



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

## **Response to Public Consultation and Final Determination**

**ECS 09/2018**

**Issued: 31 July 2018**

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# 1. Introduction

In this document, the Utilities Regulation and Competition Authority (“URCA”) issues its Final Determination on the requirement for The Bahamas Telecommunications Company Ltd. (“BTC”) and Cable Bahamas Ltd. (“CBL”) to continue to offer a resale fixed broadband product and the need for both operators to update their current product offerings to ensure these are fit-for-purpose and in-line with market developments.

URCA issued the Preliminary Determination for this consultation on 31 October 2017.<sup>1</sup> That document had the following core objectives:

- to set forth URCA’s preliminary findings of its SMP assessment of the market(s) for the provisioning of wholesale broadband services in The Bahamas;
- to set forth URCA’s proposed SMP obligations for each of these markets (i.e., the resale fixed broadband obligation), and the rationale for this proposed ex-ante regulatory remedy;
- to set forth the need for both SMP operators to review and revise their current resale fixed broadband products; and
- to invite comments from stakeholders on URCA’s proposals.

The first round of responses to the consultation were initially due on 15 January 2018 and later extended to 28 February 2018. The second round of responses were initially due on 14 February 2018 which was later extended to 2 April 2018.

In addition to seeking general comments and/or views to URCA’s preliminary findings, URCA’s consultation paper sought respondents’ views on six questions:

**Consultation Question 1:** Please provide comments on URCA’s preliminary view on the relevant product market definition in relation to wholesale fixed broadband services.

**Consultation Question 2:** Please provide comments on URCA’s preliminary view on the relevant geographic market definitions in relation to wholesale fixed broadband services.

**Consultation Question 3:** Please provide comments on URCA’s preliminary view on URCA’s SMP findings in the markets for wholesale fixed broadband services.

**Consultation Question 4:** Please provide comments on URCA’s preliminary view that the wholesale fixed broadband service markets identified are susceptible to ex-ante regulation.

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<sup>1</sup>ECS 09/2017, available at: <http://www.urbahamas.bs/consultations/review-resale-broadband-obligation-imposed-btc-cbl/>

**Consultation Question 5:** 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.

**Consultation Question 6:** Please provide comments on URCA’s preliminary views on the proposed SMP remedies in the wholesale fixed broadband service markets.

Three parties submitted initial responses to the consultation, namely:

1. Andros Lakeside Development Company Ltd (“ADC”);
2. BTC; and
3. CBL.<sup>2</sup>

BTC and CBL made additional submissions as part of the second round. These additional submissions commented on aspects of the initial responses to the consultation.

URCA thanks respondents for their written submissions and participation in the consultation process. The participation by all parties was useful and constructive.

URCA now sets out its reply to the comments it has received. In so doing, it expressly states that failure on its part to respond in this document to any issue raised by respondents does not necessarily signify agreement in whole or in part with the comment, that it has not considered the comment or that it considers the comment unimportant or without merit.

## **1.1 Background to the Consultation**

URCA is the governing body of the regulatory regime for electronic communications in The Bahamas and was established under the Utilities Regulation and Competition Authority Act, 2009 (“URCA”). Under the Communications Act, 2009 (“Comms Act” or the “Act”), URCA is responsible for licensing undertakings that provide, operate or maintain an electronic communications network or provide an electronic communications service. The Comms Act also provides, in sections 4 and 5 of the Act, guidelines that URCA must follow when issuing regulatory and other measures (including Determinations).

The Comms Act gives URCA wide-ranging powers which are to be exercised in full compliance with principles of good regulation. As such, URCA is required to introduce regulatory and other measures which are efficient and proportionate to its purpose, and it must introduce them in a manner that is transparent, fair and non-discriminatory. This means that where URCA believes that market forces alone are unlikely to achieve a policy objective within a reasonable timeframe, URCA may introduce regulatory measures, having due regard to the costs and implications for affected parties.<sup>3</sup> However, as a general principle,

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<sup>2</sup>All three responses to the first round can be found at <http://www.urcabahamas.bs/consultations/responses-preliminary-determination-review-resale-broadband-obligations-imposed-btc-cbl/>.

<sup>3</sup>See sections 5(b)(i), 5(b)(ii) and 5(c) of the Comms Act.

market forces should be relied upon as much as possible and regulatory measures should be introduced by URCA only when market forces are unlikely to achieve the electronic communications policy objective within a reasonable timeframe. In general, this means that more prescriptive regulatory measures are only imposed on operators who have a position in a market such that they can act to an appreciable extent independently of competitors, consumers and subscribers (i.e., that they have a position of significant market power (SMP)).

Section 116 and Schedule 4 of the Comms Act sets out interim SMP designations for BTC and CBL. In particular, Schedule 4 designates BTC as having SMP in the markets for fixed voice,<sup>4</sup> mobile voice and mobile data services; and CBL as having SMP in the markets for high-speed data services and connectivity, and pay TV services. The Act then imposes a duty on URCA to determine which specific, if any, ex-ante obligations should be imposed on these two operators.

As part of its 2010 Final Decision (ECS11/2010)<sup>5</sup>, URCA provided further details on the products contained in each of the high-level SMP markets and set out the specific ex-ante obligations for both SMP operators.<sup>6</sup> This included, amongst other things, an obligation for both SMP operators to offer a resale fixed broadband product in the respective geographic markets where they were considered to have SMP.<sup>7</sup> This SMP obligation, which remains in place to date, aims to provide a low-cost option for alternative providers to enter the fixed broadband market and offer retail services in direct competition to BTC and CBL without having to deploy their own network infrastructure. There are currently no other SMP obligations imposed on either BTC or CBL which require them to provide any other forms of wholesale broadband service.<sup>8</sup>

Both SMP operators have, since the publication of ECS11/2010, developed their resale broadband offers and made them available to interested parties.<sup>9</sup> In 2010, pursuant to Section 5.1.3 of ECS 11/2010, URCA conducted a high-level compliance check of both resale broadband offers to ensure that these were complete and compliant with the relevant SMP obligation. URCA, however, in keeping with the principle

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<sup>4</sup>URCA notes that footnote 3 on page 14 of the 2009 Sector Policy (available at: <http://www.urbahamas.bs/download/028537000.pdf>) states that the market for fixed voice “...is intended to include the full product set delivered over BTC’s fixed network including both voice **and** data services.” [emphasis added]

<sup>5</sup>Obligations imposed on Operators with Significant Market Power (SMP) available at: <http://www.urbahamas.bs/download/065539400.pdf>

<sup>6</sup>For CBL, the market review led to ex-ante obligations in the markets for high speed data and connectivity, and the pay TV market. For BTC, URCA imposed ex-ante obligations in the markets for fixed telephony, fixed broadband and mobile voice and data services.

<sup>7</sup>CBL was considered to have SMP in the four (4) islands where it had network coverage, including New Providence, Grand Bahama, Abaco and Eleuthera, with BTC being considered to have SMP in all remaining islands.

<sup>8</sup>In particular, there are currently no regulated active or passive wholesale network access services in The Bahamas (such as, bitstream or local loop unbundling, sub-loop unbundling, line sharing or virtual unbundling services).

<sup>9</sup> BTC’s current resale offer is available on its website (<http://files.btcbahamas.com/2013/12/20/BTC-Broadband-Resale-Offer.pdf>). CBL’s current resale offer is available on its website ([https://www.cablebahamas.com/media/files/Broadband\\_Resale\\_Offer\\_20Dec10.pdf](https://www.cablebahamas.com/media/files/Broadband_Resale_Offer_20Dec10.pdf)).

of light-touch regulation, did not review or approve the terms and conditions or pricing of these offers beyond this high-level compliance check.

In 2014, URCA conducted a full market review of the key retail communications services in The Bahamas, including retail broadband services (ECS 14/2014).<sup>10</sup> This confirmed, amongst other things, BTC's and CBL's SMP designations in retail fixed broadband services. Given the focus on retail services, URCA at the time did not review the competitive dynamics in the relevant wholesale markets, and hence URCA did not impose further wholesale remedies on the providers.

URCA understands that there has been no take-up of the resale broadband services to date. However, several industry players have informally raised concerns about the nature of the current offers. Given this, URCA has reviewed the fixed broadband resale SMP obligations in order to: (i) reconfirm the SMP designations of BTC and CBL in wholesale fixed broadband services and hence the need to maintain this obligation; and (ii) review the price and non-price terms and conditions of BTC's and CBL's resale offers to ensure these are reasonable and can support the development of effective and efficient competition in the retail broadband services market.

The Preliminary Determination<sup>11</sup> set out URCA's preliminary views on the continued requirement for BTC and CBL to offer resale broadband products and to publish the price and non-price terms and conditions of these offers on their websites. It further set out URCA's initial, high-level observations on BTC's and CBL's 2010 resale broadband offers, with both licensees being requested to explain and justify the terms and conditions (or confirm alternative terms in a revised resale offer), taking into account URCA's initial, high-level observations on their current resale offers.

## 1.2 Procedures for Making a Determination

URCA has wide-ranging powers under the Comms Act, especially as it relates to SMP licensees. Specifically, URCA's power to impose resale broadband obligations on BTC and CBL is derived from sections 40, and 5(b) of the Comms Act, which allows URCA to introduce regulatory measures where in its view, "*... market forces are unlikely to achieve the electronic communications policy objectives within a reasonable timeframe*".

In doing so, URCA must adhere to all relevant principles of the Comms Act, in particular:

- the objectives of the electronic communications sector policy as specified under section 4 of the Comms Act; and
- guidelines for regulation and other measures as per section 5(a), (b), (c) and (d) of the said Act.

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<sup>10</sup> Available at <http://www.urbahamas.bs/download/094452600.pdf>

<sup>11</sup> ECS 09/2017, available at: <http://www.urbahamas.bs/consultations/review-resale-broadband-obligation-imposed-btc-cbl/>

The procedures for making a determination, as contained in the Comms Act at section 99 (1) (a) and (b), collectively prescribe that if, on its own motion, URCA has reason to believe that a determination is necessary, it may make determinations relating to (amongst other things):

- any obligations on a licensee regarding the terms or conditions of any licence, including obligations under licence conditions and regulations;
- any activity set out in the Comms Act; and
- where the Comms Act provides for URCA to “determine” or “to make determinations” as is the case under section 39 (1).

Pursuant to section 99(2) of the Comms Act, in making any determination, URCA must comply with section 11(1) of the Comms Act which requires URCA to afford persons with sufficient interest a reasonable opportunity to comment on regulatory or other measures that in URCA’s opinion are of public significance.

URCA considers the regulatory measures consequential to this consultation are likely to have a significant impact upon the activities carried on by licensees in The Bahamas. As such, the consultation provided an opportunity for members of the public, licensees and other interested parties to submit written comments to URCA.

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

The remainder of the document is structured the following way:

- Section 2 sets out URCA’s Final Determination.
- Section 3 summarises the responses received to URCA’s consultation questions and URCA’s final decision on each, having taken into consideration the consultation responses.
- Section 4 sets out URCA’s review of the current resale offers.
- Section 5 presents the conclusions and next steps.

## 2. URCA's Final Determination

### **WHEREAS,**

- (i) Section 39 (1) of the Communications Act, 2009 empowers URCA to determine that a Licensee has Significant Market Power (SMP) in a market where the Licensee “... *individually or with others, enjoys a position of economic strength which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, consumers and subscribers.*”;
- (ii) Pursuant to Section 39(2) of the Communications Act 2009, URCA issued ECS 20/2011, the “*Methodology for Assessment of Significant Market Power (SMP) under Section 39 (2) of the Communications Act, 2009*” (the “SMP Methodology”<sup>12</sup>), containing criteria relating to the definition of markets in the electronic communications sector, and against which market power may be assessed;
- (iii) URCA, having conducted a review of wholesale fixed broadband services in The Bahamas in accordance with the Communications Act, 2009 and the SMP Methodology (SMP Guidelines) considered that it is appropriate to make certain determinations regarding the definition of markets, the existence of licensees having SMP in those markets, and the extent to which ex-ante regulation is appropriate and necessary in those markets;
- (iv) Pursuant to URCA's review, URCA issued ECS 09/2017 setting out its preliminary findings regarding the wholesale market for fixed broadband services in The Bahamas; and
- (v) URCA having reviewed all evidence and submissions made by BTC, CBL and ADC;

### **NOW URCA HEREBY DETERMINES** as follows:

#### **1. Determination of SMP in Wholesale Fixed Broadband Services**

##### Determination of Relevant Market

Based on its review of the available evidence and in-line with the approach set out in the SMP Guidelines, URCA has defined the following relevant product and geographic markets for the provisioning of wholesale fixed broadband services in The Bahamas:

- a. Product Scope. The relevant wholesale market for fixed broadband services includes the following products: copper<sup>13</sup> and fiber optic-based<sup>14</sup> broadband services;
- b. Geographic Scope. There are two separate geographic markets to be considered:

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<sup>12</sup> Also referred to as URCA's SMP Guidelines.

