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Response to BTC's submission on

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

ECS 10/2014

Submitted to the

Utilities Regulations and Competition Authority

September 30, 2014

By

Cable Bahamas Ltd



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1. Introduction

Cable Bahamas Ltd ("CBL"), together with its affiliates Caribbean Crossings Ltd ("CCL") and Systems Resource Group Limited ("SRG") (collectively, "CBL"), hereby provides comments on the submission by the Bahamas Telecommunications Company ("BTC"), dated 29 August 2014, responding to Consultation Document ECS 10/2014 published by the Utilities Regulation and Competition Authority ("URCA"):

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

CBL and BTC share a number of important, overarching concerns regarding the Preliminary Determination. While these areas of shared concern are limited in number, the issues concerned are important and the arguments put forward by CBL and BTC on these matters are compelling. We therefore urge URCA to reconsider the issues in respect of which CBL and BTC express the same or similar sentiments, and to reconsider the approach that it proposes to take towards these issues in line with the comments provided.

Outside of these areas of common concern, BTC and CBL differ in their positions on a considerable number of the issues addressed in URCA's public consultation. These include URCA's proposed market definition and analysis, as well as its proposed choice of *ex-ante* remedies. Many of the comments provided by BTC on these matters lack any evidentiary basis, and represent a significant departure from relevant international precedents.

We summarise in Section 2 below:

- (i) the issues with regard to which CBL and BTC share a common concern; and
- (ii) the issues with regard to which CBL's position diverges from BTC's.

We also set out in table form in the Annex to this document our specific comments on BTC's response to consultation on an issue-by-issue basis for ease of reference.

¹ CBL is submitting this response to BTC submission without prejudice to its right to challenge, in any subsequent administrative or judicial proceeding, the material legal and procedural defects in the process that URCA has elected to follow by publishing this Preliminary SMP Determination.



2. Summary of areas of agreement and disagreement with BTC

Areas of agreement with BTC

There are three main issues on which CBL agrees with BTC's position. These areas of agreement are summarised below, and discussed in greater detail in the Annex to this document.

Role of ex-ante regulation and conditions for its application

CBL describes in its response to consultation dated 29 August 2014 (the "Response to Consultation") how URCA has failed to determine whether the relevant retail markets are actually susceptible to *ex-ante* regulation. In CBL's view, the correct economic application of the threshold 3-criteria test at the outset of the market analysis process (i.e., as is done in the European Union ("EU"), where the test was first conceived) would have confirmed that there is no need for continued *ex ante* regulation of the retail broadband and pay TV markets. This is supported by the fact that there is actual end-to-end platform competition between CBL and BTC in the broadband market, and clear evidence of imminent potential competition between these two infrastructure providers in the pay TV market.

CBL agrees with BTC that URCA has failed to assess the adequacy of market forces alone in addressing the competitive problems that it identifies on the relevant retail markets. This is notwithstanding the fact that *ex-ante* retail market regulation should only be applied where wholesale regulation is insufficient to safeguard fair competition at the retail level.

CBL also agrees with BTC that URCA's assessment of the *ex-ante* remedies that it proposes to impose does not comply with the proportionality, transparency and non-discrimination requirements set down under Art. 5(c) of the Communications Act (as amended) (the "Communications Act"). CBL also concurs with BTC that URCA has not given due regard to the cost and implications for the affected parties, as it is required to do under Section 4 of the Methodology.

Expanding scope of retail regulation is contrary to international trends

CBL agrees with BTC that the proposal to widen the scope of retail regulation runs completely contrary to the international trend for retail market deregulation aimed at promoting greater investment and improved service quality. For example, in the EU, the European Commission (the "Commission") has identified **only one** retail market (fixed narrowband) as being susceptible to *ex-ante* regulation, and is currently proposing to withdraw *ex-ante* retail regulation from that market in favor of a margin squeeze test at the wholesale level. URCA's approach in this regard is all the more alarming if one considers the clear evidence on the record of strong platform competition between BTC and CBL (as discussed immediately above).

Concurrent application of a replicability test with a price cap

CBL agrees with the serious concerns expressed by BTC in respect of URCA's proposal to impose replicability tests in the retail broadband and pay TV markets. Whilst BTC has



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highlighted the need to provide greater clarity on the scope and application of the replicability test in respect of both of these retail markets, CBL underlines the serious inconsistency in URCA's proposal to apply this test concurrent with a price cap requirement in both retail markets.

CBL also agrees with BTC's prediction that the application of the proposed replicability test in respect of the retail broadband and pay TV markets will lead to the extension of *ex ante* regulation into service markets that are not characterised by significant market power ("SMP"). Analysys Mason, the independent consultants that CBL retained for the purposes of URCA's public consultation on the Preliminary Determination, identified a similar risk. That would amount to disproportionate regulation and is not a test that is fit for purpose in an environment which is characterised by end-to-end infrastructure-based competition. In such environments (which would be the envy of many countries), replicability is built into the system.

