



## **Response to Consultation on**

“Review of the Resale Broadband Obligation imposed on  
BTC and CBL under Section 116 and Schedule 4 of the  
Communications Act, 2009”

**ECS 09/2017**

Submitted to the

**Utilities Regulations and Competition Authority**

February 28, 2018

By

**Cable Bahamas Ltd**



# Introduction

Cable Bahamas Ltd ("CBL"), together with its affiliates Caribbean Crossings Ltd ("CCL") and Systems Resource Group Limited ("SRG") (collectively, "CBL"), hereby responds to Consultation Document ECS 09/2017 published by the Utilities Regulation and Competition Authority ("URCA") on 31 October 2017:

*Review of the Resale Broadband Obligation imposed on BTC and CBL under Section 116 and Schedule 4 of the Communications Act, 2009 (the "Preliminary Determination").<sup>1</sup>*

CBL has a number of serious concerns about the preliminary conclusions reached by URCA in the consultation document. At a time when URCA should be considering deregulatory approaches in order to stimulate investment and incentivise innovation in the sector, URCA is instead proposing to maintain or increase regulation at unsustainable levels.

CBL considers that the wholesale broadband market is not susceptible to *ex-ante* regulation, and that the regulatory obligations which currently apply to CBL should be withdrawn. In the broadband market, the existence of strong competition at retail level obviates the need for continued wholesale broadband regulation. There is strong end-to-end competition between CBL and the Bahamas Telecommunications Company ("BTC") in the broadband market, and there is no reason for any regulation at all in this market.

## **Rapidly increasing competition in the broadband market from LTE mobile**

The recent launch of Aliv, the second mobile operator in the Bahamas, further increases competitiveness of the broadband markets. Aliv for example offers various "unlimited" data plans (liberty 30 and liberty 120) as well as a "Platinum" plan including 300GByte of broadband data per month.

As recent usage numbers of broadband usage on the Aliv network show, the level of monthly data consumption is quickly approaching those of fixed broadband subscribers. As such, CBL strongly disagrees with URC's assessment, that LTE mobile services do not represent an effective demand side substitute to fixed broadband services and that thus, they do not form part of the relevant product market for fixed broadband services.

Regarding regulation on this issue, the FCC in the United States started a public inquiry in August 2017 on considering fixed and mobile telecommunications services as substitutes<sup>2</sup>. The FCC effectively argues in this notice of inquiry that wireless networks can provide a substitute for wired connections. The agency notes that most Americans have smartphones, which can be used to handle everything from Snapchat to Microsoft Word, even though the latter used to be limited to PCs. Under this FCC proposal, using a smartphone on a wireless network would be equivalent to having a wired connection for a PC.

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<sup>1</sup> CBL is submitting this response to URCA's Preliminary Determination 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 Determination.

<sup>2</sup> FCC THIRTEENTH SECTION 706 REPORT NOTICE OF INQUIRY, August 8, 2017  
Source: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0808/FCC-17-109A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0808/FCC-17-109A1.pdf)



## **The need for appropriate assessment of broadband retail markets**

The existence and impact of competitive constraints at the retail level is a critical factor when determining the need for regulation in the associated upstream wholesale broadband market. The European Commission's updated Recommendation on Relevant Product and Service Markets from 2014 ("Updated Recommendation")<sup>3</sup> and specifically Recitals 7, 8 and 10, now explicitly acknowledge this point, and clarify how the existence of retail competition is relevant when determining the appropriateness of upstream wholesale regulation:

- Recital 7 of the "Updated Recommendation" acknowledges that the starting point for the identification of markets susceptible to *ex-ante* regulation is the definition of the relevant retail market.
- According to Recital 8, once the retail market is defined, it should be assessed whether this market is effectively competitive from a forward-looking perspective in the absence of SMP regulation.
- Recital 10 goes on to state that, if the retail markets concerned is effectively competitive from a forward-looking perspective absent upstream *ex-ante* wholesale regulation, the National Regulatory Authorities (NRAs) should conclude that regulation is no longer needed at wholesale level.

A proper application of the three-criteria test would confirm that, contrary to URCA's preliminary conclusion, the retail broadband market is highly competitive and that it does not satisfy criteria one and two of the test.

### **Applying the three criteria test properly**

There are no legal, licensing or structural barriers to entry in the fixed broadband market which means that criterion 1 of the three-criteria test is not satisfied in this market. Secondly, URCA's proposed market review ignores the fact that the broadband retail market is already subject to strong price and quality competition, and BTC has the ability to expand output and improve its retail broadband offerings through additional investment or completion of its next generation access network ("NGN"). Price and quality competition exist in the retail broadband market that deliver better broadband value to Bahamian customers. Moreover, prices are in line with global and regional benchmarks. Hence, criterion 2 of the three-criteria test is nullified.