<sup>13</sup> Currently provided by BTC

<sup>14</sup> Currently provided by CBL



- Geographic Market 1 -The islands where BTC and CBL both have network infrastructure enabling them to offer wholesale fixed broadband services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera); and
- Geographic Market 2 - All remaining islands (i.e., where only BTC has a network infrastructure enabling it to offer wholesale fixed broadband services).

### SMP Determination

Based on its review of the available evidence and consistent with the approach set out in the SMP Guidelines, URCA has assessed the competitive dynamics in each of the relevant markets (as identified above) and has determined that:

1. CBL holds SMP in the market for wholesale fixed broadband services in Geographic Market 1; and
2. BTC holds SMP in the market for wholesale fixed broadband services in Geographic Market 2.

### Obligations Imposed on SMP Licensees

Given the position of economic strength held by CBL and BTC respectively in these relevant markets, and in light of the potential challenges to competition which URCA's review has indicated may arise, the following obligations shall remain applicable to both SMP Licensees, namely:

- i. BTC and CBL shall comply with the non-market specific SMP obligations specified in section 40(4) of the Comms Act, Conditions 34 and 35 of the Individual Operating Licences (IOL) and specific SMP obligations on wholesale services, accounting separation and cost accounting as set out in the current and also any future Determinations, Decisions or Regulations issued by URCA and which will remain in place until such time as determined by URCA;
- ii. BTC and CBL shall continue to offer resale fixed broadband products. Furthermore, both SMP Licensees are required to review and regularly update their current resale fixed broadband products to ensure these are adequate and up-to-date, with all such updates having to be submitted to URCA for its review and approval; and
- iii. BTC and CBL shall continue to publish the tariff and non-price terms and conditions on which their resale broadband offers are provided (i.e., by publishing the URCA-approved offers prominently on their websites and additionally making such information available in other formats upon request).

The published offers should include, at the minimum, the following:

- the pricing of the resale broadband services including:
  - an overview of the basis for setting the prices (i.e., the ‘retail minus’ approach);
  - for each retail fixed broadband service, a table setting out the relevant retail price(s) and corresponding resale broadband prices, set in-line with the described ‘retail minus’ approach; and
  - a statement setting out the date when these prices were set and that they will be automatically updated as retail prices change, based on the ‘retail minus’ approach.
  
- the main non-price terms and conditions including:
  - detailed description of the resale broadband service offerings (including, for example, service upload and download speeds, which shall be in line with the SMP Licensee’s retail offers);
  - service ordering and delivery process and timings;
  - quality of service standards (including key performance indicators and the financial compensation payable to access seekers should any such standards be missed);
  - billing and payment requirements;
  - details of a dispute resolution scheme; and
  - operations and maintenance procedures.

For the avoidance of doubt, BTC and CBL will be responsible for ensuring that the published terms and conditions are compatible with the statutory framework of the Comms Act, relevant licence conditions, the Electronic Communications Sector Policy and all relevant regulatory and other measures issued by URCA from time to time.

- iv. The resale broadband prices shall be determined based on a ‘retail minus’ approach.
- v. For the avoidance of doubt, this Final Determination includes the required changes to the BTC and CBL offers set out in Tables 1 and 2 below.
- vi. BTC and CBL shall revise and submit the revised resale broadband offers to URCA by no later than **31 August 2018**. The submission shall highlight all changes made.

Upon review and approval of the revised offers , URCA shall specify the timeframe for BTC and CBL to publish the documents on their websites.

- vii. To ensure that the resale fixed broadband offers remain up-to-date and in-line with the SMP Licensees' retail fixed broadband service offerings, BTC and CBL are required, at least every 12 months from the date of URCA's approval of the offers, to revise the overall price and non-price terms of their resale fixed broadband offers to ensure these are up-to-date and in-line with their retail fixed broadband service offerings. The revised resale broadband offers should be submitted to URCA for its review and approval no less than thirty (30) days before the date on which the revision is due, with the SMP Licensees highlighting to URCA any changes made to these offers. Following URCA's approval of any such changes, the revised resale fixed broadband offers shall be published in-line with the requirements of this Determination. Should a SMP Licensee consider that no changes are required, it shall notify URCA of the same, setting out its reasoning, within the same timeframes. For the avoidance of doubt, URCA may still, at this time, review the offer and require the SMP Licensee to make changes.

URCA notes that the above review and approval process repeals and replaces the review process set out in Section 5.1.3 of ECS 11/2010.

### **3. Responses to Consultation Questions**

In this Section, URCA summarises and responds to the comments received during the public consultation process, focusing on the comments made on the issues under consultation.

#### **3.1 General Comments**

All three parties provided general comments as part of their first round responses.

##### **Comments received**

###### **ADC's comments**

Given the critical stage of the electronic communications sector in The Bahamas, ADC considered it to be imperative to maintain some form of regulatory oversight to ensure competition develops. However, ADC favoured the introduction of regulated bitstream access or local loop unbundling (LLU) product over a resale broadband product.

This was due to, in ADC's view, resale broadband products not allowing access seekers to differentiate their services, in terms of quality of service or download speeds offered, from those of the access provider (i.e., BTC or CBL).

ADC therefore stated that bitstream access or LLU would allow for more product differentiation and innovation, as these wholesale access services provide control over key technical parameters to the access seeker. ADC then stated that, in its view, bitstream access could be introduced relatively easily, as the access provider will not be required to make extensive network changes to provide this service. If bitstream access was not feasible, URCA should, according to ADC, consider implementing LLU, as this would allow access seekers to offer both fixed voice and broadband services.

Lastly, ADC urged URCA to introduce and enforce stricter penalties for situations where the access provider delays or refuses timely installation and/or fault repair of wholesale services. In ADC's view, the "strategy of delay and then deny" is still prevalent in the electronic communications sector in The Bahamas.

ADC further raised concerns about charges for inbound international call termination services in The Bahamas and any resulting loss of foreign exchange earnings for the Bahamian economy. URCA advises that this matter is beyond the scope of this consultation process, and therefore has not considered it further in this document.

###### **BTC's comments**

BTC expressed the opinion that URCA's market review was flawed as it ignored the retail broadband market and instead focused nearly exclusively on wholesale broadband markets. In support of its position, BTC referred to the European Commission's 2014 Recommendation which sets out a two-step, sequential

approach, focusing on a review of retail markets first, including the impact on any relevant remedies. According to BTC, this Recommendation then states that only if there is SMP in the retail market and any retail remedies are deemed insufficient to support effective retail competition going forward, should a wholesale market review be undertaken. According to BTC, URCA has not undertaken the first step (i.e., assessing the sufficiency of existing and/or additional retail remedies).

BTC further stated that, in its view, there is a need to include mobile broadband services in the relevant retail and wholesale product markets. It believes this would then result in these markets being considered competitive, and thus negating the justification for ex-ante regulation in either of them.

Lastly, BTC considered there was a lack of quantitative evidence in the Preliminary Determination on the benefits of the resale broadband obligation, particularly in terms of its ability to enhance competition in the retail broadband market. This is particularly the case, according to BTC, given the lack of take-up of the resale broadband service since it was launched in 2010.

In its second-round response, BTC stated that it was in broad agreement with the comments made by CBL with regard to the market review analysis carried out by URCA. Specifically, BTC stated it:

- Agreed with CBL’s position that the presence of two infrastructure-based operators is sufficient to ensure effective retail competition in the Bahamian broadband market (and that in any event, there were also other sources of competition in the market such that it was not a duopoly); and
- Fully agreed with CBL’s overall assessment of the market.

BTC did not provide additional evidence to support its position.

In its second-round response, BTC also commented on three aspects of CBL’s proposed resale broadband offer.

- Firstly, BTC stated that the 5% “additional margin for reseller” included in CBL’s determination of the resale price was, “not consistent with retail minus pricing practice” and should therefore be excluded;
- Secondly, BTC stated it supported the inclusion of the proposed requirement to make resellers contribute an upfront payment to cover start-up costs. As such, it proposed that the magnitude of this charge could be finalized as part of the resale broadband offer review process and adopted by both BTC and CBL; and finally
- It noted that CBL included a set of one-off field work and construction charges in its resale offer and that a similar set should again be included in BTC’s own offer.

BTC also commented in its second-round response on ADC’s response. In particular, it noted that ADC did not express support for the resale broadband obligation nor express interest in using the service. According to BTC, this (combined with a lack of any other responses to the consultation) is proof that there is no interest in the service and that URCA should not take forward the proposed obligations. Secondly, BTC stated that any consideration of alternative wholesale remedies (such as LLU or bitstream) would need to be subject to a separate consultation process. Lastly, commenting on ADC’s allegations of “delay and deny” by access providers and hence its call for stricter penalties, BTC noted that such

proposals would be outside the scope of this Determination and that any complaints should follow an already established processes.

### **CBL's comments**

In its initial response, CBL was of the general view that URCA should consider deregulation rather than increased (or maintained) ex-ante regulation of broadband services. According to CBL, this is particularly the case due to the strong, end-to-end competition between BTC and CBL and the increased competition from LTE mobile services. In support of its latter statement, CBL referred to Be Aliv Limited ("Aliv") having recently launched an unlimited mobile data plan and average mobile data usage in The Bahamas being similar to fixed broadband usage. URCA notes, however, that CBL did not provide any evidence on the average usage of fixed and mobile broadband customers. CBL further made reference to a 2017 report by the United States Federal Communications Commission (FCC) which, according to CBL, supports the idea that there is substitution between smartphones and fixed broadband services.

CBL further made reference to the European Commission's 2014 Recommendation which, according to CBL, states that no wholesale regulation is needed, if the relevant retail market is prospectively competitive (in the absence of wholesale regulation). CBL considers the retail broadband market in The Bahamas to be competitive.

- According to CBL, two existing infrastructures are sufficient to ensure retail competition. Indeed, it considers that this is in line with recent European precedence, where the European Commission has accepted that two infrastructure operators may be sufficient to guarantee robust competition. Again, CBL did not provide any reference for this apparent European precedent. However, from CBL's second round response, URCA infers that this may relate to the Maltese fixed telecommunications market.
- CBL further is of the view that the retail broadband market would not meet the Three Criteria Test for determining whether a market is susceptible to ex-ante regulation. This is because, in this market, there are low barriers to entry or expansion (criteria 1) and strong price and quality competition (criteria 2).
- Lastly, CBL made reference to a market review of retail fixed telecommunications services in Malta which it believes supports its case. That is, according to CBL, both markets exhibit similar market structures (i.e., a duopoly of a fixed network operator and a cable operator). Despite the duopoly, there is strong competition in the retail market, evidenced by increasing take-up, price decreases and the range of plans available. In support of this, CBL provided graphical evidence that its average revenue per GB has fallen since 2011 and that its monthly retail broadband prices are low compared to elsewhere across the region.

In its second-round response, CBL agreed with BTC's views set out in its General Comments on Preliminary Determination (see above).

## **URCA's responses to comments received**

URCA notes ADC's support for continued ex-ante regulation of wholesale broadband service markets in The Bahamas and its stated preference for bitstream access or LLU over resale broadband offers.

As stated in Section 4.3.3 of the Preliminary Determination , URCA acknowledges that there are several alternative wholesale services which aim to facilitate competition in the retail (downstream) fixed broadband market. These include direct internet access (DIA), wholesale leased lines, bitstream, virtual unbundled local access (VULA), line sharing, sub-loop unbundling, and LLU.

