not happen to be showing on TV.

Table 5 below summarises URCA's evidence and conclusions from the Preliminary Determination on the substitutability of each of these technologies for CBL's pay TV offering.

Table 5: Comparing the Substitutability of Alternative Technologies to provide Pay TV Services with CBL's offering

Factors considered	Satellite TV	Internet Streaming	IPTV
Coverage /Availability/ Take-up	• URCA understands that there are still other providers of satellite TV services in The Bahamas, although the major provider in 2009, Satellite Bahamas, no longer offers services. • URCA's consumer evidence suggests that only a small share of Bahamian households currently subscribe to satellite TV services (i.e., 7% of survey respondents which are currently subscribed to pay TV services) • This in line with CBL's survey evidence which found that 7% of all respondents had a satellite TV system at home.	• Internet streaming is available to any user with a broadband connection. • However, URCA understands that the current take-up of these services remains limited. • In particular, whilst 20% of all respondents to URCA's consumer survey stated an awareness of internet based TV services, only 3% stated that they were currently subscribed to these services. • Again, this is in line with CBL's survey evidence, which confirmed a high awareness of these services (76%), but a low take-up (i.e., 7% of the respondents had purchased such services).	There are no IPTV services available in The Bahamas at this point in time.
Product characteristic s and price	• Satellite TV offers similar access to international channels and content • There is limited to no access to local content • It has low resilience to weather disruptions • Satellite TV has high set-up costs and a monthly charge, which puts it at par with CBL's mid to upper range packages.	• For a user to experience a high quality of service from internet streaming a broadband connection with speeds above 1.5Mbps (ideally above 3Mbps) is required. Internet speeds below this can result in delaying, buffering and viewing interruptions. • Streaming tends to be tailored to international rather than local content as it is commonly offered by international providers • Internet streaming is more likely to be used for specific programming such as movies or sports events as	While IPTV services may have similar product characteristics to CBL's current pay TV offerings, URCA is unable to verify their potential substitutability as they are not currently offered in the Bahamas.

		opposed to the general programming that is expected on a network channel • Internet streaming is free but would require the payment for a high-speed broadband connection.	
Switching evidence	• The results of URCA's consumer survey show that there would be limited switching from CBL's services to satellite TV services if prices for the CBL package increased by 5-10%. • The probability of switching is further reduced given that approximately 20% of CBL's pay TV customers subscribed to pay TV and broadband bundles (with the latter service commonly not provided by satellite TV providers).	• The results of URCA's consumer survey show that there would be limited to no switching from CBL's pay TV services to internet streaming if prices for the CBL package increased by 5-10%. • In particular, when asked about their potential response to a 5% or 10% increase in CBL's price for video on demand services, only 3-5% of the consumer survey respondents stated a potential switch to an internet based TV provider.	In the absence of IPTV services in the Bahamas, URCA cannot assess the degree of switching from CBL's offering. However, CBL's customer survey suggests that only 19% of all respondents were either "likely" or "very likely" to switch to BTC's IPTV services, if being launched (with 44% of respondents being "unlikely" or "very unlikely" and 37% "undecided".)

Combining URCA's assessment with evidence from CBL's own consumer survey, URCA does not find that internet streaming, IPTV or satellite TV are viable substitutes for CBL's Pay TV offering. Consequently, URCA continues to define the market to include only content provided over a cable network.

Finally, URCA does not find that the **barriers to entry** in the pay TV market are low. While it may be the case that a satellite provider could, in theory, enter the market going forward, this has not been the case in The Bahamas to date. In fact, as set out in its Preliminary Determination, URCA notes that the main satellite TV provider in The Bahamas in 2010 (Satellite Bahamas) no longer offers satellite TV services. In general, there has been no new entry into the Pay TV market since the last review in 2009 and although BTC has announced that it will begin offering IPTV services, this has not occurred yet. In light of these factors, URCA does not find it appropriate to conclude that barriers to entry are low at the time of this review.

