



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

CONSULTATION DOCUMENT

ECS 16/2013

Issue Date: 4 November, 2013

Response Date: 6 December, 2013

Table of Contents

| | | |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| 1 | Introduction..... | 1 |
| 1.1 | Objectives of the Consultation | 3 |
| 1.2 | Consultation Process..... | 3 |
| 1.3 | Responding to this Consultation Document..... | 4 |
| 1.4 | Structure of the Remainder of this Document | 4 |
| 2 | Legislative and Policy Framework for Retail Pricing in The Bahamas..... | 5 |
| 2.1 | Introduction | 5 |
| 2.2 | Overall Objectives of the Statutory Framework | 5 |
| 2.3 | General Functions and Powers of URCA..... | 6 |
| 2.4 | Universal Service Obligations | 6 |
| 2.5 | Other Relevant Factors to Consider..... | 7 |
| 3 | Opening Submissions by BTC and CBL and URCA's Responses..... | 9 |
| 3.1 | CBL's Comments beyond the scope of this review..... | 9 |
| 3.1.1 | BTC Tariff Rebalancing | 9 |
| 3.1.2 | Calling Party Pays Pricing | 10 |
| 3.2 | BTC's and CBL's Comments within the scope of this review | 10 |
| 3.2.1 | Exercise of Regulatory Forbearance | 12 |
| 3.2.2 | Greater reliance on ex-post competition powers..... | 12 |
| 3.2.3 | Greater Transparency of Approval Process Required..... | 13 |
| 3.2.4 | Predictability of Rules..... | 14 |
| 3.2.5 | Greater Pricing Flexibility | 15 |
| 3.2.6 | Existing Price Regulations are not efficient and proportionate | 17 |
| 3.2.7 | Objectives of Rules needed..... | 17 |
| 3.2.8 | Consideration should be given to price cap regulation in this consultation | 19 |
| 3.2.9 | Streamlining of the Approval Process for selected applications | 20 |
| 3.2.10 | Clarification of the pricing Rules for USO Services..... | 21 |
| 3.2.11 | Additional Ex-ante Price-related Competitive Safeguards..... | 23 |
| 3.2.12 | Ambiguity in the Existing Pricing Rules | 24 |
| 3.2.13 | Clarification of when/whether ex-post competition provisions apply to price regulated services subject to the <i>ex-ante</i> retail pricing framework | 25 |
| 4 | Summary of Proposed Changes to ECS 15/2010 and Conclusion | 27 |
| 4.1 | Overview of proposed changes | 27 |
| 4.2 | Conclusion..... | 27 |

Annex A (Published as a separate document)

1 Introduction

This public Consultation Document (ECS 16/2013) outlines the Utilities Regulation and Competition Authority’s (URCA) review and proposed revisions to URCA reference document ECS 15/2010 “*Regulation of Retail Prices of SMP Operators – Rules*” (“the Rules”). That retail pricing framework document is one of several *ex-ante* regulatory measures or obligations issued by URCA on 22 April 2010 under the new statutory framework ushered in by the Communications Act, 2009 (the "Comms Act") and applicable only to SMP operators, presently the Bahamas Telecommunications Company Ltd. (“BTC”) and Cable Bahamas Ltd. (“CBL”).

Broadly, the Rules constitute a preventative or *ex-ante* tariff approval scheme which is designed to protect consumers from monopolistic or excessive pricing, and militate against SMP licensees engaging in anti-competitive pricing to the detriment of emerging competition in the more contestable segments of the industry.

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

Table 1: Summary of Services Subject to the Pricing Rules

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

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

The framework behind the Rules focuses on URCA's approval process of pricing for new products or services, or when a regulated SMP operator is proposing to change prices for existing products and services.

More generally the framework outlines the application, review and approval processes, information requirements and timeframes for short-term and permanent price change requests along with relevant *ex-ante* safeguards, among others.² In particular, SMP operators must first obtain URCA's written approval before:

- introducing any changes to the prices of Price Regulated Services³ including changes of a short-term nature (excluding single day promotions);
- introducing any changes to non-price terms and conditions for Price Regulated Services;
- introducing any new services in Price Regulated Markets; or
- withdrawing and discontinuing existing Price Regulated Services.

Although URCA noted within its 2010 SMP Final Decision that the Rules were an interim measure, URCA also stated that:

*"...retail price regulation rules should be given a period of time over which URCA, and the industry, can assess how the rules function. Appropriate revisions may be reasonably required as all stakeholders get more comfortable with the level of interaction, compliance and analysis."*⁴

URCA is of the view that a reasonable period of time has elapsed since the retail pricing scheme was first implemented and that a review and update of certain provisions relating to the Rules' processes and requirements is necessary.

URCA, having regarded section 5(d) of the Comms Act, advises potential respondents that the primary purpose of the current review exercise is to advance the overall objectives of the Comms Act. In this respect, URCA, within this consultation document is seeking to:

- address concerns raised by BTC and CBL on how the Rules function;
- provide clarity and further guidance to the industry on key requirements of the Rules;

²For clarification, a service that is not classified by URCA as a Price Regulated Service is not subject to the regulatory procedures and measures stipulated in the Retail Pricing Rules.

³This includes Single Price Regulated Services, and Price Regulated Bundles.

⁴Section 2.5 of ECS 11 /2010 issued 22 April 2010 - "Obligations Imposed on Operators with Significant Market Power (SMP)" available at www.urbahamas.bs.

- further the interests of persons of The Bahamas in relation to the electronic communications sector; and
- ensure that the Rules process and requirements continue to remain compliant with the Comms Act.

In order to inform URCA's review of the Rules, URCA invited CBL and BTC to make opening written submissions to URCA.⁵ Both companies have responded to URCA's invitation and URCA thanks BTC and CBL for their opening submissions to inform this consultation. In preparing this consultation paper, URCA has given utmost consideration to all opening submissions received from both companies.⁶ The full text of all submissions can be found at <http://www.urbahamas.bs>.