URCA agrees on the merits, in principle, of bitstream access and LLU, in that (compared to a resale service) both offer access seekers more ability to differentiate and innovate their retail product offerings. However, most of these alternative services (including bitstream and LLU) require access seekers to deploy some form of infrastructure. There might also be non-trivial design and implementation costs associated with these alternative wholesale products for both the access seeker and provider. Further, the implementation of LLU, in particular, can be a time-and resource-intensive undertaking. URCA proposes to examine these and related issues in another workstream.

In fact, as set out in its Draft Annual Plan 2018 and Section 4.3.3 of the Preliminary Decision, URCA will embark on a wider review of the markets for wholesale fixed access, broadband and leased lines/dedicated connectivity markets to ensure that any prevailing bottlenecks are addressed appropriately, considering in particular whether other regulated wholesale access products should also be introduced. Therefore, as set out by BTC, any introduction of new requirements on SMP providers will be subject to a new consultation exercise.

URCA notes ADC's request that URCA consider the imposition of stricter penalties for delay and and/or refusal of timely installations. URCA will consider the approach on a case-by-case basis, but notes that in URCA's experience, entities seeking wholesale services have often been reluctant or unable to present URCA with cogent and reliable information and documentation regarding such delays as would be required for URCA to intervene, particularly where the imposition of sanctions is being contemplated.

URCA notes BTC's stated concerns with the overall review process. Concerning BTC's reference to the methodology set out in the 2014 EC Recommendation, URCA is of the view that BTC has incorrectly interpreted the recommendation. To URCA's understanding, this document states that any regulatory intervention should indeed be based on a specific competition issue in the relevant retail downstream service markets. In such a case, any regulatory remedies should focus on the enduring bottlenecks in the relevant wholesale service markets. Further, retail remedies should only be considered if the wholesale remedies are insufficient.

URCA addresses BTC's comment on the need to include mobile broadband services in the relevant retail and wholesale product markets as part of Consultation Question 1 below.

Lastly, URCA notes BTC's comment on the limited merits of the resale broadband obligation given the lack of take-up of these services to date. While URCA recognises the limited take-up for this service, it is not able to assess whether this is a result of there being no demand for these services per se (assuming they

were provided on fit-for-purpose terms) or whether the failure of demand to materialize is instead linked to the reasonableness of the current offers. Further, respondents to URCA's industry survey, conducted in advance of the public consultation, indicated potential demand for revised resale offers and other products.

BTC has also commented on certain specific aspects of CBL's proposed resale broadband offer. URCA has taken these comments into account in finalising its position on the proposed offers, as set out in Section 4 of this Determination.

Finally, URCA notes CBL's general comments, but disagrees with CBL's overall view on the competitive dynamics of the retail broadband market and thus its call for deregulation. In particular:

- URCA disagrees with CBL's stated position that there is strong infrastructure-based competition between BTC and CBL. Indeed, URCA notes that CBL has not provided any supporting evidence for its statement. Instead, URCA remains of the view that the fact that market shares have remained stable, published headline retail prices have not changed (although, URCA notes CBL's evidence on declining average revenues per GB) and there are only limited examples of product innovation, are indicative of a not yet competitive market.
- CBL has provided insufficient evidence to support its case for the inclusion of mobile broadband services in the relevant product market. As URCA sets out below in response to the comments it has received on Question 1, while it recognises the availability of unlimited mobile broadband packages (and other packages, such as Aliv's Platinum Plan), it also notes that the current prices of those packages are likely to constrain any substitution from fixed to mobile packages, in response to a small but significant and non-transitory increase in price (SSNIP) for fixed broadband services.
- Indeed, URCA also notes that in its response to Question 1, CBL did not actually rebut any of URCA's arguments for the product market set out in the Preliminary Determination. That is, CBL agreed to the proposed product market definition as part of its response to Consultation Question 1.
- Concerning the referenced 2017 FCC report, it is URCA's understanding that this document is a consultative document. As such, the FCC is seeking views from interested parties on the preliminary findings set out in that document. It does not constitute a final decision/position. Further, within the document, the FCC assesses whether US consumers are adequately served by advanced telecommunications services and whether such a definition should also cover mobile services. The FCC, however, does not assess whether fixed and mobile (data) services should form part of the same product market in the context of a competition assessment. The FCC's suggestion to include both mobile and fixed broadband services in the study is therefore not based on a detailed analysis of demand-side and supply-side substitution. Instead, it is primarily based on the observed high take-up of both services. Furthermore, the FCC clearly recognises prevailing differences in these services (which, in URCA's view, may restrict demand-side substitution between them). Lastly, the study is based on service offerings and take-up information from the U.S. market. URCA considers it important to assess demand-side substitutability in the Bahamian



market environment, as it has done in the Preliminary Determination (see also Consultation Question 1 below).

- In line with URCA's response to BTC's reference to the 2014 European Commission (EC) Recommendations, URCA understands that the European Commission generally favours wholesale regulation over retail regulation. More importantly, URCA is not aware that the European Commission generally considers two existing infrastructures to be sufficient to ensure retail competition. To the contrary, the European Commission is increasingly concerned about duopolies and/or joint dominance, as evidenced in its draft revised SMP Guidelines, issued in February 2018.<sup>15</sup>
- URCA notes that CBL's comments on the Three Criteria Test are a repetition of CBL's response to URCA's 2014 SMP Retail Market review (ECS14/2014), where URCA considered and dismissed these arguments.<sup>16</sup> Similarly, CBL's reference to the 2007 broadband market review decision in Malta is a repetition of CBL's response to ECS14/2014 which URCA concluded was not relevant to the Bahamian broadband market.<sup>17</sup>

### 3.2 Product Market Definition

#### **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.**

#### **Comments received**

Only BTC and CBL commented on the proposed product market definitions as part of their first round responses.

#### **BTC's comments**

BTC disagreed with URCA's preliminary product market definitions. Instead, BTC was of the view that the retail product market should include both fixed and mobile broadband data services. In particular, BTC drew URCA's attention to the 'AlivGO' mobile data-only plan which offers unlimited data for \$75 per month and at what it considers to offer a similar quality of service to fixed broadband services.

BTC was further of the view that supply-side substitution exists between fixed and mobile broadband services.

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<sup>15</sup> European Commission. (2018). Available at: <https://ec.europa.eu/digital-single-market/en/news/revision-guidelines-significant-market-power-commission-publishes-drafts-revised-guidelines-and>

<sup>16</sup> In particular, see pages 27-29, of ECS 14/2014

<sup>17</sup> In particular, see pages 29/30, of ECS 14/2014

## **CBL's comments**

As part of its first-round response, CBL agreed with URCA's preliminary product market definitions. In its second-round response, CBL then stated that it was "*open to a broader review of both, the product and geographic market definitions*"<sup>18</sup> and cross-referred to the 2017 US FCC study referenced in its first round response.

## **URCA's responses to comments received/Final Determination**

URCA notes BTC's disagreement with the preliminary product market definitions and the arguments put forward by BTC.

While the 'AlivGO' mobile data plan offers unlimited mobile data (an uncommon feature of many mobile data plans given the heightened risk of congestion on mobile networks), it is nearly twice as expensive as the most comparable fixed broadband tariff plans available in The Bahamas. As such, URCA considers that this plan alone is unlikely to render a SSNIP on fixed broadband services unprofitable.

URCA also disagrees with BTC on the existence of supply-side substitution between fixed and mobile services. Supply-side substitution assesses whether a mobile network operator who does not currently offer fixed broadband services would start doing so, in case of a SSNIP in fixed broadband prices. This seems unlikely given the high investment cost and time required to deploy a fixed access network. Indeed, URCA notes this is consistent with how supply-side substitution has been considered in market reviews elsewhere.

URCA notes CBL's initial agreement with URCA's preliminary product market definitions, along with its subsequent statement that it remains open to a wider product market which includes mobile data services. In this regard, URCA also notes that in its general comments, CBL proposed that mobile data services should be included in the relevant retail market. However, for the reasons set out above, URCA does not consider that mobile broadband services are currently an effective substitute for the majority of fixed broadband customers in The Bahamas. As such, it maintains the product market definition set out in the Preliminary Determination.

### **URCA's Final Determination – Product market definition**

Having considered the consultation responses received on the proposed product market definitions set out in the Preliminary Determination, URCA concludes that its preliminary findings remain valid. In particular, the relevant wholesale market for broadband services provided at a fixed location includes the following products: copper and fibre-based broadband services (currently offered by BTC); and cable-based broadband services (currently offered by CBL).

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<sup>18</sup> Page 2 of CBL's second round response to ECS 09/2017.

### 3.3 Geographic Market Definition

**Consultation question – Geographic market definition**

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

#### **Comments received**

Only BTC and CBL commented on the proposed geographic market definitions as part of their first round responses.

##### **BTC’s comments**

BTC disagreed with URCA’s preliminary geographic market definitions. Instead, BTC considers that the wider product market of fixed and mobile broadband services (as it proposed in its response to Question 1) is national in scope.

##### **CBL’s comments**

As part of its first round response, CBL agreed with URCA’s preliminary geographic market definitions. In its second round response, CBL then stated that it was “*open to a broader review of both, the product and geographic market definitions*”<sup>19</sup>. However, CBL did not provide any further details on how it believes such a broader review of the geographic market should be conducted or on the likely outcome of such a review.

#### **URCA’s responses to comments received/Final Determination**

URCA notes BTC’s disagreement with the preliminary geographic market definitions. However, BTC’s conclusion is based on a wider product market definition which does not take into consideration the difference in the competitive environment of the two geographic markets as determined by URCA. BTC has not put forward any arguments against the proposed sub-national markets for wholesale fixed broadband services given URCA’s product market definition (i.e., BTC’s proposed amendments to the geographic market definition determined by URCA were dependent on URCA accepting BTC’s position on the definition of the product market). Given URCA’s final decision on the product market definition (see above), URCA remains of the view that two distinct geographic markets are relevant to wholesale fixed broadband services in The Bahamas.

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<sup>19</sup> Page 2 of CBL’s second round response to ECS 09/2017.

URCA notes CBL's agreement with URCA's preliminary geographic market definitions. While CBL subsequently stated that it was open to a wider review of the relevant geographic markets, it has not put forward any evidence to suggest that URCA's proposed geographic market definition, given the definition of the product market, is not appropriate. Therefore, given URCA's final decision to retain the product market definition set out in the Preliminary Determination, URCA remains of the view that two distinct geographic markets are relevant to this market.

#### **URCA's Final Determination – Geographic market definition**

Having considered the consultation responses received on the proposed geographic market definitions set out in the Preliminary Determination, URCA concludes that its preliminary findings remain valid. In particular, there are two separate geographic markets:

- Geographic Market 1 -The islands where BTC and CBL both have network infrastructure enabling them to offer wholesale broadband services (i.e., New Providence, Abaco, Grand Bahama and Eleuthera); and
- Geographic Market 2 - All remaining islands (i.e., where only BTC has a network infrastructure enabling it to offer wholesale broadband services).

### **3.4 SMP Assessment**

#### **Consultation question – SMP Assessment**

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

#### **Comments received**

Only BTC and CBL commented on the proposed SMP assessment as part of their first round responses.

##### **BTC's comments**

BTC disagreed with URCA's preliminary views that BTC and CBL had SMP in their respective geographic broadband service markets. Under a wider product market definition (which BTC considered relevant, as stated in the context of Consultation Question 1 above), the retail broadband market is competitive, and thus, no ex-ante regulation of wholesale services is needed. BTC was also of the view that the current retail prices, download speeds and quality of services levels of these services in The Bahamas are competitive and compare favourably to those across the region or elsewhere. However, BTC did not provide any supporting evidence for this position.

On wholesale markets, BTC reiterated the need to include other technologies (i.e., mobile networks) in the competition assessment. Given this, it considered that the barriers to entry were low in this market,

as wireless networks could be deployed quickly in The Bahamas, as recently evidenced by Aliv deploying its network within 18 months.

BTC further noted a strong reliance on market shares in URCA's competition assessment. BTC was of the view that market shares should not be used as the sole criterion to determine SMP, as other factors should also be considered. Again, however, BTC did not provide any further details on the additional criteria that it felt should be assessed.