Further, as stated above, even if further entry would occur, in the form of IPTV services being launched in The Bahamas, any new provider is likely to require several years to reach a sizeable market share. As such, given the prevailing market structure, any prospective entry is unlikely to affect the status of competition in the relevant market within the time horizon of relevance to the market review.

URCA's Final Determination –Relevant Product Market for Pay TV Services

URCA determines the product market definition as per the Preliminary Determination, specifically that access to pay TV over a cable infrastructure is the relevant market.

Question 14 – "Do you agree with URCA's definition of the geographic market? If not, why?"

<u>BTC's comments</u>
BTC agrees with URCA's definition of the geographic market for Pay TV.

<u>CBL's comments</u>
CBL agrees with URCA's definition of the geographic market.

<u>URCA's response to BTC's and CBL's comments</u>
URCA notes BTC's and CBL's agreement on its preliminary conclusions on the relevant geographic market definition for pay TV services.

URCA's Final Determination –Relevant Geographic Market for Pay TV Services

URCA determines that the Pay TV market is national in scope.

Question 15 – "Do you agree with URCA's SMP findings in the Pay TV market? If not, why?"

<u>BTC's comments</u>
BTC supports URCA's conclusion that CBL has market power in the Pay TV market.

<u>CBL's comments</u>
CBL disagrees with URCA's SMP findings on similar grounds to those expressed in CBL's response to Question 6 (i.e., URCA has not correctly applied the EU three-criteria test to determine the presence of SMP). As well as the lack of high barriers to entry, CBL believes that the market is trending towards effective competition. This trend is mainly due to the emergence of competitors using satellite or streaming technologies and BTC's imminent entry into the retail Pay TV market through the provision of IPTV services. CBL also believes there is considerable demand switching as displayed by the Bahamian customers' switching to IPTV.

<u>URCA's response to BTC's & CBL's comments</u>
URCA notes BTC's agreement on its preliminary conclusions on the SMP findings in the market for pay TV services.

As explained by URCA in its response to CBL's general comments and to Question 6, URCA considers that CBL has misunderstood the purpose and application of the three-criteria test. The three-criteria test is not a final decision on whether to regulate a market or not. Furthermore, if all three criteria are satisfied, it only leads to a conclusion on the **presumption** of dominance and does not preclude the regulator from carrying out an SMP assessment. It is also not a formal requirement of URCA's SMP Methodology or the Comms Act.

As with BTC's response to CBL's comments on the SMP findings in the retail broadband market, BTC's cross-response to CBL's position on the SMP finding in the Pay TV market provides support for URCA's position. In particular, BTC points to examples, such as Ofcom's recent fixed access market reviews, where the three-criteria test follows the market definition process rather than precedes it. BTC then asserts that in any case, the outcome of the test should be the same whether it is carried out before or after the process of market definition. Additionally, BTC states that it comes to a different conclusion to CBL when carrying out the test in the Pay TV market.

Furthermore, in line with its response to Question 13 above, URCA disagrees with CBL's assertion that the barriers to entry into the market for Pay TV are low.

As outlined in URCA's response to comments on the product market definition in the Pay TV market, satellite TV, IPTV, OTTP or internet streaming are currently not considered by URCA to be viable substitutes for CBL's pay TV offerings. Consequently, they do not impose a competitive constraint on CBL's pricing of its products. It therefore follows that in URCA's view the market is not trending towards effective competition as claimed by CBL. URCA acknowledges that this could change if and when BTC enters the market by offering IPTV services. However, as mentioned above, URCA has seen no evidence so far to suggest that this may have a significant impact on CBL's position in the pay TV market within the time period of relevance to this market review. Until further entry occurs, with CBL's market share at virtually 100% and the results from URCA's consumer survey suggesting that TV customers do not consider any of the other alternatives to CBL's product as viable substitutes, there is insufficient evidence presented to URCA to suggest that the market is tending towards competition.

URCA's Final Determination – SMP findings in the Relevant Market for Pay TV Services

URCA determines that CBL has SMP in the market for Pay TV services in The Bahamas.

3.3.6 Remedies

Question 16 – "Do you agree with URCA's proposed SMP remedies for fixed voice services? If not, why?"