Notwithstanding the fact that the *ex-ante* market review process should be forward-looking in nature, URCA's competitive assessment does not appear to take into consideration how market conditions are likely to evolve over the review period.

The correct application of the three-criteria test in the manner as described above also confirms that the *ex-ante* regulation of the wholesale broadband access market is no longer necessary. Practice in the EU confirms that the starting point for identifying whether a

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<sup>3</sup> Commission Recommendation of 9 October 2014 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.

Source: <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-relevant-product-and-service-markets-within-electronic-communications>



wholesale market is susceptible to ex-ante regulation is the definition and assessment of the corresponding retail market. Accordingly, if the retail market is found to be effectively competitive from a forward-looking perspective absent ex-ante wholesale regulation, such wholesale regulation upstream of that market is no longer required and should be withdrawn.

As explained above, the retail broadband market is clearly competitive and does not satisfy the second part of the three-criteria test. This confirms that the ex-ante regulation of the associated upstream wholesale broadband access market is therefore no longer necessary. This market is currently subject to strong infrastructure-based competition between two well-established network operators; CBL and BTC.

CBL argues that the existence of these two infrastructure owners is sufficient to ensure effective retail competition in the Bahamian broadband market, and therefore urges URCA to withdraw current regulation from the wholesale broadband market as it is no longer required. This contention is supported by relevant precedent from the EU, where the European Commission (the “Commission”) has accepted that two infrastructure operators may be sufficient to guarantee robust competition.

#### **Example: Maltese fixed telecommunications market**

In the EU the Maltese fixed telecommunications market exhibits a number of strong similarities to The Bahamian market. Malta is a small island market. Like The Bahamas, Malta benefits from the deployment of the following two ubiquitous fixed network infrastructures:

- a traditional public telephony network; and
- a cable network.

When assessing a draft review of the national wholesale broadband access market that was undertaken by the Maltese regulatory authority (the “MCA”) in 2007, the Commission concluded that, in spite of the existence of only two infrastructure-based operators, the following factors confirmed the presence of strong retail broadband competition in Malta:

- the fact that the penetration rate of broadband services in Malta was “*not low*”, and the evidence of an upward trend in this respect;
- the existence of price competition at retail level (and related price decreases); and
- the existence of a “*variety*” of retail broadband offers, and evidence of service and technology innovation.<sup>4</sup>

Importantly, the Bahamian fixed broadband market displays the same or similar competitive indicators to those relied on by the Commission in its conclusion that the existence of two infrastructure operators is sufficient to deliver downstream broadband competition.

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<sup>4</sup> Case MT/2007/0563: Wholesale broadband access, Opening of Phase II investigation pursuant to Article 7(4) of Directive 2002/21/EC, SG-Greffe (2007) D/200366, Brussels, 29.1.2007, p. 7.