1.1 Objectives of the Consultation

This consultation has the following as its core objectives:

- to highlight the key issues and concerns raised by BTC and CBL in their submissions;
- to outline URCA's response to the issues and concerns raised by BTC and CBL;
- to set forth URCA's proposed changes and improvements to the Retail Pricing Rules; and
- to invite comments from stakeholders on URCA's proposed revisions to the Rules.

1.2 Consultation Process

Under section 11(1) and (2) and section 13(1) and (2) of the Comms Act, URCA's review and proposed revisions to the Rules constitute a regulatory measure of public significance and therefore warrants a public consultation.

URCA further notes that the current process is targeted at reviewing the regulatory requirement for SMP operators to seek pre-approval of prices for Price Regulated Services and new service introductions in Price Regulated Markets. URCA is not reviewing, as part of this process, the competitive conditions in retail markets as per the Comms Act [section 40(2)(a)]. Therefore, the 2010 SMP Final Decision on products and services subject to the Rules (Table 1 above) remains in place.

⁵In its draft Annual Plan for 2013 (available at www.urbahamas.bs) URCA proposed to undertake a review of the Rules.

⁶On 1 March, 2013, URCA sent letters to BTC and CBL inviting them to make opening submissions regarding proposed changes or amendments, along with justification, to the existing Retail Pricing Rules. URCA received written submissions from both operators. BTC made a further submission on May 9, 2013 in respect of Paragraph 28 of the Pricing Rules. All submissions have been used as references in this public consultation document..

In this respect, URCA is issuing this consultation paper pursuant to section 8(1), (d), (e) and (m) and section 5(d) of the Comms Act.

1.3 Responding to this Consultation Document

Responses to this consultation paper should be submitted to URCA by 5:00 p.m. on 6 December 2013. Persons may send their written responses or comments to the Director of Policy and Regulation, either:

- By hand, to URCA's office at UBS Annex Building, East Bay Street, Nassau; or
- By mail to P.O. Box N-4860, Nassau, Bahamas; or
- By fax, to (242) 393-0153; or
- By email, to info@urcabahamas.bs.

URCA reserves the right to make all responses available to the public by posting responses on its website at www.urbahamas.bs. If a response is marked confidential, reasons should be given to facilitate evaluation by URCA of the request for confidentiality. URCA may publish or refrain from publishing any document or submission, at its sole discretion.

URCA will review the responses received on or before 6 December 2013 and publish a Statement of Results on the consultation and the new Retail Pricing Rules applicable to SMP operators.

1.4 Structure of the Remainder of this Document

The remainder of this document is structured according to the following sections:

- Section 2 - Legislative and Policy Framework relevant to URCA's review of ECS 15/2010.
- Section 3- Summarises BTC's and CBL's submissions and URCA's Responses.
- Section 4 - Summary of Proposed Changes to ECS 15/2010 and Conclusion.

2 Legislative and Policy Framework for Retail Pricing in The Bahamas

2.1 Introduction

In this Section URCA sets forth the legislative and policy framework relevant to URCA's review and updating of ECS 15/2010.

The sector's legal architecture for regulation and competition underwent significant reforms in 2009 with the enactment by Parliament of:

- the Communications Act ("the Comms Act");
- the Utilities Regulation and Competition Authority Act ("the URCA Act"); and
- the Utilities Appeals Tribunal Act.

The Electronic Communications Sector ("ECS") Policy⁷ outlines the Government's objectives and vision, and further liberalization of the electronic communications sector in The Bahamas.

The legislative and regulatory framework in relation to URCA's review and updating of the Rules includes:

- the overall objectives of the statutory framework of the Comms Act;
- URCA's general functions and powers;
- pricing principles for USO-related services; and
- other factors, including relevant licence conditions.

2.2 Overall Objectives of the Statutory Framework

Section 4(a) and (b) of the Comms Act details the core objectives of the Electronic Communications Sector (ECS) Policy:

(a) to further the interests of consumers by promoting competition and in particular-

(i) to enhance the efficiency of the Bahamian electronic communications sector and the productivity of the Bahamian economy;

(ii) to promote investment and innovation in electronic communications networks and services;

⁷The Electronic Communications Sector Policy is available at <http://www.urbahamas.bs/download/060321200.pdf>.

- (iii) to encourage, promote and enforce sustainable competition; and*
- (iv) to promote the optimal use of state assets, including radio spectrum;
and*
- (b) to further the interests of persons in the Bahamas in relation to the electronic communications sector.*

All policy measures, decisions and laws that take effect shall be made with the goal of implementing these objectives and shall comply with relevant guidelines.⁸

2.3 General Functions and Powers of URCA

The Comms Act grants URCA wide ranging powers to regulate licensees operating in the sector. Section 7 of the Comms Act outlines URCA's functions for the purposes of carrying out the electronic communications policy objectives, two of which relate to retail price regulation:

- "(a) to regulate the electronic communications sector by exercising the powers given to it under this Act,... and*
- (f) to perform any other functions assigned to it by this Act ...".*

URCA's functions are carried out for the purposes of fulfilling the objectives at section 4 of the Comms Act. In furtherance of these objectives, URCA pursuant to section 8(1) of the Comms Act has the power to issue regulatory and other measures, including:

- "(d) issue regulations;*
- (e) issue directions, decisions, statements, instructions and notifications; ... and*
- (m) exercise any other powers assigned to it by this Act or any other law."*

2.4 Universal Service Obligations

Under section 119(1) and Schedule 5 of the Comms Act, both BTC and CBL have been entrusted with the provision of the following universal services:

- i) BTC shall provide -
 - o Affordable fixed voice telephony, inclusive of access and toll calling to all populated areas in The Bahamas;
 - o Affordable dial-up internet services to all populated areas;
 - o Dial-up internet services free of charge to Specified Institutions; and

⁸ Section 5 of the Comms Act.