<u>BTC's comments</u>

BTC agrees with URCA's decision to replace the RPR with a price cap, as it considers this will give BTC greater flexibility in rebalancing its tariffs, allow for the swift introduction of price decreases and reduce the regulatory burden for both BTC and URCA.

While BTC accepts that it should not be allowed to bundle mobile and fixed services because they cannot be replicated, they argue that the restriction on bundling should not be extended to include fixed and broadband services: BTC believes URCA should take into account CBL's ability to replicate both these services when considering the possibility of predatory pricing or margin squeezing. Further, replicability should only be tested on an *ex-post* basis.

BTC also disagrees with URCA's position on price discrimination: BTC does not believe that on-net/off-net pricing differentials should count as price discrimination and, in the interests of competition, BTC should be allowed price differentials as CBL also implements the same on-net/off-net price differentials.

CBL's comments

CBL agrees with URCA's proposed SMP remedies for fixed voice services.

As part of its second round response, CBL made reference to the need to constrain BTC's ability to offer on-net/off-net price differentials for fixed voice services. Citing a 2012 competition investigation by the French National Competition Authority which fined two mobile operators for undue on-net/off-net pricing, CBL referred to the need for *ex-ante* regulation of such potential anti-competitive behaviour. This was due to a 'snow-ball effect' where consumers were drawn to the SMP operator and then locked-in for a long period of time.

URCA's response to BTC's and CBL's comments

URCA notes BTC's and CBL's agreement on its proposed introduction of a **retail price cap** for BTC's fixed voice services.

As stated in its Preliminary Conclusions, URCA has not imposed specific remedies on BTC to prevent potential margin squeeze or predation. The **replicability requirement** relates to undue bundling (rather than predation or margin squeeze). Here the concern is that BTC could leverage its market power in the fixed voice market into the broadband market. The test proposed by URCA requires BTC to demonstrate, as part of its application for new bundles, that the bundle can be technically and economically replicated by at least one alternative operator (either based on the alternative operator's own network infrastructure or based on regulated wholesale services). If the bundle is shown to be replicable, (as may be the case for fixed voice and broadband offerings, given CBL's product portfolio), BTC can launch the proposed new product bundle. URCA notes that a similar requirement is also imposed on other SMP providers (i.e., CBL in the broadband and pay TV market).

URCA notes BTC's objection to URCA's preliminary position on **price discrimination**. URCA recognises that on-net/off-net pricing can be part of an operator's pricing strategies when competing for customers. As such, it has no concern with such practice per se within a competitive market. However, such pricing practices can in certain circumstances become anti-competitive if adopted by an SMP operator such as BTC in the context of the retail fixed voice service market.

In conclusion, and having further reviewed the advantages and disadvantages of requiring *ex-ante* cost justifications from BTC for any proposed on-net/off-net pricing of its fixed voice services, URCA has determined that imposing such *ex-ante* obligations on BTC at this stage of the market would risk unduly restricting BTC's commercial pricing decisions. Instead, URCA considers that its *ex-post* competition powers are sufficient to address any undue price discrimination by BTC. URCA further considers the risk of a 'snowball effect', as referred to in CBL's second round response, to be less prominent in this context since most of BTC's retail fixed voice offerings do not entail minimum contract durations comparable to those observed for post-pay mobile packages elsewhere.

However, URCA wishes to remind SMP licensees about its powers under sections 96 and 99 respectively of the Comms Act to issue interim orders (in cases of urgency due to risk of serious and irreparable damage) and interim determinations (if an application to URCA is likely to succeed or URCA is likely to find that a licensee has breached the Comms Act or a licence condition and irreparable harm would result if no interim determinations were made), which it will rely on in case it observes any on-net/off-net pricing that appears to be anti-competitive. URCA further wishes to remind SMP licensees that they have a duty to ensure, amongst others, that they do not price anti-competitively and should consider this carefully in the event they decide to introduce such price differentials.