### **CBL's comments**

CBL also disagreed with URCA's preliminary views that BTC and CBL had SMP in their respective geographic broadband service markets. In CBL's view, any competition assessment needs to be forward-looking (i.e., assessing prospective competition, as set out in the second criteria of the Three Criteria Test), rather than backward-looking. CBL then reiterated that it considered the broadband market in The Bahamas to be prospectively competitive (as per CBL's General Comments, set out above.)

As part of its second-round response, CBL strongly agreed with BTC's views on URCA's preliminary SMP assessment, cross-referring to its application of the Three Criteria Test and its reference to the Maltese market review (see above and Section 3.1).

### **URCA's responses to comments received/Final Determination**

URCA notes that both respondents disagreed with its preliminary position and addresses below each of the key points made by the providers:

- URCA disagrees with BTC's views on the relevant product scope of the market (as set out in the context of the General Comments and Consultation Question 1) and thus also on the perceived level of competition in the retail broadband market. Indeed, URCA notes that BTC's views on the competitive dynamics of the market are based on the wider product market it deems relevant and do not consider the competitiveness of a market excluding mobile broadband services. Further, BTC has not provided any supporting evidence on the quality of service, price levels, available download speeds and product innovations in The Bahamas and how they compare to elsewhere. Lastly, BTC has not rebutted any of URCA's analysis of the competitive dynamics in the product market definition set out in the Preliminary Determination.
- URCA also disagrees on BTC's comments in relation to the relevant wholesale markets. In particular, the product scope of the wholesale market should be no wider than the scope of the equivalent downstream retail market. In line with URCA's position in Section 3.2 above, URCA has concluded that the product market definition it set out in the Preliminary Determination remains appropriate. As such, BTC's comment on the speed with which a mobile network can be deployed in The Bahamas is not relevant, as it requires, firstly, mobile services to be included in the wholesale product market.

- URCA agrees with BTC that an assessment of competition should not rely only on market shares. Indeed, as set out in Section 4 of the Preliminary Determination and in line with URCA’s SMP Guidelines, market shares was only one of the criteria considered by URCA in its competition assessment. Other factors considered were the current market structure and control over essential infrastructure, barriers to entry/expansion and countervailing buyer power. As such, URCA considers BTC’s criticism in this regard to be misplaced.
- Similarly, in line with URCA’s SMP Guidelines and international best practice (i.e., the EC Recommendations), URCA acknowledges that any competition assessment should consider both the current level of competition and prospective competition in the market (i.e., how the currently observed level of competition may change going forward). URCA considers that its competition assessment set out in the Preliminary Determination has assessed both the current level of competition and prospective competition by, for example, taking into account prevailing barriers to entry. Further, URCA understands that CBL’s view on prospective competition is based on the wider product market it appears to deem relevant. As stated above, URCA disagrees with this alternative product market definition.

**URCA’s Final Determination – SMP Assessment**

Having considered the consultation responses received on the SMP assessment set out in the Preliminary Determination, URCA concludes that its preliminary findings remain valid. In particular:

1. CBL holds SMP in the market for wholesale broadband services in Geographic Market 1.
2. BTC holds SMP in the market for wholesale broadband services in Geographic Market 2.

### **3.5 The Need for Ex-Ante Regulation**

**Consultation question – 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.**

#### **Comments received**

Only BTC and CBL commented on the continued need for ex-ante regulation in the wholesale broadband markets as part of their first round responses.

**BTC’s comments**

BTC disagreed with URCA’s preliminary views on the continued need for ex-ante regulation in the wholesale broadband service markets as, in BTC’s view, the retail broadband market is competitive. Even if this was not the case, BTC considers that the current regulatory remedies imposed in the retail

broadband market (i.e., retail price caps, etc.) are sufficient to remedy any or potential competition problems or consumer harm and thus, there is no need for any remedies on wholesale services.

### **CBL's comments**

CBL also disagreed with URCA's preliminary findings. According to CBL, there are no high, non-transient barriers to entry in the wholesale broadband market, as fixed wireless access (FWA) providers can enter and/or expand their network coverage in a time-and cost-efficient way.

CBL was further of the view that strong retail competition negates the need for wholesale regulation. It then reiterated this view in its CBL's second round response.

### **URCA's responses to comments received/Final Determination**

URCA notes that both respondents disagree with its preliminary position and addresses each of the key points in turn.

- As set out in Section 3.4 above, URCA disagrees with BTC's and CBL's views on the level of competition in the retail fixed broadband market. As such, it disagrees with the view that ex-ante regulation is not required because the retail market is competitive.
- Further, regulatory remedies imposed in the retail broadband market do not address competition concerns in the upstream wholesale markets. Given the SMP findings in the wholesale broadband markets discussed in Section 3.4 above, URCA considers that ex-ante regulation remains merited in these markets. This is especially the case, as ex-post competition powers are likely to be insufficient to address potential consumer or competitive harm that could arise in these markets from providers abusing their market power (by, for example, engaging in actual or constructive refusal to supply).
- In addition, and as set out in its response to BTC's general comments, URCA does not agree with BTC's assertion that regulation should focus on retail markets, with intervention in wholesale markets only if such retail regulation is insufficient to remedy competition concerns. On the contrary, URCA considers that regulatory interventions should focus on upstream bottlenecks and then only be expanded to retail market if such remedies do not, on their own, address competition concerns in retail markets. Given the current state of the broadband market, URCA is satisfied that in The Bahamas, remedies currently remain appropriate at both levels of the value chain.
- Finally, URCA remains of the view that barriers to entry in the relevant market remain high. As set out in the SMP assessment in the Preliminary Determination, deploying alternative end-to-end fixed or fixed wireless infrastructure is time-and capital-intensive. This was already discussed in the context of the 2014 retail market review (see, for example, URCA's and BTC comment on prevailing high barriers to entry on page 29 of EC14/2014) and URCA believes that these observations remain valid today. Indeed, allied to this, URCA notes that there has been no further entry to the broadband market in recent years and existing FWA providers have not expanded

beyond their initial network coverage, rather choosing to focus on specific parts of The Bahamas only.

#### **URCA's Final Determination – The Need for Ex-ante Regulation**

Having considered the consultation responses received on the need for ex-ante regulation in the wholesale broadband market set out in the Preliminary Determination, URCA concludes that its preliminary findings remain valid.

### **3.6 Expected Competition Problems and Consumer Harm**

#### **Consultation question – Expected Competition Problems and Consumer Harm**

**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.**

#### **Comments received**

Only BTC and CBL commented 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.

##### **BTC's comments**

BTC disagreed with URCA's preliminary views, stating that both excessive charging and refusal to supply are not an issue in the context of the wholesale broadband market, but purely "*hypothetical problems assumed to exist in the wholesale market*"<sup>20</sup>. According to BTC, both BTC and CBL have offered the resale for several years, and there has been no serious demand for this. Further, URCA provided no evidence in support of its stated market failures.

##### **CBL's comments**

CBL strongly disagreed with URCA's preliminary views, reiterating that there was no need for any regulatory intervention as the retail broadband market is very competitive, as evidenced by the low retail prices and high quality of service levels. Further, CBL noted that URCA had provided no evidence in support of its stated market failures in the wholesale broadband market and CBL confirmed that it had never refused to supply any wholesale services. Instead, CBL posits that there has simply been no demand for these services in The Bahamas to date.

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<sup>20</sup> Page 7 of BTC's first round response to ECS 09/2017



## **URCA's responses to comments received/Final Determination**

URCA notes both licensees' disagreement with its preliminary position 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.

Firstly, URCA reminds both licensees that ex-ante regulatory remedies are introduced to prevent potential market failures, rather than when actual anti-competitive behaviour has taken place. URCA also notes the comments by ADC (mirrored by other existing and potential entrants) which suggest that potentially anti-competitive behaviour may already be taking place in the market. It is URCA's view that the current market forces are unlikely to encourage, promote and enforce sustainable competition. Therefore, URCA considers it necessary to issue ex-ante regulatory measures to achieve the electronic communications policy objective within a reasonable time frame.<sup>21</sup>

URCA further notes that neither respondent has provided any argument which suggests that it does not have the incentive, as an SMP operator, to charge excessively for wholesale broadband services or to refuse to supply such services, in the absence of any ex-ante regulation.

As such, URCA remains of the view that excessive charging for the resale product could be a significant concern, absent regulation. This is because the SMP providers could have the incentive to set prices in a way which does not allow reasonably efficient alternative providers to compete in the retail downstream market, thus enabling the SMP providers to retain their current shares in the retail broadband market and to retain the margins associated with those services. URCA does acknowledge that, to date, the resale offers have not been taken up. However, as set out above, when considering the reasons for this, it is important to note that URCA has not previously reviewed these offers to ensure they are fair, reasonable and enable reasonably efficient competitors to emerge. As such, the failure of other providers to enter the market does not necessarily indicate an absence of demand for the resale service, but rather only the absence of demand given the current terms and conditions of the existing resale offers. Indeed, the review URCA has undertaken as part of this process has highlighted a number of concerns with both the price and non-price terms of those offers, all of which may have limited the demand for these services up to this point.

### **URCA's Final Determination – Expected Competition Problems and Consumer Harm**

Having considered the consultation responses received on the expected competition problems in the wholesale broadband market set out in the Preliminary Determination, URCA concludes that its preliminary findings remain valid. In particular, in the absence of ex-ante regulation, both SMP operators have an incentive to price excessively and refuse to supply wholesale broadband services.

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<sup>21</sup> Guidelines for regulation and Government measures. Section 5 (a) (i) of the Communications Act, 2009

### 3.7 Proposed SMP Remedies

**Consultation question – Proposed SMP Remedies**

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

#### Comments received

Only BTC and CBL commented on the proposed SMP remedies.

##### **BTC’s comments**

BTC disagreed with URCA’s proposed SMP remedies of maintaining the resale broadband obligation on BTC and CBL. According to BTC, URCA had failed to justify the need for this regulatory remedy, as it had not provided any analysis of the benefits resulting from the resale broadband offer on retail competition (or any competitive harm that would result from removing the remedy).

BTC was further of the view that the resale broadband obligation on BTC is not proportionate given its SMP in Geographic Market 2 only.

##### **CBL’s comments**

CBL also disagreed with URCA’s proposed SMP remedies. In particular, CBL stated that ex-ante regulation should not be based on unverifiable claims of refusal to supply. According to CBL, it has never received any request to supply resale broadband services since launching the offer in 2010.

CBL further objected to the proposed bi-annual update of its resale broadband offer. Instead, it believes that any review should only happen in case there is a valid request to supply these services.

#### URCA’s responses to comments received/Final Determination

URCA notes both licensees’ disagreement with its preliminary position on maintaining the resale broadband obligation for both BTC and CBL.

Concerning the points raised by BTC, URCA responds as follows:

- Section 4.3.2 of the Preliminary Determination clearly explains the link between each potential market failure and the resulting proposed remedies. As part of this, URCA set out the reasons for retaining the resale broadband obligation as a least-cost regulatory remedy. Furthermore, removing this regulatory obligation would eliminate the only remedy in this market and thus, the lowest cost option for alternative service providers to enter the retail downstream market.

- BTC has SMP in the defined market and is the only provider of wholesale broadband services in Geographic Market 2. As such, without this regulated wholesale product being offered, consumers in those areas are unlikely to have a choice of broadband providers.

In line with the above, URCA remains of the view that maintaining the resale broadband obligation on BTC remains justified.