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

BTC and CBL must also provide USO-related services on the basis of “uniform” prices throughout The Bahamas.⁹

2.5 Other Relevant Factors to Consider

Section 40(3) of the Comms Act explains that URCA:

“(a) shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits;

(b) shall take into account the investment made by the relevant licensee and allow the licensee a reasonable rate of return on capital efficiently employed, taking into account the risks involved;...”

Under the standard Individual Operating Licence (IOL), SMP licensees must also meet:

- i) a requirement not to discriminate unduly against particular persons or a particular description of persons in relation to carriage services offered by it (Condition 34);
- ii) a requirement to publish charges, terms and conditions (Condition 35); and
- iii) Retail price control should (Condition 37):
 - prevent to the extent possible instances of anticompetitive pricing, including unfair cross subsidies and predation;
 - foster an environment where prices are cost oriented to promote efficiency; and
 - develop an environment where persons in The Bahamas can share in the expected efficiency gains through lower prices.

⁹Condition 31.2 of the standard Individual Operating Licence published in accordance with section 20(1) of the Comms Act.

URCA will also give consideration to its own experience and understanding in how the Rules function.

3 Opening Submissions by BTC and CBL and URCA's Responses

In this Section of the consultation document, URCA summarizes the main comments raised by CBL (i.e., Cable Bahamas Ltd. and its affiliates) and BTC in their opening submissions to URCA's review of the Rules.

URCA notes that CBL has raised several comments that URCA considers to fall outside of the remit of this review. Therefore, in Section 3.1 below, URCA first sets out these comments and why it believes these issues are beyond the scope of the current review. This is then followed by an overview of all remaining comments from BTC and CBL and URCA's response to them in Section 3.2.

3.1 CBL's Comments beyond the scope of this review

The key issues raised within CBL's submission which URCA considers to fall outside of the remit of this review are as follows:

- CBL's proposal that URCA should adopt a proactive approach with respect to BTC's tariff rebalancing; and
- the introduction of a single consistent "calling party pays" (CPP) pricing regime.

3.1.1 BTC Tariff Rebalancing

CBL considers BTC's tariff rebalancing to be a long outstanding regulatory issue which URCA should take proactive measures to address. CBL recommends that:

- URCA should first determine the degree of tariff rebalancing necessary using BTC's cost separation results; and
- URCA should implement a phased program of increases to BTC's residential and/or business fixed line prices, in addition to offsetting reductions in other service prices (e.g., domestic and/or international calling prices).

CBL believes URCA's involvement in a tariff rebalancing exercise for BTC would engender greater certainty for customers and would further the sector policy objectives.

URCA's Response

URCA accepts that it has a significant role to play in any tariff rebalancing strategy for BTC.¹⁰ However, concerns over rebalancing go well beyond the Retail Pricing Rules. URCA considers that CBL's proposal is more appropriate with the introduction of price caps and does not believe it is reasonable for URCA to provide guidance in the Rules on tariff rebalancing.

3.1.2 Calling Party Pays Pricing

CBL recommends the adoption of a single consistent "calling party pays" pricing regime which would be in line with international best practice and also in the best interest of the Bahamian public. CBL notes that other countries have benefitted from similar moves to a single pricing regime.

URCA's Response

URCA also considers that CBL's proposal for retail prices to be based on a single consistent CPP regime is similarly outside the scope of this consultation.

3.2 BTC's and CBL's Comments within the scope of this review

Below URCA sets forth those comments raised by BTC and CBL that it considers are within the scope of this review exercise. These are as follows:

BTC:

- Exercise of regulatory forbearance;
- Greater reliance on *ex-post* competition powers;
- Greater transparency of the approval process;
- Predictability of the Rules; and
- Need for greater pricing flexibility.

¹⁰A rebalanced price structure provides improved signals to actual and potential service providers to invest in network access technologies and improve incentives for competitors to compete for a broad range of customers. There is also a social dimension to tariff rebalancing. For example, a rebalancing plan is usually designed to avoid rate shocks to customers or undermine access to USO-related services hence, the need for a gradual and phased approach to price rebalancing. In the Bahamian context, tariff rebalancing would need to be compatible with the objectives of the Comms Act and does not undermine the affordability of USO-related services.

Regulators, the world over, in general need to understand the impact of a rebalanced price structure on the affordability requirements for USO-related services and the implications for different customer classes generally. Another key element of a well-designed tariff rebalancing plan would be to shield customers from rate shocks and this is usually the justification for the phased implementation of tariff rebalancing strategies all over the world. In the end the rate at which tariffs are rebalanced will ultimately depend on a host of variables that are beyond the remit of this consultation.

CBL:

- Existing Retail Price Regulations are not efficient and proportionate as required by section 5 of the Comms Act;
- Retail Pricing Rules should be amended to include a clearly defined set of objectives;
- Consideration be given to price cap regulation in this current consultation;
- Streamlining the approval process for selected price applications;
- Clarification of the pricing rules for USO-related services;
- Additional *ex-ante* competitive safeguards;
- Ambiguity in the existing Retail Pricing Rules; and
- Clarification of when/whether *ex-post* competition provisions apply to price regulated services subject to the *ex-ante* retail pricing framework.

Next, URCA puts forward its response to each of the points raised by both companies:

3.2.1 Exercise of Regulatory Forbearance

BTC is of the view that URCA should adopt a pragmatic approach to regulation. BTC cited the regulatory forbearance test used by the Regulatory Commission in the Turks and Caicos Islands and considers that this is a useful model for URCA to examine during this proceeding.