URCA's Final Determination – SMP remedies in the Relevant Market for Fixed Voice Services

URCA's determination is to impose the following SMP obligations on BTC in the market for retail fixed voice services:

- BTC's retail fixed voice services will be subject to ex-ante price cap regulation going forward. URCA will consult separately on the detailed approach and implementation of the price cap regime for retail fixed access and voice services.
- BTC shall not introduce any new retail product bundled offering which contains a retail fixed access and voice service, unless it can demonstrate that this bundle can be replicated by other providers. Replicability will be assessed in line with requirements set out in the Retail Pricing Rules.[21]

The existing SMP obligations under the Retail Pricing Rules will remain in place until the price cap regulation is fully implemented and URCA communicates the removal of any SMP obligation to BTC.

Further, for the avoidance of doubt, any standard ex-ante obligations on SMP operators as set out in Conditions 34, 35 and 36 of the IOL and section 40(4) of the Comms Act and specific SMP obligations on wholesale services and accounting separation and cost accounting as set out in

[21] Replicability will be assessed in line with requirements set out in the RPR.

regulatory and other measures issued by URCA will remain in place until such time as determined by URCA.

Question 17 – "Do you agree with URCA's proposed SMP remedies for broadband services? If not, why?"

BTC's comments

While BTC agrees with URCA's proposals for a price cap on CBL's broadband services, it disagrees with URCA's approach to geographical uniformity for BTC's own broadband offerings and the application of the ex-ante replicability tests to any bundles other than those including mobile services.

- BTC is concerned that a requirement for it to provide geographical uniform prices may result in it having to provide services below cost on the islands (i.e., Abaco, Eleuthera, Grand Bahama, and New Providence) where CBL is not active, since costs are lower on the four Geographic Market 1 islands than elsewhere, making it commercially more attractive. A requirement to maintain the same price in all geographies could mean providing broadband services below cost in Geographic Market 2 islands, which costs are higher in those islands than the four Geographic Market 1 islands.

- Similar to the response to Question 16, BTC believes that replicability tests should focus on BTC's and CBL's abilities to replicate packages provided by each other.

In conclusion, BTC agrees with the proposal for a price cap on CBL's broadband services but believes that geographical uniformity and bundling restrictions on itself should be removed.

CBL's comments

CBL disagrees with URCA's proposed remedies on five main grounds:

1. CBL disagrees with the claim that its pricing is excessive. CBL believes that the correct application of the Ofcom methodology used to determine whether its pricing is excessive or not would in fact lead to the conclusion that its broadband pricing is not excessive, that it has decreased in recent years and is in the range of benchmark prices presented in the Ofcom report.

2. CBL believes that URCA is unclear as to whether its *ex-ante* regulation is for the purpose of preventing excessive pricing or predatory pricing. CBL agrees with URCA that the risk of predatory pricing is countered by the presence of BTC in the market, but CBL believes URCA does not take into account the fact that BTC is well placed to take advantage of any potential excessive pricing by CBL.

3. Considering both markets possess similar competitive conditions and price performance, CBL would expect URCA to propose similar remedies for retail broadband and business connectivity services. However, CBL believes URCA has proposed significantly different remedies for the two markets.

4. CBL believes that URCA's proposed replicability test is contradictory to its price cap proposal. CBL argues that the purpose of a replicability test is to ensure that retail prices are high enough to ensure replicability from other operators, while the aim of a retail price cap is to ensure that operators are incentivised to reduce costs. CBL believes that these two aims are incompatible.

5. Finally, CBL believes that the application of broadband price regulation is contrary to international trends and has not fully taken into consideration the impact the regulation can have on further market entry and investment incentives: CBL argues that price regulation can have a significant discouraging effect on new competitors' incentive to enter the market. In addition, CBL argues that retail price regulation in the broadband service market has not been imposed in any of the markets covered by the Ofcom Report, nor in any of the global benchmark countries with similar TV and broadband markets to that of The Bahamas or any similar regional countries near to The Bahamas, thereby making it an international anomaly.