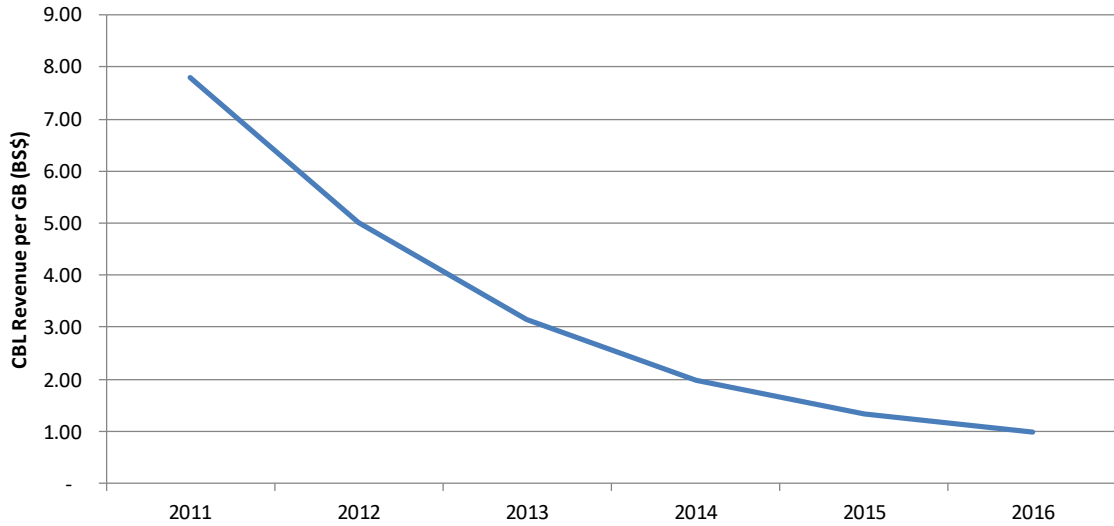


Figure 1: CBL revenue per GB has fallen continuously

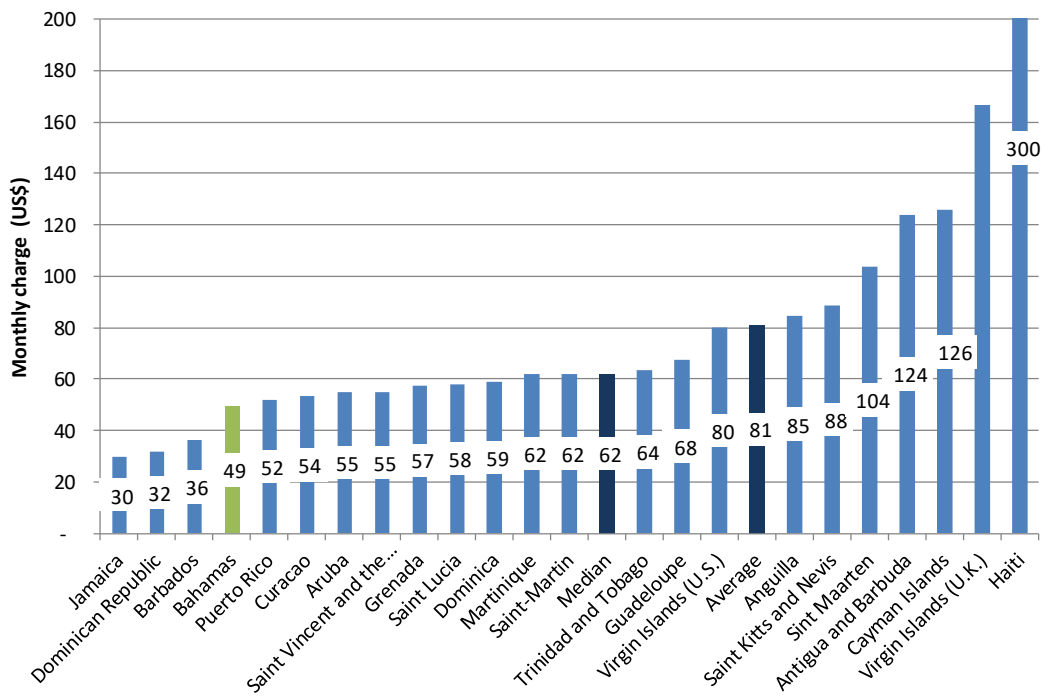


Figure 2: Cable Bahamas monthly subscription prices are among the lowest in the region



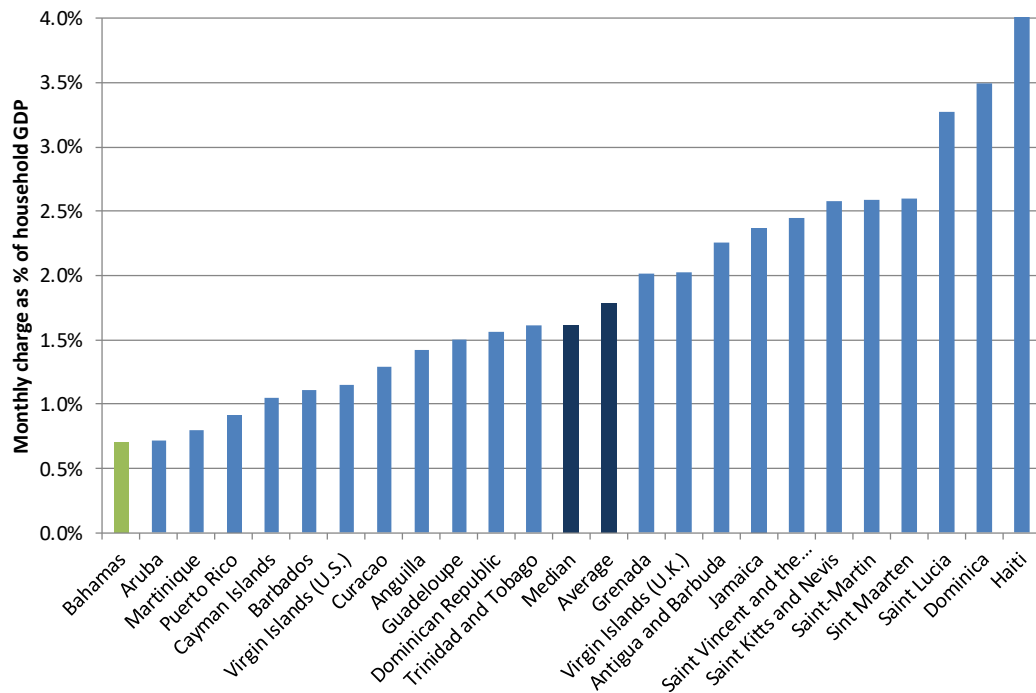


Figure 3: In terms of affordability (monthly subscription charges as % of household GDP), Bahamas has the best score (i.e. lowest cost relative to household income) in the region.