URCA's Response

URCA considers the forbearance test cited by BTC is not relevant to this current review exercise, which focuses on the review of the Rules rather than the need for any *ex-ante* regulatory control to retail prices. The latter will form part of URCA's on-going competition assessment of electronic communications services in The Bahamas.

URCA also wishes to remind BTC that the Comms Act already lays down guidelines for URCA to forbear from *ex-ante* regulation where URCA is of the view that market forces alone are likely to achieve the core policy objectives specified in section 4 of the Comms Act. Under section 5 of the Comms Act, URCA may refrain or forbear from *ex-ante* regulation and resort to light-touch regulation when light-touch regulation is compatible with achieving the objectives in section 4 of the Comms Act. URCA must resort to light touch regulation, to the extent URCA considers it appropriate, when there is sufficient competition to further the interests of communications users in The Bahamas.

3.2.2 Greater reliance on ex-post competition powers

BTC is of the view that because a Reference Access Interconnection Offer ("RAIO") is in effect and establishes a price floor for a number of BTC's retail services, there is more flexibility for forbearance regarding BTC's fixed line services. BTC also stated that while the RAIO does not apply to the mobile phone market, *ex-post* safeguards are more beneficial because the mobile market is prospectively competitive and overly restrictive *ex-ante* rules will impede BTC's ability to quickly respond to market trends. BTC recommends that URCA assess the potential problems in the mobile market that *ex-ante* regulation should address. BTC states that most potential competition problems in the mobile market can be addressed under competition Law as they are in most global markets after competitive entry.

URCA's Response

URCA notes BTC's urging for URCA to place greater reliance on the *ex-post* competition provisions of the Comms Act but stresses that there is still a need for pre-emptive or *ex-ante* measures to safeguard competition and the protection of consumer interests.

While BTC does not presently face competition in the mobile market, URCA considers that it is still important that adequate *ex-ante* safeguards are in place to guard against BTC engaging in practices that foreclose the market upon the introduction of mobile competition. URCA also disagrees with BTC's comment that because a RAIO is in effect there is more flexibility for forbearance regarding BTC's fixed line services. Indeed, URCA believes that various price-related competition concerns are likely to arise where an operator provides critical wholesale inputs to other licensees and also compete with those licensees in downstream (retail) markets. In this situation, URCA considers that regulatory forbearance would pose a significant risk to emerging competition in relevant markets.

URCA has considered that the alternative to *ex-ante* price-related competition safeguards would be for URCA to rely more on the *ex-post* anti-competitive conduct regime of the Comms Act, as suggested by BTC. However, it is URCA's considered view that the *ex-post* provisions of the Comms Act alone are insufficient to protect the market from the potential harm of any anti-competitive pricing behaviour. Relying solely on *ex-post* competition investigations could result in significant time elapsing before an abusive behaviour can be stopped, with potential significant harm already being done to the market during that period. In contrast, URCA is of the view that relying on *ex-ante* controls, such as the Rules, allows the prevention of any anti-competitive pricing from occurring in the first place and thus, protecting the market from any resulting harm of such conduct.

3.2.3 Greater Transparency of Approval Process Required

BTC emphasised the need for greater transparency in the approval process for pricing applications. BTC opined that despite providing all of the required information for an application as stipulated in the Rules, there is still no guarantee as to whether the application will be approved. BTC pointed to its May 2011 application to permanently remove domestic toll charges for mobile call origination to fixed and cellular mobile lines in the Family Islands and commented that several rounds of questions/queries between BTC and URCA occurred before BTC received an approval.

URCA's Response

URCA agrees on the need for transparency in the approval process for pricing applications and reassures BTC that URCA will continue to administer the Rules in a transparent manner.

However, URCA takes issue with BTC's comment that URCA's requests for additional information and/or clarification in respect of a price application is evidence that the

approval process for pricing applications lack transparency. URCA maintains that the process is transparent and compatible with the legislative guidelines for regulatory and other measures. URCA reminds BTC that there exists within the Retail Pricing Rules (Para. 19) a provision for URCA to request additional information from the SMP operator in respect of any proposed price change. URCA further reminds BTC that under Condition 5.1.2 of BTC's IOL, BTC might be required by URCA to provide it with such information, etc., as required or permitted by the Comms Act¹¹ or other laws¹² or legal process by URCA. These provisions are necessary to enable URCA to verify whether a price application complies with the Rules generally, or to conduct sensitivity analysis on the data submitted, especially where the underlying supporting information/data and analysis presented by the SMP operator are not fully conclusive or sufficiently robust.¹³ URCA considers that BTC's comment, if adopted, would amount to an abdication of URCA's statutory and regulatory remit.

3.2.4 Predictability of Rules

BTC referred to Paragraph 20 of the Rules that stipulates an SMP operator must submit a signed declaration *"that the proposed price change is not anticompetitive and...*

- a. Does not result in predatory pricing; and*
- b. Will not result in a margin squeeze on other operators."*

BTC mentioned that the Rules refer the SMP operator to URCA's competition guidelines on abuse of a dominant position for information on the tests for predatory pricing and margin squeeze; however, BTC stated that there are no guidelines as to which tests should be applied. BTC recommends that URCA clarify which tests are to be applied and the data that is required.

URCA's Response

URCA duly notes BTC's comments and agrees on the need for the Rules to be predictable.

¹¹ See, for example, URCA's general powers under section 8(1)(i) and (k) of the Comms Act.

¹² See, for example, URCA's functions and powers under section 4(2)(i) and (k) of the URCA Act.

¹³ URCA understands that in regulated industries it is the standard practice for regulators to make inquiries in relation to a price application and the mere submission of data/information does not guarantee automatic approval for a price change. This is often the case in RoR, and rules-based regimes. Under these arrangements the making of a price application with supporting information is merely to trigger the review process. During the review exercise it is not uncommon for the regulator to request additional information and/or seeks further clarification on the information provided.