<u>URCA's response to BTC's and CBL's comments</u>

Geographic averaging

URCA notes that BTC already faces a national geographic averaging requirement for its retail broadband services in Geographic Market 2. At the time, this was considered an appropriate remedy and URCA has seen no evidence to suggest that the overall situation has fundamentally changed since then. Whilst BTC has made reference to potentially higher cost of servicing these customers, it has not provided any evidence to support this position as part of its consultation responses.

Unlike Geographic Market 1 where CBL faces at least some competitive constraint from BTC, Geographic Market 2 has no competitive constraint from an alternative operator as BTC is currently the sole provider of broadband services in the Family Islands. It is URCA's duty to protect the interests of these consumers. However, URCA has chosen a remedy that would impose the least regulatory burden on BTC by applying geographic averaging in Geographic Market 2 rather than, for example, imposing a price cap on BTC in this market.

Replicability requirements

As stated in the context of Question 16 above, the replicability test applies to all new bundles which involve at least one price regulated SMP product. Before launching a new bundle, the SMP operator must demonstrate that the bundle is technically and economically replicable (i.e., that a reasonably efficient alternative operator can offer a similar service via its own network or any existing wholesale offers). If this cannot be demonstrated, then the new bundle cannot be launched. If it is replicable, URCA would have no *ex-ante* concerns. The objective of the replicability test is to prevent an SMP operator from leveraging its market power from one geographic market to another. An example of such a scenario is if an operator that has SMP in geographic market A where it is the only service provider and there are no wholesale offerings, but no SMP in geographic market B, the operator could offer a bundle consisting of products in both markets. Operators in geographic market B would not be able to compete with this offering because they are not able to replicate product X within the bundle. This allows the SMP operator to leverage its market power from geographic market A in geographic market B. The RPR also prevent this, and so, the replicability test does not impose any new requirements on either BTC or CBL.

Contrary to CBL's statement, replicability testing is not incompatible with a price cap. The former aims to prevent leveraging market power from an SMP market to another market and the latter aims to ensure that prices in an SMP market are broadly reflective of a competitive level. It is common for regulatory authorities to act to promote both objectives.

Price cap and excessive pricing

URCA has considered the evidence put forward by CBL on excessive pricing and acknowledges that there are some merits in comparing average prices rather than headline prices and notes that there has been a fall in average prices of CBL's broadband prices. However, these have occurred in 2013/14, thus after URCA began its consultation (and so, outside the period considered by URCA). In coming to a conclusion on excessive pricing, URCA must give weight to the entire period of time since the last consultation in 2009, not just the last year. CBL's own evidence shows that the improvements have only come in the last year, with product offerings remaining largely unchanged before that.

For the purpose of this determination, URCA also needs to consider the risk of excessive pricing going forward, which is linked to **barriers to entry and expansion**. As set out in the context of Question 6 above, URCA does not agree with CBL that barriers to entry/expansion in the broadband market are low. There has been, to URCA's knowledge, limited entry so far and market shares have remained stable. As such, URCA remains of the view that CBL and BTC have the ability to extract rent from their customers by pricing excessively in the relevant markets where they have SMP, absent any *ex-ante* price regulation.

However, paying heed to the fact that unlike in the Pay TV market, CBL does face some emerging competitive pressure from BTC in the broadband market, URCA finds that lighter touch regulation in Geographic Market 1 is appropriate. Consequently, URCA will impose a modified price cap on CBL's business and residential broadband products in Geographic Market 1. This modified price cap aims to prevent CBL from increasing its retail broadband prices in Geographic Market 1 from their current levels. URCA considers this to represent an effective remedy to prevent excessive pricing, whilst providing licensees with the ability to innovate and compete on prices in Geographic Market 1. URCA further considers this remedy will limit any regulatory burden of implementing this remedy on CBL's broadband offerings (i.e., a modified price cap as proposed by URCA does not require the detailed analysis underlying a price cap regulation and results in limited compliance monitoring).

Further details on the modified price cap will be presented in URCA's consultation on the price cap (see Section 4 below). This consultation will cover, amongst others, a discussion on whether the modified price cap will apply to individual services or across all the relevant services, whether it will be set in nominal or real terms, and the treatment of new and bundled service offerings.