Areas of disagreement with BTC

BTC and CBL differ in their positions on several of the issues raised in the consultation document. These areas of disagreement are summarised below, and discussed in greater detail in the Annex to this document.

Need to define separate markets for residential and business customers

There is no evidence that the market for fixed line services is either competitive, or trending towards competition. This market therefore is not a candidate in this review process for deregulation. Furthermore, CBL does not agree with BTC that URCA should define separate retail markets for business and residential fixed line services.

BTC has based its argument concerning separate market definitions on a flawed understanding of how the small but significant non-transitory increase in price ("SSNIP") test should be applied in respect of these services to determine the existence of demand and supply side substitutability.

If, however, URCA believes that there is any value in considering the existence of separate retail and business service markets, a separate consultation should be initiated to focus on the evidence and the implications of any such change in the existing market definition in order to fully ventilate all of the relevant issues. Before reaching any conclusions, URCA should, at a minimum, seek comments from business customers to determine their view of the relevant market and the degree of competition.

Implementation of price caps for fixed, broadband and pay TV services

BTC is supportive of the implementation of price caps for fixed, broadband and pay TV retail services, even for a transitional period. It contends that the introduction of price cap regulation would reduce the regulatory burden for URCA and the affected SMP designated operators.

CBL does not agree that price caps should be implemented on the retail broadband and pay TV markets, and considers this to be an ill-timed, intrusive and disproportionate proposition. However, CBL would be amenable to the application of a properly constructed price cap with respect to BTC's fixed narrowband services.



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As demonstrated in the Response to Consultation, the extension of *ex-ante* price regulation in the retail pay TV and broadband markets is not warranted. Both of these markets are either moving towards imminent competition, or are already subject to effective competition. These markets should, therefore, be candidates for deregulation (or at the very least, lighter-touch regulation), and not price cap regulation.

Moreover, URCA has failed to provide any evidence of excessive pricing on these markets. It has also ignored the fact that the presence of strong infrastructure competition constrains CBL and BTC from engaging in excessive pricing practices in the broadband market. The existence of infrastructure based competition will have the same effect in the pay TV market as soon as BTC's new IPTV service is operational, which is expected to happen within the next six months (as discussed in more detail below).

Contrary to BTC's position, CBL considers that the cost, complexity and significant lead times required to implement a price cap scheme makes price cap regulation particularly unsuitable as a transitional tool for the broadband and pay TV markets. This difficulty is compounded by the degree of regulatory discretion afforded in the implementation of this remedy, and the fact that URCA has chosen not to consult on the details of a price cap methodology concurrent with this market review.

Withdrawal of obligations to eliminate unfair on-net/off-net pricing differentials

BTC disagrees with URCA's proposal to impose a non-discrimination requirement in terms of its on-net/off-net pricing. BTC is opposing this remedy purely because it wants to have the flexibility to protect its monopoly starting-position by imposing differential pricing between on-net/off-net calls for mobile services once competition is introduced in the mobile sector.

There is ample precedent from other jurisdictions about the anticompetitive "*snowball effects*" of on-net/off-net price discrimination by the dominant mobile operator. CBL therefore supports URCA's proposal to impose a non-discrimination requirement on BTC's on-net/off-net pricing of fixed services. The application of unfair on-net/off-net pricing differentials by an SMP designated operator presents a serious risk to competition, particularly considering the snowball effects that this practice can give rise to. The associated danger to competition means that on-net/off-net pricing differentials should be addressed on an *ex-ante* basis, rather than under *ex-post* competition law as suggested by BTC.

Finally, BTC points to the fact that CBL uses on-net/off-net pricing differentials, and argues that it should also be allowed to do the same. BTC's logic in this regard is flawed. Because CBL does not have market power on the fixed call market, the application of on-net/off-net pricing differentials by CBL is by definition not anti-competitive and is, in fact, pro-competitive under the circumstances.

Necessity to include IPTV in the retail pay TV market

CBL disagrees that it is premature to consider whether IPTV is part of the pay TV market. The market definition process should be "*prospective*" in nature, and should take account of expected or foreseeable technological or economic developments over the time period of the market review (which is typically a 12 – 18 month period). CBL



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therefore contends that URCA must take into account the planned entry by BTC into the IPTV market over the course of the market review period.