URCA sees merit in the clarification to the Rules relating to relevant competition-related tests, as suggested by BTC. To this end, URCA as part of its review and update of the Rules will bring more organisation to the Rules by clarifying, amongst others:

- when it is necessary for the SMP operator to conduct an assessment of margin squeeze and/or predatory pricing tests;
- details of the tests for assessment of margin squeeze and/or predatory pricing;
- the information required to conduct each assessment; and
- the process to demonstrate regulatory compliance.

The revisions to the Rules will also include more detail on how bundles will be assessed from both a technical and economic viewpoint. In particular:

- when it is necessary for the SMP operator to conduct a bundle test;
- details of the bundle test to be undertaken by the SMP operator;
- the information required to determine whether a bundle is replicable from a technical and economic viewpoint; and
- the process to demonstrate regulatory compliance.

3.2.5 Greater Pricing Flexibility

BTC commented that it is prevented from subsidizing handsets on conditional purchase of a price regulated service although this is standard industry practice.

BTC believed that where the licensee does not provide a wholesale input to other licensees for a fee (as is currently the case in the mobile termination market) there would be limited opportunity for the SMP operator to behave anti-competitively.¹⁴

BTC also stated that the timeframes for price changes should be realigned to reflect market conditions, as the current Rules are "*...onerous and ... slow Go-To-Market time for BTC's products and services*" and added that this makes it difficult for BTC to respond to competitive pressure from CBL in the fixed line market. BTC referenced the various timeframes in the existing Rules and reiterated that these are "*extremely onerous on the business.*" Within its 9 May 2013 letter to URCA, BTC commented that the cooling-off period of 120 calendar days for special offers and discounts prevented the company "*from repeating these promotions in the marketplace which improve consumer welfare by providing much needed savings and other benefits*".

¹⁴This observation is broadly in line with CBL's proposal in Section 3.2 above on the need for there to be separate procedures for price regulated services that give rise to policy and/or competition-related concerns versus those that do not lend themselves to such concerns.

URCA's Response

URCA does not agree that the Rules prohibit an SMP operator from subsidizing cellular mobile phones on the conditional purchase of a Price Regulated Service. As of for all other changes to Price Regulated Services, URCA is of the view that BTC would have to seek prior approval from URCA to offer such a package where it included a subsidized handset as, for example, BTC did prior to introducing the Apple iPhone packages which included the iPhone at a discounted price or for free. Any such application would then be subject to the review process (and associated competition tests) set out in the Rules.

URCA notes BTC's argument that limited opportunity exists for the SMP operator to behave anti-competitively where it is not required to provide a wholesale input for a fee to downstream competitors. However, URCA is of the view that even where the SMP operator does not provide a wholesale input for a fee, other price-related competition concerns could arise; for example, predatory pricing (in the case of a price decrease) and undue price discrimination. In the case of the mobile market, URCA reiterates its position that it is important that adequate safeguards are in place to guard against BTC engaging in practices that foreclose the market upon introduction of mobile competition.

URCA proposes to maintain the existing price-related competition tests in the Rules subject to the proposed revisions at Section 3.2.4 above. URCA is of the view that BTC will still have pricing flexibility but must ensure that price changes do not result in any anti-competitive harm to existing and potential licensees/competition.

Regarding the various time frames in the existing Rules, URCA has reviewed the Rules with a view to identifying possible reductions to the current timelines for the review processes. In respect of the timeframes for permanent price changes, bundling offerings, new service introductions, and withdrawal and discontinuation of services, URCA believes that these are still fit for purpose and proportionate. URCA notes that BTC has not presented any arguments or evidential support to substantiate its claim that these timeframes are "*onerous and ... slow Go-To-Market*" decisions by BTC or any other licensee. Meanwhile, URCA's own experience suggests that the timeframes are not unreasonable. Therefore, URCA proposes not to make any revisions to the timeframes at this time. URCA considers that if SMP operators provide all the required information (as set out in the relevant parts of the Rules) as part of their initial application, this facilitates a timely review process by URCA. However, URCA considers that it would be important to clarify what constitutes a "new services" and the information required for the aforementioned pricing applications. In particular, URCA proposes that the revised Rules only apply to new services in price regulated markets.

On the other hand, URCA's review indicates that there is scope for streamlining the timeframes and information required for short-term price changes (i.e., promotions). For example, URCA proposes to reduce the period within which similar promotions cannot be launched from 120 calendar days to 90 calendar days.¹⁵

3.2.6 Existing Price Regulations are not efficient and proportionate

In reference to section 5 of the Comms Act, CBL viewed the existing Retail Pricing Rules as neither efficient nor proportionate and believe the Rules are better suited for the monopoly environment of the past rather than the current market in which there is competition.

URCA's Response

URCA notes that when the retail pricing framework was implemented in 2010 it was deemed to be efficient and proportionate and in general compliance with the Comms Act, including section 5. URCA believes that, on balance, the framework has achieved the primary purpose for which it was designed, namely: (i) to protect consumers from monopolistic or excessive pricing; and (ii) to militate against SMP licensees engaging in anti-competitive pricing to the detriment of emerging competition in the more contestable segments of the industry.

Notwithstanding URCA's view that the framework is still compliant with section 5 of the Comms Act, URCA acknowledges the importance of timely review and updating of regulatory measures to keep pace with experience in how the Rules function. URCA is of the view that sufficient time has elapsed since implementation of the pricing Rules in April 2010 and is further of the view that a review of how the Rules function is now warranted. In conducting this review, URCA, amongst other things will take into consideration relevant comments made by BTC and CBL.