Consistency of assessment of excessive pricing and predation

URCA maintains that BTC would constrain CBL from any attempts at predatory pricing and this view was shared by both respondents. However, there is no evidence presented to URCA to suggest that BTC would be successful at constraining CBL from charging excessive prices.[22] For example, URCA has seen no evidence for active price competition in the broadband market (i.e., besides a few temporary promotional offers, headline prices have remained constant in recent years and average prices have only fallen recently). There is also no evidence presented to URCA of BTC successfully gaining market share in recent years, which URCA sees as a barrier to expansion. Thus, URCA is of the view that CBL is unlikely to attempt predatory pricing in this market as it would incur short-term losses for no obvious gain as BTC is financially strong enough to not be weakened by such pricing. However, CBL would still have an incentive to price excessively if BTC cannot expand operations easily.

Consistency of remedies for the broadband market and the market for business connectivity services

While it is true that both markets have the same players, in URCA's opinion the competitive dynamics differ. As outlined in the Preliminary Determination, the market for business connectivity services has seen an improvement in product offerings as well as the launch of new services in the time period since the last review. URCA has not seen any evidence to prove that there may be a threat of excessive pricing in the business connectivity services market. There has not been the same degree of movement towards competition in the broadband market, as explained above. Therefore, because URCA disagrees with CBL that the competitive conditions are the same in both markets, the remedies in the markets are consistent with the findings of the threat of excessive pricing.

URCA's Final Determination – SMP remedies in the Relevant Market for Broadband Services

URCA's determination is to impose the following SMP obligations on BTC and CBL in the markets

[22] URCA notes that CBL can also not constrain BTC's pricing behaviour in Geographic Market 2, in the absence of a national uniform pricing requirement imposed on BTC. However, this argument was not made by CBL.

for retail broadband services:

- CBL's retail residential and retail business broadband services will be subject to a modified price cap going forward. In the interim period until the modified price cap has been determined and fully implemented by URCA, URCA will not review any applications by CBL for price increases for its retail broadband services which have not been notified to URCA prior to the date at which this final determination has been published.
- CBL shall continue to offer stand-alone (unbundled) retail broadband offers.
- BTC is required to offer geographic uniform prices for retail broadband services.
- BTC and CBL shall not introduce any new retail product bundled offerings including broadband services in the geographic markets where they hold SMP, unless it can demonstrate to URCA that these bundles can be replicated by other providers.[23]

Further, for the avoidance of doubt, any standard obligations on SMP operators as set out in Conditions 34, 35 and 36 of the IOL and section 40(4) of the Comms Act and specific SMP obligations on wholesale services and accounting separation and cost accounting as set out in regulatory and other measures issued by URCA will remain in place until such time as determined by URCA.

Question 18 – "Do you agree with URCA's proposed SMP remedies for business connectivity services market? If not, why?"

<u>BTC's comments</u>
BTC did not provide an answer to Question 18.

<u>CBL's comments</u>
CBL agrees with URCA's proposed SMP remedies for the business connectivity services market.

<u>URCA's response to BTC's and CBL's comments</u>
URCA notes CBL's agreement on its preliminary conclusions on the proposed SMP remedies for business connectivity services.

URCA's Final Determination – SMP remedies in the Relevant Market for Business Connectivity Services

URCA's determination is not to impose any additional, specific SMP obligations in the market for business connectivity services (i.e., national and international leased circuits).

[23] Replicability will be assessed in line with requirements set out in the RPR.

However, for the avoidance of doubt, any standard obligations on SMP operators as set out in Conditions 34, 35 and 36 of the Individual Operating Licences (IOL) and section 40(4) of the Comms Act and specific SMP obligations on accounting separation and cost accounting as set out in regulatory and other measures issued by URCA will remain in place until such time as determined by URCA.

Question 19 – "Do you agree with URCA's proposed SMP remedies for Pay TV services? If not, why?"

BTC's comments

BTC supports URCA's analysis and proposed remedies for Pay TV services.