Recent developments that have taken place since CBL submitted its Response to Consultation confirm the need to take account of BTC's plans to launch pay TV services in the SMP analysis of the pay TV market. On 29 August, Phil Bentley, the Chief Executive of BTC's parent company, Cable and Wireless Communications ("CWC"), stated that BTC would launch pay TV in The Bahamas as soon as March 2015, with trials expected as early as December 2014. Mr Bentley further stated that BTC would like to partner with ZNS for the launch of this service, which, he stated, would "*be better [than CBL's] and give better coverage*".² In a press release published at the same time, BTC quoted Mr. Bentley as describing "*BTC TV*" as "*a new TV offering to beat Cable Bahamas [...] giving our customers choice and value-for-money*".³

This follows on from earlier indications by BTC of its plans to launch pay TV services. For example, the former Chief Executive of BTC, Geoff Houston, announced in September 2012 that BTC's pay TV offering would have more than 100 channels, and would leverage the company's existing next generation network ("NGN") and broadband offering.⁴ BTC's failure to discuss (or even mention) its IPTV plans in its response to consultation is therefore hardly defensible, particularly considering the recent publicity that it has given to this issue.

[X]

² Guardian, 1 September 2014, *BTC to offer TV package by Spring 2015*, and Tribune 1 September 2014, "*Over one-third of three year, \$170m upgrade to go on cell network*".

³ "*CWC CEO Phil Bentley Outlines the New BTC*", by Bahamas Telecommunications Company (BTC).

⁴ Guardian, 1 September 2014, *TV Package CWC: BTC "should be doing a lot better"*.



ANNEX

Table of CBL Comments on BTC’s Response to URCA Preliminary Determination (ECS 10/2014)

BTC Comment No. ¹	Description of BTC Comment	CBL Comment in Response	Page No. ²
Background issues			
1	<p>Role of <i>ex-ante</i> regulation</p> <ul style="list-style-type: none"> • BTC contends that <i>ex-ante</i> regulatory intervention should only take place where market forces alone are unlikely to achieve the objectives of the Communications Act 2009 (as amended) (the “Communications Act”) within the relevant timeframe. • BTC also states that, when imposing regulatory remedies, due consideration should be taken to ensure that the cost (to both URCA and the affected parties) is proportionate to the competitive problem identified. • BT argues that the proposed remedies must be fit 	<p>CBL agrees with this comment</p> <ul style="list-style-type: none"> • CBL notes that, by failing to correctly apply the European Union’s (“EU”) 3-criteria test at the outset of the market review process, URCA has not determined whether <i>ex-ante</i> regulatory intervention is actually required on the relevant retail markets. • The correct application of the 3-criteria test would confirm that the retail broadband and pay TV markets are not susceptible to <i>ex-ante</i> regulation as: <ul style="list-style-type: none"> ➤ both markets are either already competitive, or are trending towards competition (criterion 1); and ➤ neither market is characterised by high and non- 	2

¹ This numbering applies for purposes of the table only.

² This refers to the page number in BTC’s response to consultation.



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	<p>for purpose and take account of emerging trends within the electronic communications sector. The obligations imposed must also be transparent, fair and non-discriminatory.</p>	<p>transitory barriers to entry (criterion 2) (URCA's incorrect application of the 3-criteria test is addressed in detail in Section 2.1 of CBL's response to consultation (the "Response to Consultation").</p> <ul style="list-style-type: none">• It also confirms that further <i>ex-ante</i> regulation of the wholesale broadband market is no longer required, and that the existence of strong infrastructure competition at the wholesale level between BTC and CBL is sufficient for The Bahamas (this point is addressed in detail at Section 2.3 of the Response to Consultation.• Article ("Art.") 5(a) of the Communications Act and Section 4 of URCA's Methodology for the Assessment of SMP (the "Methodology")³ require that regulatory remedies only be imposed where it is determined that market forces alone are unlikely to achieve the desired objectives within a reasonable timeframe.<ul style="list-style-type: none">➤ URCA has failed to assess the adequacy of market forces alone in addressing the competitive problems that it identifies on the relevant retail markets.➤ <i>Ex-ante</i> retail market regulation should only be applied where wholesale regulation is insufficient to safeguard fair competition at retail level (see Art. 17 of the EU's Universal Service Directive).⁴	
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³ Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009, Final Decision, ECS 20/2011, 13 October 2011.

⁴ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks (Universal Service Directive) as amended by Directive 2009/136/EC.



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		<ul style="list-style-type: none"> • CBL also agrees that URCA’s assessment of the <i>ex-ante</i> remedies that it proposes to impose does not comply with the proportionality, transparency and non-discrimination requirements set down under Art. 5(c) of the Communications Act. Nor has URCA given due regard to the cost and implications for the affected parties, as it is required to do under Section 4 of the Methodology. 	
2	<p>Nature of competition in The Bahamas</p> <ul style="list-style-type: none"> • BTC states that effective competition in The Bahamas is ensured by the existence of infrastructure competition between CBL and BTC. This reflects the <i>status quo</i> in other Caribbean markets, where competition is between the public service telephony network (“PSTN”) and cable network operators. • BTC acknowledges that, even in a “<i>larger and more developed market</i>”, consolidation in the telecommunications sector means that effective competition is between the large infrastructure-based providers. • It argues that, for this reason, <i>ex-ante</i> regulation in The Bahamas should focus on ensuring that competition between the main players is fair, and that they are not constrained unnecessarily from developing new services. 	<p>CBL agrees with this comment</p> <ul style="list-style-type: none"> • URCA seems to assume that the presence of two infrastructure operators is not sufficient to ensure effective competition in The Bahamas. • CBL argues in Section 2.2.1 of the Response to Consultation that strong infrastructure based competition between BTC and CBL is sufficient to ensure effective downstream competition: <ul style="list-style-type: none"> ➤ CBL demonstrates, for example, how The Bahamian broadband market exhibits the same characteristics as the Maltese broadband market, where the European Commission (the “Commission”) has held that two infrastructure operators can guarantee effective retail broadband competition. • CBL also demonstrates in Section 2.3 of its Response to Consultation that the existence of strong infrastructure competition at the wholesale level between BTC and CBL confirms that neither wholesale nor retail broadband regulation is required in The Bahamas. 	6