3.2.7 Objectives of Rules needed

CBL proposed that the Rules be amended to include a clearly defined set of objectives, including:

- (i) *"Reliance on market forces to the greatest extent possible,*

¹⁵The cooling-off period is necessary to avoid operators using promotions to circumvent the price approval and notification process. In Canada, operators must observe a minimum six (6) month (i.e., 180 days) waiting period in respect of special promotions for local wire line services. In other markets, the typical cooling-off period before an operator is allowed to re-introduce a similar or identical promotion varies extensively but 90 to 120 days appears to be a reasonable benchmark.

- (ii) *Fostering of competition and innovation,*
- (iii) *Promoting efficiency and investment, and*
- (iv) *Minimizing regulatory burden to the greatest degree practicable”.*

URCA’s Response

It is URCA's view that the objectives proposed by CBL seem reasonable but only in the limited context of determining the scope of the Rules and which services should be subject to *ex-ante* regulation. However, the scope of the Rules and which services should be subject to *ex-ante* regulation are not under consideration in this consultation. For these reasons, URCA is of the view that they are not objectives to consider when applying the Rules. In originally imposing the SMP obligations on CBL and BTC in 2010, including the Retail Pricing Rules, URCA was required under section 40(3) of the Comms Act to ensure that, prior to imposing any obligations under section 40(1) of the Act, “... *any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximize consumer benefits*”. URCA, having previously been obliged by the statute to consider “objectives” similar to those proposed by CBL when first imposing the Rules, does not consider that CBL has made out a satisfactory basis for URCA to repeat the statutory process in the current review and proposed revisions to the Retail Pricing Rules which form part of the SMP obligations frame work.

3.2.8 Consideration should be given to price cap regulation in this consultation

CBL cited a previous Public Consultation on Retail Pricing Regulation in the Communications Sector (the "2009 Consultation"), issued by the Committee for the Privatisation of BTC wherein URCA proposed various initiatives in respect of retail price regulation for operators having SMP, including price cap regulation. CBL noted that in the Results on the 2009 Consultation, URCA was of the view that implementation of price cap regulation was not possible at the time due to the "high data and information requirements". For this reason, URCA proposed to implement interim/transitional arrangements as a part of the SMP obligations framework.

CBL further noted that ROR regulation¹⁶ has been replaced by price cap regulation elsewhere and most of the Caribbean. CBL suggested that URCA should give consideration to price cap regulation in the current consultation, noting that a key benefit of adopting price cap regulation is the flexibility it provides operators with market power or SMP to implement price changes in response to market developments.

CBL believed that URCA is now in an appropriate position to depart from the existing Rules based approach given the numerous consultations completed (including separated accounting) since implementation of the Rules, in addition to URCA's upcoming market reviews scheduled for this calendar year (2013).

URCA's Response

URCA agrees with CBL that price cap regulation is the preferred retail pricing mechanism in the global market. It is a matter of public record that URCA generally favours price cap regulation over other formal retail pricing schemes, such as rate of return regulation. URCA also stands by its previous statements on the merits of price caps relative to rate of return regulation and affirms its view that price cap is the most appropriate form of regulation for use in The Bahamas, if formal price regulation is to be introduced.

URCA stresses that, at this time, it is not in an appropriate position to depart from the existing Rules-based framework and therefore considers it is unable to give adequate consideration to price cap regulation in the current consultation. URCA notes that price caps are usually set for a minimum period of three (3) years and is a forward-looking remedy. For this reason, price cap design must be informed by an up-to-date review of the competitive conditions in the provision of key retail services in the electronic communications sector in The Bahamas. Given the lapse in time since URCA's 2010

¹⁶ Rate of return regulation.

market review determination, URCA believes that a new market review would be critical to a consultation on price cap regulation in The Bahamas. However, based on the outcome of URCA's upcoming study of the competitive conditions in key retail markets, URCA will consider what remedies to impose including the feasibility of alternative forms of retail pricing schemes.

Therefore, URCA proposes to maintain the existing Rules-based pricing scheme. However, based on URCA's own experience and relevant concerns highlighted by CBL and BTC in their respective submissions, URCA will review and streamline the Rules processes and requirements, as necessary and appropriate.

3.2.9 Streamlining of the Approval Process for selected applications

CBL stated that either as an alternative or in combination with price caps, URCA should seek to streamline and improve the application procedure within the existing Retail Pricing Rules for: (i) permanent price changes, (ii) special offers or discounts, (iii) introduction of new services, and (iv) introducing or changing the price of bundles of price regulated services.

CBL believed that:

- 1 *There should be two categories of permanent price change requests:*
 - a. *The first would involve simple and straightforward price changes that do not raise policy or competition-related matters and hence are granted immediate final or, at least, interim approval.*
 - b. *Where policy and competition-related matters arise, a detailed evaluation process requiring additional time to review and approve would be warranted.*
- 2 *Expedited or automatic approval for promotions, new service introductions and bundling offers that satisfy pre-established conditions to be determined by URCA.*

URCA's Response

As stated previously in this consultation document, URCA proposes to maintain the existing Rules-based approach to retail pricing and reassures CBL that consequential to the outcome of URCA's upcoming assessment of the competitive conditions in key retail markets, URCA will examine the feasibility and appropriateness of alternative pricing schemes, including price caps.

URCA notes the two categories of permanent price change requests proposed by CBL. URCA does not consider it necessary to divide applications for price changes into the two categories suggested by CBL before considering the application. URCA notes that if a price application is less complex and unlikely to raise any regulatory issues, then this will lead to an expedited review process by URCA under the current regime. Therefore, URCA does not propose to amend the Rules for this proposal. Indeed, URCA believes that to do so would introduce uncertainty into the framework as this would require deciding which category each application falls into.