CBL's comments

CBL disagrees with URCA's proposed remedies, believing that *ex-ante* regulation should be limited to the PRIME (SuperBasic) service only and should not be extended to premium TV packages, for four main reasons:

1. CBL believes URCA has not presented adequate evidence of excessive pricing in the retail pay TV market and also failed to acknowledge how the imminent entry of BTC in the market limits the risk thereof.

2. CBL believes that URCA has not adequately justified the need for *ex-ante* price regulation beyond the PRIME package and it argues that there is no need to extend it beyond the PRIME package.

3. Similar to point 2 in response to Question 17 above, CBL believes URCA is unclear as to whether the regulation is aimed at preventing excessive or predatory pricing in the retail pay TV market. CBL also believes URCA has not taken into consideration BTC's position to take advantage of excessive pricing of CBL.

4. Similar to point 4 in response to Question 17 above, CBL believes that imposing price regulations as well as a replicability test contradict each other and would be inconsistent.

URCA's response to BTC's & CBL's comments

URCA notes BTC's agreement on its preliminary conclusions on the proposed SMP remedies for pay TV services.

Risk of excessive pricing

URCA has reviewed CBL's evidence on excessive pricing and notes a similar pattern as for broadband prices (i.e., headline prices remaining unchanged in recent years, whilst averages prices have fallen in 2013 due to an increase in the number of channels offered). URCA acknowledges that there has been an improvement in offerings in the last year, noting that these improvements have come after URCA began its consultation. As mentioned in the context of broadband services, in coming to a conclusion on excessive pricing, URCA must give weight to the entire period of time since the last consultation in 2009, not just the last year. CBL's own evidence shows that the improvements have only come in the last year, with product offerings remaining largely unchanged before that. URCA does not think it prudent to place the entire weight of evidence on the most recent year and for this reason, does not change its finding that prices may be excessive.

As stated above, URCA also needs to consider the risk of excessive pricing going forward, which is linked to the degree of barriers to entry. Contrary to CBL's position, URCA remains of the view that **barriers to entry** for most adequate substitutes to CBL's offerings remain high. Based on the evidence provided to URCA by CBL, even IPTV offerings (which appear to be the most likely alternative product going forward) are only a potentially emerging competitive threat in the medium term. Given this, URCA remains of the view that, absent any *ex-ante* price regulation, CBL has the ability to extract rent from its pay TV customers by pricing excessively. URCA remains of the view that this is best addressed by imposing a price cap on CBL's pay TV services.

Replicabililty requirements and consistency with the price cap

As per URCA's responses to comments on Questions 16 and 19 above, an SMP operator only needs to demonstrate that a proposed new bundle can be replicated. Before launching a new bundle, the SMP operator must demonstrate that the bundle is technically and economically replicable (i.e., that a reasonably efficient alternative operator can offer a similar service via its own network or any existing wholesale offers). If this cannot be demonstrated, then the new bundle cannot be launched. If it is replicable, URCA would not have any *ex-ante* concerns. Whilst URCA recognises the fact that content rights might restrict the ability for alternative operators to replicate CBL's pay TV offers, URCA considers this to be evidence of the need for the replicability test to ensure CBL does not leverage its SMP in pay TV service into other markets. The test would serve to ensure that CBL's pay TV offers are such that other providers could offer pay TV packages that are broadly similar (whilst not necessarily being identical to CBL's packages).

Contrary to CBL's statement, the replicability requirement is compatible with price control. The replicability test aims to prevent an SMP operator from leveraging market power from the market in which it has SMP market to another market. The price control, on the other hand, aims to ensure that prices in a SMP market are broadly reflective of a competitive level/efficient cost level. The two remedies therefore serve independent but complementary purposes of simulating a competitive outcome in the market.

Extension of the price cap beyond PRIME package

As was outlined in the Preliminary Determination, packages such as PRIME and PRIME Ultimate represent the essential means to gain access to pay TV services in The Bahamas. For this reason, URCA considers that it is important to regulate them to ensure that customers of pay TV in The Bahamas are protected.