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3	<p>Need for retail market deregulation</p> <ul style="list-style-type: none"> • BTC argues that the trend internationally is for retail deregulation, as opposed to the imposition of retail price caps. • It therefore urges that, at a minimum, URCA implement any price caps for a “<i>transitional</i>” period only, with the objective of removing retail price regulation when “<i>market circumstances allow</i>”. • In BTC’s view, this should happen following entry by a new mobile network operator, as this new operator will be able to provide fixed services in direct competition with those of BTC and CBL. 	<p>CBL agrees (in principle) with this comment</p> <ul style="list-style-type: none"> • As a threshold comment, <i>ex-ante</i> retail market regulation should only apply where wholesale regulation is incapable of safeguarding fair competition at the downstream level. As demonstrated above, strong infrastructure competition between BTC and CBL is capable of guaranteeing effective retail competition in the Bahamian broadband market. This market should, therefore, be deregulated. • There is a general trend towards retail market deregulation. This is particularly the case in the EU, where the Commission has identified only one retail market as susceptible to <i>ex-ante</i> regulation (the market for fixed call access or so-called Market 1).⁵ In fact, the Commission is now proposing to withdraw <i>ex-ante</i> retail regulation from this market in favor of a margin squeeze test at the wholesale level:⁶ <ul style="list-style-type: none"> ➤ The retail market for fixed call access has been either partially or fully deregulated in the following EU Member States (“MS”): Finland, Germany, The Netherlands, Romania and the UK. This trend of deregulation is likely to continue in the EU. • However: There is no evidence that the retail market for fixed line services in The Bahamas is either competitive, or 	3 & 4
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⁵ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (2007/879/EC).

⁶ Commission Recommendation of XXX on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2001/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.



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		<p>trending towards competition. CBL therefore believes that this market is not a candidate for deregulation in this review process.</p> <ul style="list-style-type: none">• Moreover, CBL does not agree with BTC's argument that the withdrawal of <i>ex-ante</i> retail regulation in The Bahamas should be contingent on the entry of a second mobile licensee.<ul style="list-style-type: none">➤ There is clearly no case for the further <i>ex-ante</i> regulation of the retail broadband and pay TV markets. URCA should therefore remove regulation from these markets immediately.• CBL also disagrees with BTC's contention that the imposition of a price cap remedy on the retail broadband and pay TV markets would be appropriate, even as a transitional tool.<ul style="list-style-type: none">➤ CBL sets out below in its response to BTC Comment No. 9 how URCA has failed to justify its proposal to impose a price cap remedy on the retail broadband and pay TV markets, even on a transitional basis.➤ As explained in Section 2.6.2 of the Response to Consultation, the establishment and imposition of a price cap remedy is a difficult, time-consuming and costly process. As is also explained in in Section 2.6.1, a price cap cannot be applied "<i>in abstract</i>", and consistency must be ensured between the application of this and the other <i>ex-ante</i> retail remedies that apply in respect of the retail broadband and pay TV markets. The complex nature of the development and application of a price cap remedy therefore makes it unsuitable as a	
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		"transitional" remedy on the retail broadband and pay TV markets.	
Proposed market definition			
4	<p>Need to define separate markets for business and residential fixed line services</p> <ul style="list-style-type: none"> • BTC states that URCA should define separate retail markets for business and residential fixed line services. <ul style="list-style-type: none"> ➤ BTC argues that the European Commission's reasoning for including residential and business services within a single market (as set out in the Commission's Explanatory Memorandum accompanying the Recommendation on Relevant Product and Service Markets (the "Explanatory Memorandum") does not apply to The Bahamas. ➤ It also contends that, while there is supply side substitutability between both services, the fact that business fixed line services are currently more expensive than residential fixed line services (by an estimated 1.7 to 2.2 times) confirms that the SSNIP (small 	<p>CBL does not agree with this comment</p> <ul style="list-style-type: none"> • CBL does not agree with BTC that URCA should define separate retail markets for business and residential fixed line services. • BTC has clearly misunderstood how the SSNIP test is applied in practice in the market definition process. <ul style="list-style-type: none"> ➤ While acknowledging the existence of supply side substitutability, BTC relies on the fact that business fixed line services are an estimated 1.7 to 2.2 times more expensive than residential fixed line services in order to demonstrate that the SSNIP test would not be satisfied. ➤ The SSNIP test is not applied by measuring the price differences between two services as they currently stand. As confirmed by par. 17 of the Commission' Notice on Market Definition,⁷ the SSNIP test investigates whether a hypothetical small but permanent 5 – 10% increase in current prices would result in customer switching. Moreover, the 	5, 8 – 11 & 17 – 18

⁷ Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03).