Concerning the points raised by CBL, URCA has the following responses:

- URCA clarifies that the proposed regulatory remedies are not based solely on concerns stated by alternative operators. Instead, they are reflective of URCA's assessment of the potential market failures in the wholesale broadband market (see Section 3.6 above) and its consideration of how these may be addressed in a proportionate way. As stated above, URCA considers the resale broadband obligation represents the least-cost regulatory remedy in this market.
- In URCA's view, and for the reasons set out by URCA in response to the comments it received on the previous question, the absence of any request to supply resale broadband services does not mean that there is no demand for this service. Indeed, respondents to URCA's targeted industry survey conducted in mid-2017 did confirm some demand for the product.
- URCA is, however, committed to ensuring that the costs of the obligation remain proportionate and the minimum necessary to ensure the efficient working of the service. It therefore acknowledges CBL's concern over the potential costs of the SMP providers having to review and potentially update their offers every six months. At the same time, URCA does not consider it appropriate only to review the terms of the offer once there is a formal request for these services from an access seeker. This is because such requests may only materialise if the published offer is reasonable. URCA has therefore amended this requirement in the Final Determination such that reviews should take place at least once a year, on the anniversary of the offer coming into effect. Furthermore, such reviews should focus on ensuring that any changes in the terms and conditions of CBL and BTC's relevant retail broadband offers are also reflected in the wholesale offer.

#### **URCA's Final Determination – Proposed SMP Remedies**

Having considered the consultation responses received on the proposed SMP remedies in the wholesale broadband market set out in the Preliminary Determination, URCA concludes that its preliminary findings remain valid. It has, however, amended its Determination regarding the required frequency and nature of the reviews of the resale offers.

## 4. Review of Current Resale Broadband Offers

In preparing the Preliminary Determination, URCA conducted an initial review of BTC’s and CBL’s published resale broadband offers. At the time, URCA noticed that both offers still reflected the original terms and conditions dating back to 2010. As such, in Section 4 of the Preliminary Determination URCA set out preliminary, high-level observations on the current price and non-price terms and conditions set out in BTC’s and CBL’s published resale offers.

As part of their consultation responses, BTC and CBL were then requested to explain and justify the terms and conditions (or confirm alternative terms in a revised resale offer), taking into account URCA’s initial, high-level observations on current resale offers. BTC and CBL both submitted updated offers to URCA on 28 February 2018. These were made available on URCA’s website to allow other interested parties to submit written comments.<sup>22</sup>

Having reviewed BTC’s and CBL’s updated resale broadband offers and supporting information, URCA has concluded that further changes are required to these documents to ensure they are fit for purpose and enable reasonably efficient downstream competitors to enter the market. These changes are set out in Tables 1 and 2 below.

Both SMP operators are now required to update and submit to URCA for final review and approval the revised resale broadband offers in line with Section 2 above and the required changes set out below, by no later than **31 August 2018**. Upon review and approval URCA will indicate the timeframe for BTC and CBL to publish the respective offers on their websites.

**Table 1: Required amendments to the updated resale fixed broadband offer –BTC<sup>23</sup>**

| Document reference | Clause               | Required amendments  |
|--------------------|----------------------|--|
| General comment    | Cross-references     | URCA notes that numerous cross-references within BTC’s resale broadband offer (BRO) are incorrect. BTC shall review all cross-references in its BRO and revise them as necessary.  |
|                    | References to “days” | Throughout its BRO, BTC mostly refers to calendar days. However, there are several references to “days” only, without specifying whether these are calendar days or working days. URCA sees merits in expressing all timelines in terms of working days, rather than calendar days. As such, BTC shall restate the relevant timelines and make reference |

<sup>22</sup> <http://www.urcabahamas.bs/consultations/responses-preliminary-determination-review-resale-broadband-obligations-imposed-btc-cbl/>

<sup>23</sup> Accessible here: <http://www.urcabahamas.bs/wp-content/uploads/2018/03/BTC-Broadband-Resale-Offer.pdf>

to Working Days in the relevant clauses. In doing so, BTC shall not amend the overall elapsed time foreseen for each process, but only convert calendar days to working days, where relevant.

| Document reference | Clause   | Required amendments  |
|--------------------|--|--|
| Cover page         | For the purposes of s. 116 of the Communications Act 2009, URCA conducted a high-level review of BTC's Broadband Resale Offer pursuant to Section 5.1.2 of URCA's SMP Final Decision (ECS11/2010) issued April 22, 2010. Based on the Review, URCA is satisfied that the offer is complete. URCA has not approved the terms and conditions or pricing of the Offer in order to encourage negotiations between BTC and potential wholesale customers.   | BTC to remove this statement as it is no longer relevant.  |
| Page 3             | <p>Footnote 1: There is no Annex C – Technical Specifications, but the same Annex naming as the Reference Access and Interconnection Offer is used for the purposes of simplicity</p> <p>The Broadband Resale Offer (“the BRO”) and attached pro forma agreement takes effect from the date on which the terms of the Offer are approved by the Utilities Regulation and Competition Authority (“URCA”) and shall continue in effect until superseded by a revised Broadband Resale Offer.</p> | <p>BTC to revise footnote 1, as there is an Annex C “Operations and Maintenance” in the BRO.</p> <p>BTC to amend this paragraph in reference to the key SMP findings and regulatory requirements set out in Section 2 of this Final Determination.</p> |
| Clause 1.1         | By a Final Determination dated [[[TBD]]] of the Utilities Regulation and Competition Authority of The Bahamas made under the Communications Act, 2009, BTC was designated as having significant market power in certain markets and has been obliged to publish a Broadband Resale Offer in respect of certain wholesale services relevant to those markets.   | BTC to amend this clause in reference to the key SMP findings and regulatory requirements set out in Section 2 of this Final Determination.  |
| Clause 1.3         | The services offered under this Agreement will be available to all interconnecting   | BTC to remove the reference to interconnection from this clause – i.e.,:   |

|                              |   |   |
|------------------------------|---|---|
|                              | Licensed Operators on a non-discriminatory basis.   | <i>“The services offered under this Agreement will be available to all Licensed Operators on a non-discriminatory basis. “</i>  |
| Clause 2.1 and Clause 2.2    | The following documents, along with the Schedules attached to them, form an integral part of this Agreement: [...]<br><br>In the event of any inconsistency between parts of this Agreement, the language of the part listed higher in the following table shall prevail over that in any lower part:   | BTC to revise clause 2.1 to reflect the current structure of the Agreement.<br><br>BTC to place Annexes in clause 2.2 in chronological order.   |
| Clause 7, Quality of Service | BTC shall supply the same quality of service for a Service as it supplies to its own Customers or to its subsidiaries or affiliated companies for the same service or a similar service.<br><br>BTC shall use its reasonable endeavours to adhere to the Quality of Service standards set out in Annex H – Quality of Service Standards.  | BTC shall add a reference in this clause to URCA’s Quality of Service Regulations (ECS 42/2016 issued 22 December 2016). <sup>24</sup>  |
| Clause 11.5                  | The Access Seeker shall require its Customers not to use the Broadband Resale Service in a way that contravenes any law or regulation issued in The Commonwealth of The Bahamas or that is connected to a criminal or fraudulent activity. In particular, the Access Seeker is required to put measures in place to avoid or deter its Customers using the BTC network to perpetuate fraudulent activities. In the event BTC brings it to the Access Seeker’s attention that its Customers are using its network to engage in fraudulent activities and the Access Seeker fails to take any action to stop this use within 7 days, BTC shall be entitled to bring this Agreement to an end, and the Access Seeker shall be liable for all damages and charges as a result of the fraud. | BTC shall amend this clause by deleting the following sentence. <i>“In particular the Access Seeker is required to put measures in place to avoid or deter its Customers using the BTC network to perpetuate fraudulent activities.”</i><br><br>This is because, as a reseller, there will be limits on any network measures the Access Seeker will be able to put in place given the end-to-end nature of the service provided by BTC. |

<sup>24</sup> <http://www.urbahamas.bs/wp-content/uploads/2017/03/Quality-Of-Service-Regulations-For-Electronic-Communications-Networks-And-Services-In-The-Bahamas.pdf>

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| Clause 13.1   | If a Party is in material breach of any of the terms of this Agreement, the other Party may send it a notice (the Breach Notice) specifying the nature of the breach, a reasonable timescale for its remedy, and the consequences of a failure to remedy the breach (including the suspension and termination of the Agreement). | BTC to amend the clause as follows in order to prevent a unilateral determination of breach by either party:<br><br><i>“If a Party <b>is suspected of being in</b> material breach of any of the terms of this Agreement, the other Party may send it a notice (the Breach Notice) specifying the nature of the breach, a reasonable timescale for its remedy, and the consequences of a failure to remedy the <b>suspected</b> breach (including the suspension and termination of the Agreement).”</i> |
| Clause 14.1.8 | Where BTC decides to stop providing the Broadband Resale Service, subject to approval from URCA.   | BTC to make reference to written approval from URCA being required before it stops providing the Broadband Resale Service:<br><br><i>“Where BTC decides to stop providing the Broadband Resale Service, subject to <b>written</b> approval from URCA.”</i>   |
| Clause 14.3   | Subject to the approval of URCA, a Party may terminate this Agreement in any of the following circumstances:   | BTC to make reference to written approval from URCA being required:<br><br><i>“ BTC, subject to the <b>written</b> approval of URCA, or the other Party may terminate this Agreement in any of the following circumstances:”</i>   |
| Clause 14.4.3 | the other Party shall be responsible for and bear all direct costs incurred by both Parties in the removal of equipment and cabling at all relevant switches, shared sites and shared facilities that have been terminated;  | BTC to make the following amendments to this clause:<br><br><i>“the other Party shall be responsible for and bear all direct costs <b>reasonably</b> incurred by both Parties in the removal of equipment and cabling at all relevant switches, shared sites and shared facilities that have been terminated; <b>and</b>”</i>  |
| Clause 14.5   | Except in the case of a clear emergency relating to safety or potential risk of major network failure, the first Party shall obtain the approval of URCA before the implementation of the steps set out in Clause 19.  | BTC to make reference to written approval from URCA being required. Also, BTC to review the cross-reference in this clause, as clause 19 refers to credit rating and bank guarantees:<br><br><i>“Except in the case of a clear emergency relating to safety or potential risk of major network failure, the first Party shall obtain the <b>written</b> approval of URCA before the implementation of the steps set out in Clause 19.”</i>   |
| Clause 18.1   | 18.1 The Parties shall not divulge to any third party the contents of this   | BTC to make the following amendments to this clause:   |

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|             | <p>Agreement, unless required to do so by law, or URCA’s regulations or decisions. For the avoidance of doubt, URCA and any person specifically authorised by law is not a third party for the purposes of this Clause.</p>   | <p><i>“The Parties shall not divulge to any third party the contents of this Agreement, unless required to do so by law, <b>order of a court of competent jurisdiction</b> or URCA’s regulations or decisions. For the avoidance of doubt, URCA and any person specifically authorised by law is not a third party for the purposes of this Clause.”</i></p>   |
| Clause 21.1 | <p>All notices provided for in this Offer shall be in writing and shall be delivered to the relevant contact persons nominated for various purposes in Schedule 1 - Contact Details from time to time.</p>  | <p>BTC should add a condition to keep the Contact Details current.</p>   |
| Clause 28.1 | <p>Each Party warrants to the other Party that it has the necessary rights, licences and authorities to enter into and perform its obligations in terms of this Agreement; Each Party indemnifies the other Party against any loss, claim, expense, damage or action, suffered or sustained by such other Party pursuant to a breach by such Party of its warranty in terms of Clause 28.1, notwithstanding anything to the contrary contained in this Agreement.</p>   | <p>BTC to consider splitting Clause 28.1 into two clauses.</p> <p><i>“28.1 Each Party warrants to the other Party that it has the necessary rights, licences and authorities to enter into and perform its obligations in terms of this Agreement;</i></p> <p><i>28.2 Each Party indemnifies the other Party against any loss, claim, expense, damage or action, suffered or sustained by such other Party pursuant to a breach by such Party of its warranty in terms of Clause 28.1, notwithstanding anything to the contrary contained in this Agreement. “</i></p> |
| Clause 29.1 | <p>The law governing this Interconnection Agreement shall be the law of The Commonwealth of The Bahamas.</p>  | <p>BTC to remove the reference to “Interconnection” from this clause.</p>  |
| Annex A, A3 | <p>The Service will only be available on access lines connected to a BTC subscriber access point for customers that have an access line rental to BTC. If no access line is available to the Customer’s premises, the Customer must make a separate application to BTC for a narrowband access line and be provided with the line before the Broadband Resale Service can be ordered. If the Customer terminates the access line service or refuses to pay the access line rental to BTC, BTC shall be entitled to terminate the provision of the Broadband Retail Service to the Customer.</p> | <p>This clause suggests that retail customers may still have to retain a BTC line and pay for it, even when purchasing the broadband services from the access seeker. However, at the retail level, BTC offers an unbundled broadband service.</p> <p>As such, BTC needs to amend this clause to ensure non-discrimination.</p>  |



