



Response to Consultation on

**“Review of Wholesale Broadband Access Services
under Sections 39 and 40 of the Communications
Act, 2009”**

ECS 04/2020

Submitted to the

Utilities Regulations and Competition Authority

May 27, 2020

By

Cable Bahamas Ltd



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0 Executive Summary

Summary of CBL's position

- a) Ex-ante regulation is too onerous and heavy handed: potential issues can be resolved in commercial negotiations between operators, with URCA as a possible arbiter, and/or by enforcing licence conditions and competition law (e.g. penalising margin squeezes).
- b) If URCA insists on onerous ex ante-regulation, the market definition should be clear and exclude resale DIA.
- c) If URCA insists on cost-based pricing, it should include the subsidy imposed by URCA via the limit on basic TV at \$38.

Overview of specific comments on consultation questions

1) Focus on wholesale DIA services (WDIA)

- URCA's proposal and the way it reaches its conclusions are exceptional and therefore well **outside the international mainstream**. The impact of such extravagant measures is therefore untested and URCA itself has not even bothered to carry out an impact analysis. Had it done so, it would have realised that its proposal comes at a potentially high cost to the Bahamian economy and more specifically, CBL's investment plans.
- URCA describes two types of WDIA: DIAs which are an input for the delivery of OLO services (wholesale input DIA) and simple resale DIA (resale DIA). They are clearly not in the same market and must therefore be dealt with separately.
 - However, regulating resale DIA in the proposed manner would be
 - i. internationally unheard of and therefore untested with unknown effects on the telecoms market and the broader economy,
 - ii. inconsistent with the treatment of broadband resale decision made by URCA and
 - iii. incompatible with the argument of OLO service differentiation, which underpins URCA's proposal
 - iv. reliant on a unquestionably incorrect market analysis, which does not recognise that resale DIA is a substitute for retail DIA and not a substitute for wholesale input DIA.
 - v. A substantial risk factor affecting CBL's investments
- Therefore: **Regulating resale DIA in the proposed manner is entirely unjustifiable** and a strong push back from CBL should be expected. It would also put CBL's current and future investment plans at risk.
- Conventional wholesale products require a minimum of investment in core Networks by OLOs. Therefore, conventional wholesale products do not seem to be a viable option for OLOs. If URCA's main objective is to meet OLOs' needs, the **focus on wholesale input DIA services is justified**. But: Has URCA carried out an impact assessment of its extravagant proposal?

2) Market definitions of WBA services

- URCA has not tested if **resale DIA are substitutes for retail DIA**. They necessarily are because they are the precisely same product and result in the same retail services without the need for additional network elements or functionalities. Therefore, **resale DIA are possibly part of the retail DIA market, but certainly not of the wholesale DIA market that URCA is proposing to regulate.**
- **Broadband resale services of any kind** are not a demand substitute for wholesale input DIA services because OLOs cannot customise BRO services in a meaningful way to differentiate their product and **must therefore be in a separate market**.



- The so-called WBA market is not a market but a group of markets, which URCA has randomly defined based on similar “service characteristics”. This **grouping into an overarching “WBA market” must therefore not be utilised by URCA (as it currently is) to extend market analysis** affecting one proper market (e.g. BRO broadband) to another proper market (e.g. wholesale input DIA).

3) SMP designations in these WBA markets

- CBL is of the view that it does not have SMP because it is constrained by BTC, but nonetheless **accepts that a plausible regulatory case resulting in CBL’s and BTC’s SMP designation could be presented.**
- It is worth noting that URCA’s SMP justification is resides on a series of logical errors: CBL has retail SMP in residential broadband and thus resale BB SMP (as per ECS09/2018). Resale BB is part of the WBA market and – based on “similar characteristics”-WDIA is, too. Therefore, CBL has SMP in the WDIA market. However, there is NO such thing as a WBA market: there is a resale broadband market and a wholesale input DIA market

4) Competition problems or market failures resulting from SMP in wholesale DIA

- CBL has no ability to engage in excessive charging because **BTC’s almost perfectly overlapping network and commercial presence constrain it.**
- **Refusal to supply has not happened before** in CBL’s case and is particularly unlikely because CBL cannot know what the access seeker will use its service for. If -against all odds- it happens nonetheless, there are surely less onerous instruments than ex-ante regulation to deal with it.
- **Price increases would lower CBL’s revenue in the DIA market** (retail and wholesale). Therefore, CBL has no strong incentive to margin squeeze **as long as there continues to be only one DIA price**, for wholesale and retail.