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	<p style="text-align: center;">but significant non-transitory increase in price) test would not be met.</p> <ul style="list-style-type: none"> • BTC also argues that a high degree of competition exists in respect of the business fixed access and call markets, and that URCA should therefore place a greater reliance on <i>ex-post</i> intervention, rather than <i>ex-ante</i> price regulation, for this market. 	<p>Methodology identifies a 12 month “<i>non-transitory</i>” period for the application of the SSNIP test,⁸ a requirement that BTC has clearly failed to take account of. This logic applies in respect of both demand and supply side substitutability.</p> <p>➤ Contrary to BTC’ contention, therefore, the existence of a price difference between business and residential fixed line services at this time does not confirm that the SSNIP test would be satisfied in respect of these services.</p>	
<p style="text-align: center;">5</p>	<p>Need to define separate markets for business and residential broadband services</p> <ul style="list-style-type: none"> • BTC also argues that separate markets should be defined for business and residential broadband services. • It states that, while there is supply side substitutability between both services, the fact that business fixed line services are currently more expensive than residential fixed line services (between two and four times) confirms that the SSNIP test would not be met. 	<p>CBL does not agree with this comment</p> <ul style="list-style-type: none"> • Once again, BTC has misunderstood how the SSNIP test is applied in the market definition process. While acknowledging the existence of supply side substitutability, BTC relies on the fact that business broadband services are currently between two and four times more expensive than residential broadband services in order to demonstrate that the SSNIP test would not be satisfied. • As demonstrated above, the SSNIP test is not applied by measuring the price differences between two services as they currently stand. The existence of a significant price difference between business and residential broadband services at this time is therefore irrelevant, and does not confirm that the SSNIP test would be satisfied in respect of these services. 	<p style="text-align: center;">22 & 23</p>

⁸ Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009, Final Decision, ECS 20/2011, 13 October 2011, Section 3.1.



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6	<p>Proposed geographic scope of the retail broadband market</p> <ul style="list-style-type: none"> • BTC argues that the sub-markets as defined by URCA for broadband and business connectivity services are “<i>too-small to merit separate definition and regulation</i>”. • For this reason, BTC argues that, in order to ensure consistency between the geographic scope of the fixed voice, broadband and business connectivity markets: <ul style="list-style-type: none"> • a single national geographic market should be defined for broadband services and business connectivity services; or • two geographic markets should be defined for fixed voice, broadband and business connectivity services. • According to BTC, this approach would address the current inconsistency, whereby the fixed voice and pay TV service markets are defined as a single national market, but two geographic markets are defined for broadband and business connectivity services. 	<p>CBL does not agree with this comment</p> <ul style="list-style-type: none"> • BTC seems to be under the mistaken belief that the geographic scope of each of relevant retail markets should be “<i>consistent</i>”. • It also states that some of the geographic markets as defined by URCA are too-small to merit separate definition and regulation. • Both of these arguments are flawed for the reasons set out below: <ul style="list-style-type: none"> ➤ For the purposes of both <i>ex-post</i> competition law and <i>ex-ante</i> 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.⁹ ➤ The criteria set out in the Methodology to be used when defining a relevant geographic market do not make any reference to the need to ensure that the geographic scope of the various service markets defined is “<i>consistent</i>”. 	<p>5, 21, 23 & 25</p>
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⁹ See: Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372 /03), par. 8, and Commission Explanatory Note on Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Explanatory Memorandum, Commission Staff Working Document), Section 2.4.



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		<ul style="list-style-type: none"> ○ In contrast, these criteria appear to confirm that the geographic scope of a service market is defined by reference to the competitive conditions that exist within a given geographic area(s). ➤ Moreover, the importance of “<i>quantitative</i>” factors as the basis for geographic market definition (as opposed, for example, to the actual size of a geographic market) is acknowledged by the EU’s Body of European Regulators for Electronic Communications (“BEREC”) when it states that: “[...] <i>the number of operators offering their retail services in a particular geographical area [...] may provide factual information about the position of operators in separate geographical areas.</i>”¹⁰ 	
7	<p>Not necessary to include IPTV in the retail pay TV market until the launch of that product</p> <ul style="list-style-type: none"> • BTC states that it is “<i>premature</i>” to consider whether IPTV is part of the pay TV market until this product becomes available in The Bahamas. • It also states that, in any case, URCA may wish to forebear from the regulation of IPTV product until it has become “<i>properly established</i>”, and any “<i>market deficiencies</i>” have become apparent. 	<p>CBL does not agree with this comment</p> <ul style="list-style-type: none"> • The Explanatory Memorandum on the Recommendation on Relevant Product and Service Markets confirms that <i>ex-ante</i> markets should be defined “<i>prospectively</i>”.¹¹ • The Explanatory Memorandum also requires that market definitions: “[...] <i>take account of expected or foreseeable technological or economic developments over a reasonable horizon linked to</i> 	27 & 28

¹⁰ Draft Review of the BEREC Common Position on Geographical Aspects of Market Analysis, June 2014, p. 14.