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| Annex A, A6                       | <p>The Access Seeker shall ensure that its Customers use the Broadband Resale Service in accordance with any applicable law or regulation, and shall not affect the quality of service provided by BTC to its own or to other Customers. BTC reserves the right to impose download limits on the Broadband Resale Service at its own discretion.</p>   | <p>BTC to amend this clause to ensure non-discrimination on any download limits that it imposes (i.e., any limits should not discriminate against the resellers, compared to BTC's own retail broadband services).</p>  |
| Annex A, A9                       | <p>BTC is responsible for the delivery and maintenance of the service, for the provision of equipment on Customer's premises necessary to connect Customers to the service (ADSL modem and filter), for the allocation of user names, passwords and IP addresses, and for fault repairs to the Broadband Resale Service. BTC shall not be responsible for testing, provisioning, supplying, purchasing, installing or maintaining any equipment to be installed on the Customer's premises other than the ADSL modem and filter. [...]</p> | <p>In response to URCA's clarification question, BTC confirmed that all modems offered by the Reseller to its customers had to be purchased or rented from BTC. This is to ensure interoperability.</p> <p>URCA considers this requirement too restrictive and notes that CBL's BRO does not contain a similar requirement.</p> <p>As such, BTC is required to revise this clause and any other relevant section in its BRO to allow the Reseller's customers to also use alternative modems. In order to ensure interoperability, however, BTC may provide the Access Seeker with a list of manufacturer modems or modem specifications which can be supported on its network.</p> |
| Annex B, B.2.3                    | <p>[...] If additional information is required, the Access Seeker will be required to submit a new Order with the additional information included.</p>   | <p>BTC to amend this clause, as a new Order submission should not be necessary. Instead, BTC should consider a pause/restart condition in relation to obtaining the outstanding information from the Access Seeker. Otherwise, BTC is in a position to frustrate the provision of the service.</p>  |
| Annex B, Forecasting requirements | <p>Forecasting and resourcing: The Access Seeker may provide BTC with forecasts of its likely orders for the Broadband Resale Service. [...]</p> <p>The Access Seeker shall order the Broadband Resale Service by letter, fax or email to BTC's Interconnection Manager [...] setting out the following information:</p> <ul style="list-style-type: none"> <li>• Date of Order</li> <li>• Access Seeker's name and order number</li> <li>• Customer's name</li> </ul>   | <p>While the provisioning of forecasts is not compulsory, URCA is concerned that the personal details BTC requests on the customers wishing to migrate from BTC could enable BTC's own retail unit to then target these retail customers in order to retain them.</p> <p>As such, BTC is requested to add a clause to the resale broadband offer stating that it will refrain from contacting these retail customers other than to facilitate their migration of the service.</p>   |

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|                               | <ul style="list-style-type: none"> <li>• Customer’s name and phone number for contact regarding the order</li> <li>• Name and phone number of on-site contact (if different from above)</li> <li>• Address of premises where the Broadband Resale Service is to be installed</li> </ul> <p>[...]</p>   | URCA notes that this is in line with Clause 23 of the BTC RAIO.   |
| Annex B, B3.2                 | [...] If additional information is required, the Access Seeker will be required to submit a new Order with the additional information included.  | As per clause B2.3, BTC shall amend also this clause, as a new Order submission should not be necessary. Instead, BTC should consider a pause/restart condition in relation to obtaining the outstanding information from the Access Seeker. Otherwise, BTC is in a position to frustrate the provision of the service.                                   |
| Annex B, B4.2                 | [...] If additional information is required, the Access Seeker will be required to submit a new Disconnect Order with the additional information included.   | As per clauses B2.3 and B3.2, BTC shall amend also this clause, as a new Disconnect Order submission should not be necessary. Instead, BTC should consider a pause/restart condition in relation to obtaining the outstanding information from the Access Seeker.   |
| Annex C.4, Outages            | C.4.1 <b>Unplanned outages:</b> If BTC detects an unplanned outage which is likely to affect the Service, the technical contact person of the other Party must be notified. At the time of notification, the outage could have ceased to exist or could still be persisting. In cases where the outage has ceased to exist, the contact persons will note the occurrence, duration and details of the failure. BTC will keep the technical contact person of the other Party informed at mutually agreed upon intervals of the progress of the repair until restoration of full service whereupon the technical contact person will note the outage duration and details of the failure. | BTC to include a timeline for notification for unplanned outages, setting out that it will notify affected Access Seekers immediately and no later than 30 minutes from the start of an unplanned outage.   |
| Annex C.5, Customer Equipment | C.5.1 BTC shall only be responsible for the maintenance of the Equipment (ADSL modem and filters) that it provides to a Customer. With the exception of costs caused by normal wear and tear, BTC may charge the Access Seeker for the costs of  | <p>BTC to remove reference to “acts of God” from this clause, as the Access Seeker cannot be liable for such acts as they are outside the control of the Access Seeker concerned.</p> <p>BTC also to remove the statement that “<i>nothing in Clause 15 – Force Majeure shall apply to relieve the Access Seeker from any obligation to pay these</i></p> |

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|                             | <p>maintenance of Equipment, including but not limited, to those caused by:</p> <ul style="list-style-type: none"> <li>• acts of God (e.g., fire or tempest);</li> <li>• failure to use the Equipment in accordance with this Agreement;</li> <li>• any act of willful damage or interference by a party other than BTC, its employees or agents;</li> <li>• negligent use or misuse of the Equipment by a party other than BTC, its employees or agents;</li> <li>• any failure or fluctuation of the electrical power supply to that Equipment, or any external electromagnetic interference, or any failure of air conditioning and humidity control for the Equipment; or</li> <li>• the performance of maintenance service by a party other than BTC.</li> </ul> <p>and nothing in Clause 15 – Force Majeure shall apply to relieve the Access Seeker from any obligation to pay these charges.</p> | <p><i>charges.</i>”, as URCA does not consider it reasonable for these obligations to universally apply in the context of Force Majeure.</p> <p>Alternatively, BTC may add a clause to the BRO in line with the following wording:</p> <p><i>“If an event of Force Majeure results in a loss or damage to the Equipment, then BTC shall rectify such loss or damage to the extent required by the Reseller, provided that any cost of rectification (less any insurance proceeds received by BTC for the loss or damage) is borne by the Reseller and BTC having taken reasonable steps to mitigate the Cost.”</i></p> |
| Annex D.6, Billing disputes | D.6.3 If Invoicing Party determines that the information is insufficient to identify the disputed amount, the Disputing Party must immediately supply the relevant evidence and indicate the discrepancy in the Invoicing Party’s invoice.   | <p>BTC to amend clause D6.3 as follows:</p> <p><i>“If Invoicing Party determines that the information is insufficient to identify the disputed amount, <b><u>the Invoicing Party shall request and</u></b> the Disputing Party must <del>immediately</del> supply <b><u>within (BTC to insert timeline) of such request</u></b> the relevant evidence and indicate the discrepancy in the Invoicing Party’s invoice.”</i></p>  |
| Clause E.1.3                | Billing disputes should be resolved according to the provisions of Clause E.7.   | The cross-reference is incorrect (i.e., there is no Clause E.7). BTC to insert the correct cross-reference.  |
| Annex E.2 to E.5            | n/a  | <p>The timeline specified in these Annexes are based on Calendar Days, while all other timelines within the resale broadband offer are stated in Working Days.</p> <p>For consistency purposes, BTC is requested to amend the timelines in Annexes E.2 to E.5 to</p>   |

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|                     |   | Working Days, rather than Calendar Days (without amending effective timings).  |
| Clause E 5.1.       | After the expiry of 30 Calendar Days after a dispute has been referred to the Chief Executives under step 3 above, either Party may refer the dispute to URCA. Each Party will bear its own costs of any reference to the URCA. | The cross-reference to “step 3” is incorrect. BTC to update the cross-reference to “step 4” instead.   |
| Annex F, Price list | Retail Minus Discount value of 16%  | <p>Having reviewed BTC’s supporting costing and benchmarking evidence, URCA does not consider this to represent an appropriate basis for determining the Retail Minus Discount. As noted by BTC in its submission, there are certain limitations to both its costing data and the benchmarking evidence (the later mostly reflecting Wholesale Line Rental services rather than resale broadband services). There is further a need to ensure consistency in approach on how the Retail Minus Discount is derived by BTC and CBL.</p> <p>However, URCA notes the similarity in the Retail Minus Discount from BTC and the revised Retail Minus Discount value submitted by CBL (see Table 2 below). As such, BTC is required to either:</p> <ul style="list-style-type: none"> <li>• apply a Retail Minus Discount of 18.5% in this BRO; or submit to URCA an analysis (and accompanying explanation) of an appropriate “retail minus” discount based on BTC’s revenues from retail broadband services and any avoidable costs associated with the resale broadband services, using its latest accounting separation results, no later <b>than 20 working days after publication of this Final Determination</b>. URCA will then review BTC’s analysis and proposed “retail minus discount”.</li> </ul> <p>BTC is requested to update the wholesale broadband prices in Table G1 based on the above.</p> <p>BTC will not be permitted to charge reseller any one-off implementation charge (See Clause 13.3 and Annex 2 in Table 2).</p> |

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|                      |   | Further, BTC shall ensure that all recurring and non-recurring fees set out in its BRO are correct and consistent with those charged to its own retail fixed broadband customers. For the avoidance of doubt, this shall include any waivers or discounts offered by CBL to its own retail customers   |
| Annex F, Price list  | <p>Access Seeker must provide a bank guarantee based on forecast of three (3) months revenue.</p> <p><u>Residential Customers:</u></p> <p>Installation: \$32.32.</p> <p>Security Deposit: \$150.</p> <p>Modem Purchase: \$150.</p> <p>Modem Rental: \$5.38 per month.</p> <p><u>Business Customers:</u></p> <p>Installation: \$150.</p> <p>Security Deposit: \$150.</p> <p>Modem: \$5.38 per month.</p> | <p>This requirement shall be removed as it is not consistent with Clause 19 of the Main Agreement.</p> <p>The below holds for both residential and business customers:</p> <ul style="list-style-type: none"> <li>• <b>Installation charges</b> are acceptable, assuming that BTC is actually undertaking the installation at the customer premise (rather than the Access Seeker). However, BTC shall ensure that the level of the charges for residential and business customers (i.e., \$32.32 and \$150, respectively) are correct and consistent with those charged to its own retail customers. For the avoidance of doubt, this shall include any waivers or discounts offered by BTC to its own retail customers.</li> <li>• BTC to remove the requirement for the Access Seeker to pay a <b>security deposit</b> for each customer. It is for the Access Seeker to determine if it requires such a deposit from its customers, not for BTC. While BTC may face some credit risk with its Access Seekers, this may be resolved through the provisions of Clause 19 of the Main Agreement.</li> </ul> |
| Annex G              | Quality of Service Standards  | <p>BTC to ensure that the principles and standards in Annex G are clear, complete, correct and, where applicable, consistent with the Quality of Service Standards set out in its RAIO.</p> <p>BTC to further include in this Annex penalties for missing any Quality of Service Standards, ensuring these are consistent with those set out in its RAIO.</p>  |
| Annex H, Definitions | n/a   | BTC to consider moving the Definitions to the beginning of the document.   |