URCA also does not consider it feasible to include in the Rules a set of ‘pre-established conditions’ to allow for an automatic approval of some pricing applications (such as promotions, new services and bundling offers). Given the dynamic nature of the sector and resulting retail offerings, URCA considers that predefining such conditions and including them into the Rules could result in either the Rules requiring regular updating and/or licensees being constrained in their retail service tariff design, which would result in great uncertainty in the market.

As stated above (Section 3.2.4) in response to BTC, URCA has proposed a revision to the Rules by clarifying what constitutes a “new services” and the information required for the aforementioned pricing applications. URCA has proposed a revision that further clarifies the information required for each type of price application under the Rules.

On the other hand, URCA accepts the need to streamline the timeframes and approval process for special promotions as well as to clarify the information required for each type of special promotion application.

3.2.10 Clarification of the pricing Rules for USO Services

CBL stated that legal and regulatory uncertainty exists from the interplay of the *ex-ante* retail pricing framework under Part VI of the Comms Act and the pricing-related aspects of the USO framework under Part VII of the Act.

CBL recommends a review and more organization of the following two categories of USO-related services:

- (1) USO services that are also classified as price regulated services; and
- (2) USO services that are not price regulated services.

CBL recommends that URCA provide guidelines detailing how a price-related application for designated USO services should be filed and the requisite criteria needed for URCA's evaluation. More specifically, CBL wants URCA to consider alternative approaches for the development and organization of specific affordability criteria for proposed price changes to price regulated USO services and the price regulation mechanism that would be applied (e.g., price cap or other pricing rule). The same concerns would also apply to USO services that are not price regulated.

URCA's Response

URCA could not confirm for itself the specifics of CBL's assertion that there exists "*legal and regulatory uncertainty ...*" between Parts VI and VII of the Comms Act. In relation to Part VI, URCA notes that these provisions set out the procedures URCA must adhere to when making SMP determinations and the remedies or obligations URCA may impose on SMP licensees (including the principle that retail price control should allow the licensees a reasonable rate of return on capital efficiently employed, taking into account the risks involved). Meanwhile, Part VII deals exclusively with determinations of universal service obligations (USOs) and the establishment of Universal Service Funds.

Although URCA is uncertain about the main area of concern for CBL, it is worth noting that under present USO-related policy BTC and CBL are obligated to provide USO services on a "uniform" and "affordable" basis throughout The Bahamas. The pricing principle that USO services must be affordable may result in the USP pricing USO-related services below the costs of provisioning such services. However, a USP may, under certain conditions, request compensation under the Universal Service Fund (USF) to offset financial losses it may incur due to its USOs.

URCA notes that *ex-ante* controls within the Rules generally only apply to retail services which are price controlled as a result of an SMP assessment. This means that, in URCA's view, operators would be free to price other services that are not classified as price regulated services, subject to the competition provisions within the Comms Act. This view also holds for non SMP USO services; however, for these services URCA would conduct regular assessments of whether an operator is meeting its USOs and as part of this process, URCA will assess the affordability of the relevant retail tariffs. URCA appreciates the need for guidelines for assessing the affordability of USO-related services. URCA reminds CBL that in URCA's Working Programme for 2013, URCA proposed to undertake various activities to ensure USPs comply with their USOs. These work streams include a consultation on guidelines for assessing the affordability for

USO-related services in The Bahamas.¹⁷ These affordability guidelines will be integral to URCA's evaluation of a price change request for USO-related services.

URCA agrees with CBL on the need for review and updating of the Retail Pricing Rules to clarify the treatment of price regulated USO-related services (i.e., that fall under the remit of the Rules). Consequential to this review, URCA proposes to amend the Rules to reflect the requisite criteria needed for URCA's evaluation, the approval process and related timeframes, and information requirements applicable to price regulated USO-related services.

In relation to USO services that are not subject to *ex-ante* retail price control the process and requisite criteria needed for URCA's evaluation are different from those applicable to price regulated USO-related services. In particular, the prices of these USO services will be reviewed with reference to their affordability to consumers in The Bahamas, with such an assessment carried out in line with Guidelines URCA may publish from time to time as to how such assessments should be conducted.

3.2.11 Additional Ex-ante Price-related Competitive Safeguards

CBL is concerned that if sufficient *ex-ante* competitive safeguards are not instituted, significant competitive market damage could occur before any *ex-post* remedies are actually applied. CBL stated that while the current Retail Pricing Rules include *ex-ante* safeguards against predatory pricing, margin squeezes and unfair cross-subsidy, more adequate safeguards should be established to prevent other forms of anti-competitive pricing behaviour such as off/on-net price discrimination.¹⁸

CBL added that off/on-net price discrimination is a popular tactic employed in other jurisdictions and CBL would like to see *ex-ante* safeguards in place prior to mobile competition to prevent possible abuse of this practice in the event of price changes that can potentially raise concerns related to policy or competition.

URCA's Response

Although predatory pricing and margin squeeze are the main anti-competitive practices identified under paragraph 20 of the existing Rules, SMP operators are still required to demonstrate that any proposed price changes of Price Regulated Service will not result in undue discrimination. URCA reminds CBL that the Retail Pricing Rules are

¹⁷The requirement for USO-related services to be affordable applies to USO-related services that are classified as price regulated service and those that are not classified as such.

¹⁸This comment contrasts with BTC's request as part of Section 3.1 above that URCA should rely more on its *ex- post* powers to address competition-related concerns.

supplemented by the Comms Act and the standard IOL which currently includes a prohibition against undue discrimination by the SMP operator (from, for example, anti-competitive forms of off/on-net price discrimination).¹⁹ As a matter of practice, when conducting price reviews, URCA's general approach has been to give utmost consideration to all statutory and licensing obligations, as required.

URCA has proposed revisions to the Rules to:

- Clarify the need for the SMP operator to demonstrate as part of its application that its proposed price changes of Price Regulated Service will not result in undue discrimination (including a written declaration on this matter);
- Provide further information on the approach to the assessment of undue discrimination to be undertaken by the SMP operator; and
- The information required to conduct an undue discrimination test.