¹¹ Commission Explanatory Note on Commission Recommendation on Relevant Product and Service Markets, Section 2.1.



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		<p><i>the timing of the next market review</i>:¹²</p> <ul style="list-style-type: none">➤ a 12 to 18 month time horizon is typically chosen as the appropriate time period for the significant market power (“SMP”) analysis.• Therefore, and contrary to BTC’s arguments, URCA should take account of the likely launch of IPTV over the proposed market review period when defining the retail pay TV market.• BTC’s argument regarding regulatory forbearance is also flawed, as BTC seems to ignore the fact that <i>ex-ante</i> regulation:<ul style="list-style-type: none">➤ is exclusively forward looking in nature; and➤ should take account of prospective or likely future developments.• BTC is essentially advising URCA to refrain from acting until the market failure (or “<i>market deficiency</i>” as it calls it) has already taken place. This would be contrary to the objectives of <i>ex-ante</i> regulation (which applies prior to the competitive harm takes place), and is akin to the approach taken under <i>ex-post</i> competition law.• Recent developments that have taken place since CBL submitted its Response to Consultation confirm the need to take account of BTC’s plans to launch pay TV services for the SMP analysis of the pay TV market. On 29 August, Phil	
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¹² *Ibid.*



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		<p>Bentley, the Chief Executive of BTC’s parent company, Cable and Wireless Communications (“CWC”), stated that BTC would launch pay TV in The Bahamas as early as March 2015. In a press release published by BTC at the same time, Mr. Bentley is quoted as formally announcing “<i>BTC TV</i>” (see Section 2 of CBL’s submission above for more details).</p> <ul style="list-style-type: none"> ➤ In spite of the significant publicity that it has given to its imminent launch a competing IPTV service, BTC has failed to even mention its pay TV plans in its response to consultation. • [X] • However: While CBL does not agree with BTC’s rationale for forbearance, we believe that there is merit in limiting the application of price regulation on the pay TV market to PRIME services only, owing to the imminent entry of BTC to this market. CBL has developed this argument in detail in Section 2.5 of its Response to Consultation. 	
Proposed SMP assessment			
8	<p>Failure by URCA to take account of the competitive constraints imposed by second mobile licence</p> <ul style="list-style-type: none"> • BTC accepts URCA’s conclusion that fixed and mobile services do not form the same market. However, it argues that mobile services do constitute a substitute to fixed services (which it calls “<i>one-way substitutability</i>”): ➤ to support this argument, BTC states that 	<p>CBL does not agree with this comment</p> <ul style="list-style-type: none"> • Fixed and mobile voice services are complements, as opposed to substitutes, and should not be considered as part of the same service market. There is very limited international precedent for including fixed and mobile telecommunications services in the same market. ➤ In the EU, for example, the overwhelming consensus among National Regulatory Authorities (“NRAs”) is 	3 & 20



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	<p>customers have the option to use their mobile phone when making calls, instead of their fixed phone.</p> <ul style="list-style-type: none"> • According to BTC, this one-way substitutability places an additional constraint on BTC's pricing behaviour. • BTC argues that the entry of a new mobile operator would also create an additional competitive constraint in the retail broadband and business connectivity markets. • It therefore contends that URCA should have taken into consideration the impact that the new mobile entrant would have in its competitive assessment of these markets. 	<p>that fixed and mobile services do not form part of the same service market. The reasons for the non-integration of fixed and mobile services in the same markets are mostly related to the following (retail market) factors:</p> <ul style="list-style-type: none"> ○ the different characteristics of fixed and mobile offers; ○ the different preferences and usage patterns for the fixed and mobile services; ○ the existence of different prices between fixed and mobile offers; ○ fixed offers do not allow mobility in the use of the service; and ○ fixed and mobile services are mainly compliments, rather than substitutes.¹³ <ul style="list-style-type: none"> • BTC supports its assumption of one-way or asymmetric substitution by stating that customers have the option to use their mobile phone when making calls, instead of their fixed phone. It does not, however, establish that fixed subscribers would switch to mobile telephony subscriptions if there was a small but permanent 5 – 10% increase in current prices of retail fixed voice services (the SSNIP test), which is the only reliable indication of demand side substitutability. • In cases where NRAs have decided to take account of the 	
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¹³ BEREC Report on Impact of Fixed-Mobile Substitution in Market Definition, BoR (12) 52, 24 May 2012, p. 23.