**Table 2: Required amendments to the updated resale fixed broadband offer – CBL<sup>25</sup>**

| Document reference | Issue   | Required amendments   |
|--------------------|---|---|
| General comment    | Cross-references  | URCA notes that numerous cross-references within CBL’s resale broadband offer (BRO) are incorrect. CBL to review all cross-references in its BRO and revised them as necessary.   |
|                    | Time periods  | <p>Throughout the amended resale broadband offer, CBL refers to “days” without specifying whether these are calendar days or working days.</p> <p>URCA sees merits in expressing all timelines in terms of working days, rather than calendar days. As such, CBL shall restate the relevant timelines and make reference to Working Days in the relevant clauses. In doing so, CBL shall not amend the overall elapsed time foreseen for each process, but only convert calendar days in to working days, where relevant.</p> |
| Document reference | Clause  | Required amendments   |
| 1 Definitions      | Applicable Laws – [...] any enforceable community right within the meaning of the Comms Act;”   | URCA notes that “community rights” is not a legal term of art having a precise legal definition. As such, CBL shall either delete the word “community” from the definition or provide its definition for the term ‘community right’ to URCA to determine whether it may remain.   |
|                    | Emergencies – [...] “Any event of Force Majeure or any situation which, if not remedied within 24 hours, may cause material detriment to the Services or to the Network of Cable Bahamas. | CBL to revise the definition of Emergencies to ensure it is consistent with the required amendments for Clause 19.  |
| 5.2 Cable modems   | (b) To facilitate inventory management, quality assurance, network compatibility and ongoing support, the Reseller should purchase or rent cable  | As resellers have a choice to self-supply the modem or use a CBL modem, CBL shall amend the sub clauses as follows:<br><br><i>“To facilitate inventory management, quality assurance, network compatibility and ongoing support, the Reseller <b>may</b> purchase or rent cable modems from Cable Bahamas at prices</i>   |

<sup>25</sup> Accessible here: <http://www.urcabahamas.bs/wp-content/uploads/2018/03/CBL-Broadband-Resale-Offer.pdf>

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|                               | <p>modems from Cable Bahamas at prices mentioned in Annex 2 of this Agreement. In that case Cable Bahamas will initially provision and configure the retail customer's cable modem.</p> <p>(c) Subject to 5.2. (c), the Reseller may provide cable modems to its retail customers under terms and conditions (sale, rent, etc.), which depend solely on the decision of the Reseller.</p>  | <p><i>mentioned in Annex 2 of this Agreement. In that case Cable Bahamas will initially provision and configure the retail customer's cable modem.</i></p> <p><i>Subject to 5.2. (b), the Reseller may provide cable modems to its retail customers under terms and conditions (sale, rent, etc.), which depend solely on the decision of the Reseller."</i></p> <p>In addition, and in order to ensure interoperability, CBL may provide the Access Seeker with a list of manufacturer modems or modem specifications which can be supported on its network.</p>  |
| <p>6 Service availability</p> | <p>(a)The Service shall be available in those parts of The Bahamas, where Cable Bahamas supplies the services on its fully-digital cable network.</p> <p>(b)The Services will not be available in newly built subdivisions, which have never been connected to the Cable Bahamas network.</p>  | <p>URCA understands that CBL's network is now entirely digital. As such, CBL shall remove the reference to "fully digital" from sub clause 6 (a).</p> <p>Concerning sub clause (b), CBL has an obligation to offer the resale service across its entire network coverage area (i.e., where it offers retail broadband services). This also holds for premises in newly connected areas where it expands its network coverage. As such, CBL shall revise this sub-clause accordingly or remove it from the final BRO.</p> <p>This also applies to clauses 10 (b) iii and 10 (f).</p>  |
| <p>9 Maintenance</p>          | <p>(a) Cable Bahamas shall be entitled at any time to improve, modify, suspend, test, maintain or repair the Network (or any part thereof), the Services provided to the Reseller and any other services offered by it in relation thereto, and to interrupt the Network or the Services or any other such services for such purposes without incurring any liability or obligation to the Reseller or the Reseller's retail customers provided that Cable Bahamas treats the Reseller on a non-</p> | <p>The non-discrimination requirement is most important between the Reseller and CBL's own retail broadband business (rather than other service providers).</p> <p>As such, CBL is requested to amend sub clauses (a) and (c) by adding a reference to CBL's own retail broadband business.</p> <p>Further sub clause (b) may be deleted as the first part of this sub clause that speaks to stoppage may be subsumed under section 17 "Suspension". The latter part that speaks to technical maintenance may be subsumed under sub clause 9 (a) or (c).</p> <p>URCA also notes that these sub-clauses do not contain any obligations on CBL with regards to the timeframe within which it must notify access seekers of relevant action it intends to</p> |

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|                                      | <p>discriminatory basis, fairly and on a par with other Accredited Service Providers.</p> <p>(b) Cable Bahamas can stop the provision of the Services in the case of a threat to the viability or security of its network operations or safety or in the case of technical intervention or maintenance work by Cable Bahamas on its network.</p> <p>(c) In the event of a preventive and/or planned technical intervention and/or maintenance work requiring a service interruption, Cable Bahamas will inform the Reseller as soon as possible prior to the service interruption and on a non-discriminatory basis, fairly and on a par with other Accredited Service Providers.</p> | <p>take, or does take, under these provisions. Given this, CBL should:</p> <ul style="list-style-type: none"> <li>• Add a reference in sub clauses (a) and (c) regarding the minimum period of notice it shall give to access seekers ahead of planned interventions.</li> <li>• Add a statement that the Reseller will be given a plan as to when the service will be restored and that URCA will be informed about this also.</li> </ul> |
| <p>11.1 Use of the Service</p>       | <p>(e) The Reseller hereby assumes full and complete responsibility towards its retail customers for the services it provides to such customers as part of its contract with them. The Reseller may not hold Cable Bahamas responsible or seek any indemnity in the case of a legal or regulatory action brought by a retail customer of the Reseller, nor may a retail customer of the Reseller seek legal or administrative redress against Cable Bahamas arising out the intentional or negligent acts or breach of contract by the Reseller.</p>  | <p>URCA does not consider this general exception of liability to be valid, as there may be cases where liability is justified. CBL may wish to limit its liability, where appropriate, but not exclude this all together.</p> <p>CBL should revise this sub-clause accordingly.</p>  |
| <p>11.4 Minimum service duration</p> | <p>For every retail customer line opened by the Customer, the minimum duration of the</p>   | <p>CBL shall amend this clause to ensure non-discrimination with its own retail business.</p>  |



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|                                   | <p>Services provided by Cable Bahamas to the Customer shall be one year.</p>  | <p><i>“For every retail customer line opened by the Customer, the minimum duration of the Services provided by Cable Bahamas to the Customer shall <b>in line with the minimum contract length applicable to the relevant retail broadband product offered by Cable Bahamas.</b> <del>be one year.</del>”</i></p>  |
| <p>13.2 Service charge review</p> | <p>(b) Either party may also initiate a pricing review, no more frequently than once per calendar quarter, in the following circumstances:</p> <p>(i) In the case of the Reseller: if there is a reduction in the primary, non-promotional, non-short term, retail price plans of Cable Bahamas selected in the Retail Minus determination, as set in Annex 3;</p> <p>(ii) In the case of Cable Bahamas: if there is an increase in the cost of providing the Service as a result of third-party price increases or regulatory requirements and/or if Cable Bahamas believes that the Retail Minus calculation results in tariffs below Cable Bahamas’ production cost for the corresponding retail service;</p> <p>(f) If the parties are unable to agree a price review then either party may terminate this Agreement upon 6 months’ notice in accordance with termination provisions.</p> | <p>The restriction that tariffs can only be reviewed once a quarter is not in line with the regulatory requirement for CBL to automatically update its resale broadband prices, in case its retail broadband prices change. As such, CBL is requested to amend this sub-clause accordingly.</p> <p>Sub-clause (b) (ii) shall also be amended by replacing “believes” with “can demonstrate”.</p> <p>CBL shall further delete sub-clause (f) as it is not reasonable. In particular, if CBL were to increase its prices and the other party does not agree with this, it should be able to terminate the agreement more quickly than 6 months (i.e., in line with any min. contract lengths of its retail customers).</p> |
| <p>13.3 Invoicing</p>             | <p>(a) Cable Bahamas will invoice the Reseller for the installation cost, upon final signature of the Agreement.</p>  | <p>URCA assumes that the reference to “installation costs” in sub clause (a) should refer to “implementation costs”. As stated in Annex 2 below, CBL will not be permitted to charge the reseller an implementation charge. As such, this sub clause shall be removed.</p>   |

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|   | [..]  |   |
|   | (c) The invoice will include: [...]   | CBL shall amend sub clause 13.3 (c) to ensure non-discrimination with its own retail business. In particular, recurring rental charges should be invoiced by CBL in arrears, with installation and activation and any other one-off charges to be invoiced in advance.  |
| 13.4 Payment                                    | (a) Invoices will be due for payment by the Reseller within a 20-day period upon receiving the invoice.   | CBL shall ensure that the timelines stated in clause 13.4 are stated in terms of working days. In doing so, CBL shall not amend the overall elapsed time foreseen for each process, but only convert calendar days in to working days, where relevant.<br><br>CBL shall also include a timeline in sub-clause 13.4 (e), consistent with the “15 day” period contained in sub clause 13.4 (d). |
| 16.1<br>Establishment of a Monitoring Committee | (b) The Monitoring Committee can meet upon request of any Party – and communicate a meeting agenda giving seven (7) days notice. The Monitoring Committee will be comprised of four (4) members, equally split between staff from Cable Bahamas and from the Reseller, of which a programme director for Cable Bahamas and a programme director for the Reseller. Any decision will have to be voted unanimously by the members of the Monitoring Committee. Should a decision imply a change to the Agreement, it will have to be validated by legal representatives of both Parties as part of an amendment to the Agreement. | CBL shall amend this clause by allowing the Monitoring Committee to convene at a shorter time period in case of Emergencies.<br><br>CBL should further add a statement on what happens where the Monitoring Committee cannot reach a unanimous decision.  |
| 16.2 Role and activities                        | (b) In the event members of the Monitoring Committee do not reach an agreement, the Parties will organize negotiation meetings with their Management within   | CBL shall amend clause (b) by allowing for a shorter time period in case of Emergencies.<br><br>Further, CBL shall add a clause stating that the activities of the Monitoring Committee will be governed by “Section 21 –   |

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|                  |  | thirty (30) days after the date of the Committee meeting where a disagreement will have been noted.  | Confidentiality”, and “Section 25 – Customer Data and Privacy” of the BRO.  |
| 17 Suspension    |  | Clause 17 (a), 17 (c) (vii) and 17 (c) (ii)  | CBL shall amend these sub-clauses by adding the requirement for the Suspending Party to provide a notice regarding a suspension to the other Party, setting out the reason for the suspension. If the reason for suspension was not an emergency, this notice must be provided in advance.  |
|                  |  | Clause 17 (iv)   | CBL shall increase the notice period in sub-clause Clause 17 (iv) to 15 Working Days. URCA considers 7 days unreasonably short and notes that BTC also provides 15 Working Day notice in its resale offer.  |
| 18 Termination   |  | (i) the other Party is in material breach of this Agreement and the Terminating Party has given seven (7) days notice of such breach and the other Party has failed to rectify such breach within that time;   | CBL shall revise sub clause (i) as set out below to prevent either Party making a unilateral determination of breach.<br><br><i>“the other Party <b>has been duly determined to be</b> in material breach of this Agreement and the Terminating Party has given seven (7) days notice of such breach and the other Party has failed to rectify such breach within that time;”</i> |
|                  |  | (iv) the Parties are unable to agree on the variation of this Agreement and the Terminating Party has given the other Party not less than six (6) months’ notice of its intention to terminate this Agreement.   | Further, CBL shall delete sub-clause (iv) as it is not reasonable. In particular, if CBL were to increase its prices and the other party does not agree with this, it should be able to terminate the agreement more quickly than 6 months (i.e., in line with any minimum contract lengths of its retail customers).   |
| 19 Force Majeure |  | (a) Non-performance by either Party of its obligations pursuant to this Agreement or delay in performing same shall not constitute a breach of the Agreement if and for as long as it is due to a force majeure event, including, but not limited to, government action or requirement of regulatory authority, lock-outs, strikes, shortage of transportation, war, rebellion or other military | The definition of force majeure as set out in this clause is much wider than that contained in CBL’s Individual Operator Licence (IOL) and thus broadens the events under which CBL may not be held liable. While the provision is applicable to both parties, CBL shall amend the definition to ensure consistence with the IOL.   |

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action, fire, floods, hurricanes, natural catastrophes or any other unforeseeable obstacles that a Party is not able to overcome with reasonable efforts, or non-performance of obligations by a sub-contractor to a Party pursuant to any of the aforementioned reasons. The Party prevented from fulfilling its obligations shall on becoming aware of such event inform the other Party in writing of such force majeure event as soon as possible. If the force majeure event continues for more than three (3) months, either Party shall have the right to terminate this Agreement with immediate effect by written notice.