3.2.12 Ambiguity in the Existing Pricing Rules

CBL requested clarification on two excerpts from the Pricing Rules, as follows:

- (i) The Approval Process:

“An SMP operator must obtain URCA’s written approval before...

8.2 Introducing any changes to non-price terms and conditions for Price Regulated Services that could be expected to affect either the effective price paid by consumers or the costs incurred by the SMP operator”

- (ii) Introduction of New Services:

43. “An SMP operator that proposes to offer a new service, that is, a service materially different to any existing service...”

CBL requested URCA to provide some clarity on how these provisions are applied and explain what does *“a service [is] materially different to any existing service”* mean.

URCA’s Response

With respect to the query on Paragraph 8.2 of the Rule, URCA's view is that non-price terms and conditions refer to any and all terms and conditions other than the price for the service. URCA clarifies its view that the non-price terms and conditions that may

¹⁹URCA notes that off/on-net price discrimination is a common practice in the communications sector globally and only considered anti-competitive under certain conditions.

have an impact on either the effective price and/or cost of a service, include, but are not limited to:

- Contract length (which could be used as the period over which any fixed fees are annualised in order to determine the overall effective price);
- Quality of service (which would affect the cost of providing the service);
- The value of ancillary services or goods provided with the service;
- Time taken to provide the service (which would affect the cost of providing the service);
- Maintenance terms (which would affect the cost of providing the service); and
- Minimum call periods for which callers are charged (which would influence the effective price of usage and hence the overall effective price).

The above list is not an exhaustive one and other non-price terms and conditions of a significant nature could be considered by URCA, depending on the circumstances.

URCA also clarifies that “*a service [is] materially different to any existing service*” if the service:

- has not been previously marketed or sold by the licensee; or
- the service significantly amends any of the terms and conditions of an existing service, including price.

Material differences may, in URCA’s view, be due to any factors which would cause a consumer to think the service is substantially different to what it was, such that the consumer’s purchase decisions might change.

For the avoidance of doubt, URCA considers that rebranding or repackaging of an existing service would not constitute a material difference for the purposes of the Rules.

3.2.13 Clarification of when/whether ex-post competition provisions apply to price regulated services subject to the *ex-ante* retail pricing framework

CBL suggests that URCA clarify the scope and application of *ex-post* competition provisions under Part XI of the Comms Act where SMP operators are subject to retail price regulation. CBL cited the example of an SMP operator receiving *ex-ante* approval for a price application under the Retail Pricing Rules and inquired whether *ex-post* competition provisions would apply in such a case.

URCA’s Response

URCA clarifies its view that *ex-ante* approvals for a price application under the Rules could still be subject to the *ex-post* anti-competitive conduct regime of the Comms Act.

This is because *ex-ante* approvals (of a change in price and/or non-price terms and conditions) are always conditional on the supporting information submitted and prevailing circumstances at the time the application is made. In this respect, changes in the supporting information available to URCA could still trigger an investigation under the ex-post enforcement provisions (Part XI) of the Comms Act.

URCA notes that the instances in which this is most likely to arise include (but are not limited to):

- o New information becoming available subsequent to the introduction of a price change;
- o Errors coming to light in any of the information previously provided to URCA either by way of another regulatory measure, an application or a notification; and
- o Evidence arising of the actual or expected impact that the price or non-price terms and conditions have on the market.

4 Summary of Proposed Changes to ECS 15/2010 and Conclusion

4.1 Overview of proposed changes

Based on URCA's review of the submissions received from BTC and CBL, and URCA's own experience in how the Rules function, amongst other factors, URCA proposes to make certain changes to the Retail Pricing Rules.

In summary the main changes URCA proposes to make to the Rules are as follows:

- Clarify the information required for each type of price application and revise requirements to seek approval for new services in price regulated markets (Sections 3.2.5 and 3.2.9 above);
- Revise the approach for assessing promotions to increase the flexibility to operators whilst ensuring URCA can still prevent anti-competitive promotions on an *ex-ante* basis (Section 3.2.5 above);
- Clarify the treatment of price regulated USO-related services (Section 3.2.10 above); and
- Provide details of the assessment and information on the margin squeeze, predation tests, and bundle tests (Section 3.2.4 above), and undue price discrimination (Section 3.2.11), including illustrative working examples.²⁰
- Clarify what constitutes a 'new services' and 'non-price terms' (Section 3.2.12 above); and
- Clarify when/whether *ex-post* competition provisions of the Comms Act apply to price regulated services subject to the Retail Pricing Rules (Section 3.2.13 above).

Details of the proposed revisions to the existing Retail Pricing Rules are presented in Annex A to this consultation document.

4.2 Conclusion

Having considered the respective opening submissions received from BTC and CBL, and URCA's own experience in administering the Rules, among others, URCA has proposed several revisions to the existing Retail Pricing Rules. URCA is satisfied that the proposed revisions are:

- compatible with the statutory framework of the Comms Act;
- consistent with relevant licence conditions applicable to price regulated services provided by SMP operators;

²⁰ See Annexes 1, 2, 3 of the Draft Rules

- in line with changes in the commercial and regulatory environment in The Bahamas; and
- consistent with URCA's general powers to safeguard the interests of persons in The Bahamas in relations to electronic communications services. URCA has a duty to balance the interests of its stakeholders and believes that its proposals strike a reasonable balance between the commercial interests of operators and the customers they serve.

URCA will review all written responses to the consultation and issue a Statement of Results on the consultation as well as a revised version of the “Regulation of Retail Prices for SMP Operators – Rules”. The final revised version of the Rules will supersede ECS 15/2010.

URCA looks forward to constructive engagements on the draft revised Retail Pricing Rules document at Annex A below.