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		<p>competitive constraint posed by mobile voice services in a fixed voice market review (owing to the presence of asymmetric fixed to mobile substitution), the existence of such competitive constraint has rarely impacted on the competitive assessment undertaken on fixed voice market.</p> <ul style="list-style-type: none"> Finally, the process for the licensing of a second mobile operator in The Bahamas has not yet been decided upon, and no indication has been provided as to when the new licence will actually be awarded. The degree of uncertainty surrounding the mobile licensing process means that BTC's comments are highly speculative, and do not, therefore, constitute valid reasoning. 	
Proposed SMP remedies			
9	<p>Proposal to impose price caps in respect of fixed voice, broadband and Pay TV markets</p> <ul style="list-style-type: none"> BTC supports URCA's proposal to apply a price cap to address market failure on the fixed voice services, broadband and Pay TV markets. <ul style="list-style-type: none"> BTC states that the implementation of a price cap would afford BTC greater tariff flexibility, and would allow for the "<i>speedy</i>" introduction of price decreases to the benefit of the consumer. 	<p>CBL does not agree with this comment (in respect of the broadband and pay TV markets)</p> <ul style="list-style-type: none"> CBL considers that the extension of <i>ex-ante</i> price regulation (in the form of a price cap) into the retail broadband and pay TV markets is wholly inappropriate for the following reasons.¹⁴ <ul style="list-style-type: none"> Both the retail broadband and pay TV markets are either moving towards competition, or are already subject to effective competition (see Sections 2.2.1 and 2.2.2 of the Response to Consultation): 	2, 14 – 16 & 28

¹⁴ These reasons are addressed in more detail in Sections 2.2, 2.4, 2.5 and 2.6 of the Response to Consultation.



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	<ul style="list-style-type: none"> ➤ BTC sets out a design principle for such a price cap at pp. 14 – 16 of its response. ➤ BTC states that the introduction of a price cap would also “<i>reduce the regulatory burden for both BTC and URCA</i>”. • It also argues that, given that competition in the electronic competition sector is based on customer spending across all communications services, price caps should be “<i>broad-based</i>” (i.e.; bundle based), rather than focused on sub-markets controlling individual prices. 	<ul style="list-style-type: none"> ○ the extension of <i>ex-ante</i> price regulation (in the form of a price cap) into these markets is therefore not required. ➤ URCA assumes that there is excessive pricing in the retail broadband and pay TV markets, but has provided no evidence of this (see Sections 2.4.1 and 2.5.1 of the Response to Consultation): <ul style="list-style-type: none"> ○ in terms of the retail broadband market, for example, URCA has misunderstood and incorrectly applied the methodology used by Ofcom in its price survey (see Section 2.2.1 of the Response to Consultation). ➤ URCA has failed to consider the negative consequences of imposing a retail price cap on CBL in these markets, such as the reduction in service quality and the impact on CBL’s ability/incentive to innovate (see Section 2.6.1 of the Response to Consultation). ➤ When assessing the risk of excessive pricing on the retail broadband and pay TV markets, URCA has failed to take into account that BTC is well placed to respond and take advantage of potential excessive pricing by CBL (see Sections 2.4.2 and 2.5.3 of the Response to Consultation). • BTC states that the introduction of a price cap would also reduce the regulatory burden for both BTC and URCA. This may be true for BTC’s fixed voice services but is otherwise wholly incorrect with respect to the retail broadband and pay TV markets. As explained in our response to BTC
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		<p>Comment No. 3 above, the establishment and imposition of an <i>ex-ante</i> price cap remedy is a complex, time-consuming and costly process.</p>	
<p>10</p>	<p>Proposal to impose replicability tests on fixed voice, broadband and pay TV markets</p> <ul style="list-style-type: none"> • BTC notes that URCA does not describe how the proposed replicability remedy is to apply in practice, nor does it describe the particular competition concern that this remedy is supposed to address. It therefore urges URCA to provide greater clarity on the scope of its proposed replicability test. • BTC also argues that, owing to the nature of competition in The Bahamas, the replicability test should be applied on the basis of the costs actually incurred by CBL and BTC. This would make the replicability tests “<i>much simpler and easier to apply</i>”. • BTC notes that, while URCA is content to rely on <i>ex-post</i> competition law alone to address margin squeeze and predatory pricing concerns in the fixed voice service market, it proposes to apply a replicability test in respect of bundles including this service. <ul style="list-style-type: none"> ➤ It argues that service bundling can be an effective way of passing economies of scope on to consumers, and should therefore be permitted, unless specific competition problems are identified. BTC 	<p>CBL agrees with this comment (in respect of the broadband and pay TV markets)</p> <ul style="list-style-type: none"> • CBL considers that there has been a general failure by URCA to consult on the price control remedies (including the price cap and replicability requirements) that it proposes to impose on the retail broadband and pay TV markets (this issue is addressed in detail in Section 2.6.2 of the Response to Consultation). • CBL also considers that there is a serious inconsistency in the proposal to concurrently impose a replicability remedy in the retail broadband and pay TV markets, together with a price cap: <ul style="list-style-type: none"> ➤ while a price cap is aimed at keeping retail prices below a certain level, a replicability test aims to ensure that retail prices do not result in a price squeeze (this issue is addressed in detail in Section 2.5.4 of the Response to Consultation). • CBL agrees that that the application of an <i>ex-ante</i> replicability test in respect of retail broadband and pay TV services would result in the extension of <i>ex-ante</i> regulation to services not characterised by SMP. This risk has also been identified by Analysys Mason in its report for CBL (see p. 30 of the Analysys Mason report). • However: CBL does not agree with BTC that the restriction on service bundling should not apply to fixed voice services. 	<p>12 – 14, 29 & 31</p>