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21  
Confidentiality

Clause 21 is not consistent with similar passages in the Interconnection Agreement between BTC and SRG. As such, CBL shall revise the clause to state clearly that CBL is not allowed to share information gathered from the Reseller with its own retail business, affiliated companies or third parties.

Further, the revised clause should be aligned with the Data Protection Act.

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22 Client base

(b) Where Cable Bahamas changes the standard terms upon which it supplies services to its own retail customers, Cable Bahamas may make equivalent changes to the terms and conditions of this resale offer, provided that Cable Bahamas shall provide the Reseller with one (1) month prior written notice of any such change.

CBL shall amend clause 22 (b) as follows:

*“(b) **Subject to Section 21**, where Cable Bahamas **proposes to** change the standard **price and non-price** terms upon which it supplies services to its own retail customers, Cable Bahamas **shall** make equivalent changes to the terms and conditions of this resale offer, provided that Cable Bahamas shall provide the Reseller with one (1) month prior written notice of any such change **and offer the Reseller any such change prior to introducing the changes to its own retail customers.**”*

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| 23 Insurance                 | <p>(b) The Reseller must on request by Cable Bahamas from time to time, but no more than once in any year, promptly provide Cable Bahamas with an insurance certificate in respect of the policies listed in the present clause.</p>  | <p>CBL shall amend clause 23 (b) as follows:</p> <p><i>“The Reseller must on request by Cable Bahamas from time to time, but no more than once in any year, promptly provide Cable Bahamas with an insurance certificate in respect of the policies listed in the <u>previous</u> clause.”</i></p>   |
| 24 Liability                 | <p>CABLE BAHAMAS ITS DIRECTORS OFFICERS EMPLOYEES AGENTS SERVANTS SUBSIDIARIES OR AFFILIATES SHALL HAVE NO LIABILITY OR OBLIGATION TO THE CUSTOMER IN EITHER CONTRACT OR FOR SPECIAL INCIDENTAL OR CONSEQUENTIAL DAMAGES OF ANY KIND INCURRED BY THE CUSTOMER OR CUSTOMER’S CLIENTS SUCH AS BUT NOT LIMITED TO CLAIMS FOR DAMAGES FOR PERSONAL INJURY, WRONGFUL DEATH</p> <p>LOSS OF USE, LOSS OF ANTICIPATED PROFITS OR OTHER INCIDENTAL TO OR CONSEQUENTIAL DAMAGES OR ECONOMIC LOSSES OF ANY KIND INCURRED DIRECTLY OR INDIRECTLY RESULTING FROM OR RELATED TO THE CABLE MODEM</p> | <p>CBL shall replace all references to “customers” with “Reseller” in Clause 24.</p> <p>Further, , while exemption/exclusion clauses are a standard part of a contract, the general legal position is that a contract cannot restrict or exclude liability for personal injury or death resulting from negligence. As such, CBL shall amend this part to reflect this.</p>   |
| 25 Customer data and privacy | <p>(b) Reseller acknowledges and agrees that Cable Bahamas and its Affiliates and their respective agents, may use, process and/or transfer Customer Data (including intra-group transfers and transfers to entities in countries that do not provide</p>   | <p>CBL shall remove from this clause the following passages, as agreed in CBL’s letter to URCA dated 18<sup>th</sup> April 2018:</p> <p>“(b) Reseller acknowledges and agrees that Cable Bahamas and its Affiliates and their respective agents, may use, process and/or transfer Customer Data (including intra-group transfers and transfers to entities in countries that do not provide statutory protections for personal information): (a) in connection with provisioning of Services; (b) to incorporate Customer Data into databases controlled by Cable Bahamas or</p> |

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|                            | <p>statutory protections for personal information): (a) in connection with provisioning of Services; (b) to incorporate Customer Data into databases controlled by Cable Bahamas or its Affiliates for the purpose of providing Service; administration, provisioning, billing and reconciliation, verification of Customer identity, solvency and creditworthiness, maintenance, support and product development, fraud detection and prevention, sales, revenue and customer analysis and reporting, and market and customer use analysis; and (c) to communicate to Reseller by voice, letter, fax, or E-mail regarding the Services. [...]</p> | <p>its Affiliates for the purpose of providing Service; administration, provisioning, billing and reconciliation, verification of Customer identity, <del>solvency and creditworthiness</del>, maintenance, support and product development, fraud detection and prevention, <del>sales</del>, revenue and customer analysis and reporting, and market and customer use analysis; and (c) <del>to communicate to Reseller by voice, letter, fax, or E-mail regarding the Services.</del> [...]"</p>   |
| <p>Annex 1, Figure 1.1</p> | <p>The downlink speed for REVON PRO is quoted at 10Mbps.</p>   | <p>CBL to add the upload speeds for each retail broadband service to Figure 1.1.</p> <p>CBL has confirmed to URCA that the correct download speed for its REVON PRO offer is 18Mbps. It shall therefore update this in its final Reseller Agreement.</p>  |
| <p>Annex 2, Figure 2.1</p> | <p>Non-recurring fees for Signal activation fee (first outlet), Reconnection fee, Customer Deposit, installation and service drop conduit after 50'</p>  | <p>The below holds for both residential and business customers:</p> <ul style="list-style-type: none"> <li>• Installation charges are acceptable, assuming that CBL is actually undertaking the installation at the customer premise (rather than the Access Seeker).</li> <li>• CBL should remove the requirement for the Access Seeker to pay a <b>security deposit</b> for each customer. It is for the Access Seeker to determine if it requires such a deposit from its customers, not for CBL.</li> </ul> <p>In general, CBL shall ensure that all recurring and non-recurring fees set out in its BRO are correct and consistent with those charged to its own retail customers. For the</p> |

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|   |  | avoidance of doubt, this shall include any waivers or discounts offered by CBL to its own retail customers.  |
| Annex 2, One-off charges by retail customer connected | Figure 2.2 Field work unit costs   | CBL shall remove this section from the final BRO, as agreed in CBL's letter to URCA dated 18 <sup>th</sup> April 2018.   |
| Annex 2, Recurring charges and per user charges       | <p>(b) Such tariffs for any subsequent term shall be based on the charges existing as at the previous calendar quarter prior to the anniversary of the Commercial Launch Date.</p> <p>(c) The "Retail" tariff shall be determined based on the base monthly tariff – excluding promotion or special discount – from the middle month of the calendar.</p> <p>(e) In the event that Cable Bahamas believes that the Retail Minus calculation results in service charges below Cable Bahamas' production cost for the corresponding retail service offered to its customers, the Parties shall negotiate in good faith to agree revised tariffs at the highest of either the price corresponding to the application of the Retail Minus to the "Retail" tariff offered by Cable Bahamas to its customers or Cable Bahamas' production cost for the service in question. For the avoidance of doubt, production costs shall exclude any costs relating to or incurred in marketing, sales, commissions, customer services, billing, debt collection etc. normally being</p> | <p>CBL shall amend this clause such that it is consistent with URCA's required amendments to Clause 13.2.</p> <p>The reference to promotions or special tariffs should be removed from sub clause (c). In particular, Access Seekers should be enabled to replicate any promotion or discount offered by CBL to its retail customer. As such, these will also need to be taken into account when determining the recurring end user charges.</p> <p>Sub-clause (e) shall be deleted as it suggests potentially moving away from a retail-minus price and as such, would run counter to this Determination.</p> |

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|   |     | part of the cost calculations for the corresponding retail price provided to Cable Bahamas' retail customers. Further the production costs shall be the average national costs rather than regional costs for the provision of the services to Cable Bahamas' customers. |  |
| Annex 2, Recurring charges and per user charges | (d) | A retail minus of 22% shall be applied to the selected tariffs.  | Having reviewed CBL's costing information and analysis underlying its proposed retail minus discount value, URCA issued clarification questions to CBL on certain cost items and assumptions within its analysis. This has led to CBL submitting a revised analysis showing a retail minus discount of 18.5%. For confidentiality reasons, URCA cannot share this analysis in this document.<br><br>CBL is requested to update the wholesale broadband charges in its resale broadband offer based on the revised Retail Minus Discount value.   |
| Annex 2, Implementation costs                   |     | The Reseller shall pay Cable Bahamas a one-off implementation fee of \$30,000.   | URCA understands that the proposed one-off fee relates largely to the regulatory costs of establishing this BRO. As such, URCA does not believe it is appropriate to include this charge in the BRO. Rather, these costs should be recovered across all customers, including CBL's own retail customers, in line with URCA's decision on how interconnection specific costs should be treated in BTC's RAIO. <sup>26</sup> This is because all customers will benefit from the introduction of an effective resale offer, if it generates more effective competition in the retail market, whilst it will also ensure that competition can take place on a level playing field.<br><br>URCA further considers that if CBL were allowed to recoup its internal set-up costs from resellers this would undermine the cost minimization principle as CBL would have little or no incentive to deploy the most cost efficient resale broadband solution within its network. This potential result would be incompatible with the core objectives of the Comms Act specifically those relating to promoting efficiency of the Bahamian electronic communications sector and the productivity of the Bahamian economy. |

<sup>26</sup> ECS 01/2011 issued 11 January 2011 "Obligations on Bahamas Telecommunications Company Ltd. Under s.116(3) of the Communications Act, 2009: Draft Reference Access and Interconnection Offer (RAIO), Response to Public Consultation and Final Decision".



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URCA notes that the above is in line with the treatment of one-off costs associated with the implementation and fixed number portability in 2013 and mobile number portability in 2017.<sup>27</sup>

CBL is therefore requested to remove this clause.

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Annex 2, 6. Billing for each retail line shall commence at least five (5) days after installation of service unless provided otherwise. If the installation falls after the first day of a calendar month, the charges for the first month's invoice will be calculated as: the number of days from the installation to the end of the calendar month divided by 30, multiplied by the Monthly Recurring Charges, plus any Non-recurring Charges, if applicable. Reseller shall pay Cable Bahamas for the Services, including any termination charges, within thirty (30) days after the date of Cable Bahamas' invoice (the "Due Date"). [...] In the event Reseller fails to pay Cable Bahamas' invoice in full or remit payment to the proper address by the Due Date, Reseller shall also pay a late fee of \$5.50 for each retail customer. At Cable Bahamas' request, Reseller shall, within five (5) days after written notice from Cable Bahamas, provide a security deposit or alternate security in order to assure payment.

Following clarification from CBL, it has confirmed that the phrase "any termination charges" should be replaced by "Service Activation Fee". The level of the proposed activation fee is set out in Figure 2.1 of Annex 2 of the Offer. CBL also confirmed it does not levy a termination fee on its retail customers. As such, CBL is required to update this clause accordingly in its Reseller Agreement.

CBL has also confirmed that the "security deposit" referred to in this clause is \$100 / \$150 for residential and business customers. Again, CBL shall clarify this in the final version of its Reseller Agreement.

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<sup>27</sup> See, for example, Section 3.1 of ECS 17 2013, available here: Section 3.1 - <http://www.urbahamas.bs/wp-content/uploads/2017/02/ECS-17-2013-Third-Final-Determination-for-Fixed-Number-Portability-Cost-Allocation-and-Recovery.pdf>



## 5. Conclusions and Next Steps

This Final Determination sets out URCA's position on the continued need for ex-ante regulation of wholesale fixed broadband services, in the form of requiring BTC and CBL to both prepare and publish the price and non-price terms and conditions of their resale broadband products on their websites. It further sets out the required changes to BTC's and CBL's updated resale broadband offers and supporting information, submitted to URCA as part of this public consultation process.

BTC and CBL are required to amend and resubmit revised resale broadband offers as set out in Sections 2 and 4 above to URCA, by no later than **31 August 2018**. Upon review and approval URCA will indicate the timeframe for BTC and CBL to publish the respective offers on their websites.

URCA notes that this Final Determination replaces the review and approval process set out in Section 5.1.3 of ECS 11/2010.