Furthermore, unlike the provision of retail broadband services in Geographic Market 1 where CBL faces at least some competitive constraint from BTC, CBL is currently the sole provider of Pay TV services. For this reason, URCA does not consider it appropriate to adopt a light tough regulatory approach and instead considers it necessary to apply the price cap regulation to all of CBL's access and content pay TV packages.

Further details on the price cap regulation on CBL's retail pay TV services will be presented in URCA's consultation on the price cap regulation. This is further discussed in Section 4 below.

URCA's Final Determination – SMP remedies in the Relevant Market for Pay TV Services

URCA's determination is to impose the following SMP obligations on CBL in the market for retail pay TV services:

- CBL's access and content pay TV packages (e.g., those packages currently marketed as PRIME, PRIME Select, PRIME Plus and PRIME Extra) will be subject to an *ex-ante* price cap regulation going forward. URCA will consult separately on the detailed approach and implementation of the price cap regime, after publication of the Final Determination for this market review process. In the interim period until the price cap has been determined and fully implemented by URCA, URCA will not review any applications by CBL for price increases for its pay TV services which have not been notified to URCA prior to the date at which this final determination has been published.

- CBL shall not introduce any new retail product bundled offerings of pay TV services with any other of its other retail services unless it can demonstrate that these bundles are replicable by other providers.[24]

For the avoidance of doubt, any standard obligations on SMP operators as set out in Conditions 34, 35 and 36 of the Individual Operating Licence (IOL) and section 40(4) of the Comms Act and specific SMP obligations on wholesale services and accounting separation and cost accounting as set out in regulator and other measures issued by URCA will remain in place until such time as determined by URCA.

[24] Replicability will be assessed in line with requirements set out in the RPR.

4 Conclusion and Next Steps

In this document, URCA has summarized the general comments and answers to the consultation questions and set out its final position on those responses. Taking into account the comments received, URCA has set out in Section 2 above its Final Determination on its SMP assessment (and required remedies) for the provision of key retail communications services in The Bahamas.

Going forward, URCA will undertake further analysis to determine the detailed design and implementation of any new remedies imposed on SMP licensees. URCA will provide further details on any impact the new set of remedies may have on existing SMP obligations (in particular, the RPR). This is set out below.

For the avoidance of doubt, URCA wishes to remind SMP licensees that the existing SMP obligations will remain in place until any new remedies outlined in this document are fully implemented.

4.1 Next Steps

Following the publication of this Final Determination, URCA will.

- **Develop and consult on further details for the price cap remedies**. As part of this market review process, URCA has imposed a range of remedies on SMP licensees in the relevant markets (see Table 4 in Section 2). Whilst some of these remedies have already been in place since the initial SMP Assessment in 2010, URCA has also imposed new remedies on SMP licensees in form of a price cap regulation on BTC's fixed voice services and CBL's pay TV services and a modified price cap on CBL's broadband services. The details on the design and implementation of these remedies are beyond the scope of this Final Determination. A key next step after this Determination is for URCA to determine the detailed design and implementation of the price caps and modified price caps. This will include, amongst others, determining the proposed structure of the price caps (i.e., the number and composition of tariff baskets), the proposed price cap formulae (e.g., RPI – X), the proposed X factor values, and the treatment of product bundles and new service offerings. URCA will then issue a further consultation document, setting out its preliminary views on the proposed price caps and modified price caps which interested parties will be invited to comment on.

- **Update the RPR, taking into account this Final Determination.** BTC's fixed voice services and CBL's SuperBasic TV services are currently subject to a notification and approval process by URCA set out in the RPR. Going forward, there will be a price cap imposed on BTC's fixed voice services and CBL's pay TV services. Whilst these price caps will replace the pre-approval requirements for certain retail fixed voice and pay TV services, several aspects of the RPR will remain in place. This includes, amongst others:

- the replicability tests for bundled offerings including price regulated services;
- the approval process and rules for special offers and promotions of price regulated services; and
- changes to non-price terms and conditions for price regulated services.

Given the above, URCA will amend the RPR, taking into account the new SMP obligations set out in Section 2 above. URCA will complete this following the exercise to develop the retail price control obligations.