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	<p>sees no reason why such commercial activity should be subject to <i>ex-ante</i> regulation.</p> <ul style="list-style-type: none"> • BTC submits that, owing to the nature of competition in The Bahamas, replicability tests should focus on BTC and CBL’s abilities to replicate each other packages: <ul style="list-style-type: none"> ➤ according to BTC, this would permit the bundling of voice and broadband packages, but not mobile services (at least not prior to the award of a second mobile licence); and ➤ the restriction on service bundling should not, therefore, apply to fixed and broadband services as CBL is able to replicate both services (and already provides bundles of fixed and broadband services). • BTC also notes that the application of an <i>ex-ante</i> replicability test would be “<i>counterproductive</i>”, and, considering the increase in service bundling, would result in the extension of <i>ex-ante</i> regulation to services where operators do not have SMP. • BTC contends that the replicability issue should therefore only be addressed on an <i>ex-post</i> basis, and not under <i>ex-ante</i> regulation. 	<p>CBL contends that BTC has not made a case for the deregulation of fixed voice services in the current market analysis. Any bundle including BTC’s fixed line service should, therefore, be subject to a replicability test.</p>	
11	Proposal to impose a non-discrimination requirement in terms of on-net and off-net pricing	CBL does not agree with this comment	29 &



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	<ul style="list-style-type: none"> • BTC disagrees with URCA’s position on fixed voice price discrimination in respect of its pricing of on-net and off-net calls: <ul style="list-style-type: none"> ➤ it argues that URCA should not use the <i>ex-ante</i> rules to “<i>micro-manage</i>” one tariff, when its overall strategy for retail pricing is “<i>moving towards a broader approach</i>”. • BTC notes that CBL uses on-net/off-net pricing differentials, and that BTC should also be allowed to do the same. It argues that on-net/off-net pricing differentials should only be addressed under <i>ex-post</i> competition law: <ul style="list-style-type: none"> ➤ BTC claims that on-net/off-net differentials are an appropriate tool in the competition for groups of customers, and that the level of price differential should be based on customers’ willingness to buy, as opposed to any cost differences in the provisioning of the service. 	<ul style="list-style-type: none"> • An SMP designated operator should not be allowed to price discriminate by offering on-net/off-net pricing differentials. • The competitive harm caused by the application of unfair on-net/off-net pricing differentials by a dominant operator is well known, particularly in respect of network operators with a smaller market share. • The harm caused to competition by on-net/off-net pricing differentials has been addressed by the French National Competition Authority (“NCA”) in recent decisions: <ul style="list-style-type: none"> ➤ In December 2012, the NCA fined two French mobile operators, Orange and SFR, for abuse of dominance for selling unlimited on-net calls on their respective networks: <ul style="list-style-type: none"> ○ the NCA concluded that this practice drew consumers to Orange and SFR, who were then locked in once they had chosen a post-paid tariff plan from those operators (the so-called “<i>snowball effect</i>”).¹⁵ ➤ In June 2014, the NCA fined SFR and its affiliate, SRR, for abuse of dominance for on-net/off-net pricing differentials: <ul style="list-style-type: none"> ○ the NCA also confirmed that this practice would give rise to a “<i>snowball effect</i>”.¹⁶ 	30
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¹⁵ French NCA;
http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=418&id_article=2014

¹⁶ French NCA;



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		<ul style="list-style-type: none">• The danger posed to competition by the snowball effect means that the application of on-net/off-net pricing differentials by an SMP designated operator should be addressed on an <i>ex-ante</i> basis.• BTC argues that CBL uses on-net and off-net pricing differentials, and that it therefore should also be allowed to do the same. This is a flawed argument. Because CBL does not have market power on the fixed call market, the application of on-net/off-net pricing differentials by CBL is by definition not anti-competitive and is, in fact, pro-competitive under the circumstances.	
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