# Responses to Consultation Questions

## **Consultation question – Product market definition:**

**Q1. Please provide comments on URCA’s preliminary view on the relevant product market definition in relation to wholesale fixed broadband services.**

As per previous consultations, CBL agrees with the product market definition.

## **Consultation question – Geographic market definitions:**

**Q2. Please provide comments on URCA’s preliminary view on the relevant geographic market definitions in relation to wholesale fixed broadband services.**

As per previous consultations, CBL agrees with the geographic market definition.

## **Consultation questions – SMP Assessment:**

**Q3. Please provide comments on URCA’s preliminary view on URCA’s SMP findings in the markets for wholesale fixed broadband services.**

CBL disagrees with URCA’s preliminary view on URCA’s SMP findings in the markets for wholesale fixed broadband services. URCA’s competitive assessment in the Preliminary Determination is limited to a historic analysis of the development of broadband shares over time, a limited review of the existence of barriers to entry and expansion and a brief assessment of the existence of countervailing buyer power (“CBP”).

Importantly, URCA’s appraisal of these factors is backward-looking only, and fails to establish whether or not the fixed broadband market trends towards effective competition within the time frame of the proposed market review. This is in spite of the fact that the application of the second criterion of the three-criteria test is exclusively forward-looking in nature, and requires an analysis of whether or not the fixed broadband market is likely to trend towards competition over the market review period.

In the Introduction above, CBL provides evidence for the competitive dynamic of this market, which contradicts the finding of SMP.

## **Consultation questions – The need for ex-ante regulation:**

**Q4. Please provide comments on URCA’s preliminary view that the wholesale fixed broadband service markets identified are susceptible to ex-ante regulation.**

CBL disagrees with URCA’s preliminary view that the wholesale fixed broadband service markets are susceptible to ex-ante regulation. In footnote 17, the consultation document makes just one reference to further network infrastructures deployed by alternative operators in The Bahamas using fixed wireless networks with a limited geographic coverage.

In its assessment however, URCA does not further consider the ability of fixed wireless networks to provide fixed access and broadband services. These fixed wireless networks are very cost effective in terms of initial investment and service deployment, and spectrum is already available in The Bahamas for the provision of such services. Therefore, the potential time and resource requirements to start operations are different for fixed wireless operators,



especially as they may not have to overcome lengthy approval processes for the construction of underground ducts associated with fixed wireline networks.

Therefore, the criterion of high legal, licensing or structural barriers to entry is not satisfied. In addition, CBL reiterates that the existence of strong competition at retail level negates the need for continued ex-ante regulation at the wholesale level, and two broadband infrastructure providers in The Bahamas is sufficient. This argument is discussed in more detail in the Introduction above.

#### **Consultation questions – The need for ex-ante regulation:**

##### **Q5. Please provide comments on URCA’s preliminary views on the main competition problems or market failures that could arise from a licensee having SMP in respect to the provisioning of wholesale fixed broadband services.**

CBL strongly disagrees with URCA’s preliminary views on the main competition problems or market failures. In the consultation document, URCA fails to provide any evidence on competition problems such as excessive charging, refusal to supply or any resulting consumer harm. As shown above, the broadband market in the Bahamas is very competitive, prices are at the lower end of international benchmarks, affordability levels are the best in the region and consumers are enjoying high-quality services (see Figures 2 and 3 above).

In wholesale markets, CBL has never refused to supply any services – there has simply been no demand for such services.

#### **Consultation questions – Proposed SMP remedies:**

##### **Q6. Please provide comments on URCA’s preliminary views on the proposed SMP remedies in the wholesale fixed broadband service markets.**

CBL disagrees with the proposed remedies in the wholesale fixed broadband service markets. In footnote 31 URCA states that “... respondents to URCA’s industry survey reported instances where the SMP operators had not responded to their request for a resale broadband product (or other wholesale broadband service) in a timely and/or constructive manner. URCA is not able to verify these statements but notes that these were made by more than one independent respondent.”

Regulatory remedies should never be based on unverified claims from “more than 1” survey responses. Since 2010, CBL has a published wholesale offer for the provision of resale cable broadband access services to retail customers on the network of Cable Bahamas. However, until today, there has not been any request from service providers to make use of such service. The overall market in the Bahamas is limited in size and prices are highly competitive among the existing operators as shown above.

In light of this non-existent demand for wholesale services, the obligation to prepare an updated resale offer every 6 months seems highly disproportionate. URCA may consider a revised obligation, which only requires the development of an updated resale offer, in case of a reasonably serious request from another service provider.