5) Need for ex-ante regulation of wholesale DIA

- CBL believes that **less onerous alternatives to onerous ex-ante regulation should be explored**, such as
 - commercial negotiation, especially given the existence of only one OLO with a tiny footprint
 - enforcement of licence conditions by URCA and or
 - enforcement of competition law (ex-post regulation) to name but a few.

6) Proposed SMP remedies in the WBA service markets

- In CBL’s view, the term “wholesale DIA services” should be defined more accurately. URCA **should not regulate resale DIA. A resale offer does not address a bottleneck** in an OLO’s network. Nor does it address URCA’s perceived lack of innovation.
- Cost-based pricing: URCA’s proposed cost calculations can result in a wide range of results which implies equally **large risks, adversely affecting CBL’s current and future investment decisions.** URCA could impact CBLs investment returns arbitrarily via the prices it sets based on its choices.
- URCA is currently forcing CBL to subsidise its basic TV package, i.e. selling it substantially below cost. **A contribution towards this subsidy needs to be taken into account** when setting cost-based reference prices.
- Cost-based DIA resale may result in inefficient market entry.



1 Comments on Question 1: focus on wholesale DIA services

Consultation questions – Focus on wholesale DIA services

Q1. Please provide comments on URCA’s focus on wholesale DIA services in this preliminary determination. Please substantiate any responses with supporting evidence.

1.1 Comments on the nature and definition of wholesale DIA services in the context of URCA’s proposed ex-ante remedies

URCA has provided a definition of wholesale DIA for the first time in the current consultation. It is worth noting that currently there is only one DIA product¹, so the distinction between wholesale and retail DIA is both new and notional. URCA developed it towards the final part of its data gathering and market inquiry exercise. The distinction between wholesale and retail is not inherent to the DIA product but only exists based on URCA’s definition. As the definition of the wholesale DIA (WDIA) service relies solely on URCA’s specification it is fundamental for the product definition to be precise and clear.

URCA specifies the following characteristics of WDIA:

- Technical features:
 - “Dedicated” bandwidth
 - Includes “Internet connectivity”
 - “Symmetric” bandwidth and
 - WDIA is “subject to higher standards of service” than retail DIA (p.12)
 - “there is commonly no distinction between retail and wholesale DIA services in terms of technical and service characteristics.” (p. 13)

The last two statements by URCA seem contradictory. It is unclear if URCA is proposing to regulate the existing DIA offering or if CBL would need to create a special DIA product to cater for the needs of URCA and allegedly some OLOs. CBL assumes the former to be the case.

URCA further states that

- ways in which wholesale DIA services are used in The Bahamas fall into two categories:
 1. an end-to-end service (i.e., to the customer premises), which allows OLOs to offer retail DIA services to their customers; and
 2. a service connecting to the OLO’s point of presence, or “PoP” (such as a base station or data centre), which allows OLOs to use wholesale DIA as an input for the delivery of retail Fixed Wireless Access (“FWA”) services.
- “the {WDIA} service is an input to OLOs’ retail services, regardless of its other uses by customers as a retail service, URCA assesses these DIA services as wholesale services.”

It appears to follow that there are two types of WDIA OLOs use: those which are an input for the delivery of OLO services and simple resale DIA. Hereinafter, the latter type is called ‘resale DIA’, the former ‘wholesale input DIA’.

¹ Neither BTC nor CBL offer a wholesale DIA service that is different from the retail one.



It is not entirely clear that URCA is proposing to regulate only wholesale input DIA as opposed to indiscriminately regulate both, wholesale input and resale DIA.

URCA should make it clear that it does not propose regulating resale DIA. A resale offer does not address a bottleneck in an OLO's network: It is the entire bottle. As a result, an OLO has no opportunity to differentiate its product or to innovate. Therefore, resale DIA, would not offer remedy to the perceived competition issue of lacking innovation, which URCA cited as its key concern when it designated CBL with SMP in the retail broadband market. Setting cost-based prices for DIA resale services would also be completely outside the "international mainstream".²

The "international mainstream" sometimes defines other wholesale services that can be used by OLOs to deliver retail broadband internet services. These options are C)-E) in the illustration below, whereas the wholesale broadband product this consultation is concerned with seems to be product B) in the service scope illustration below.

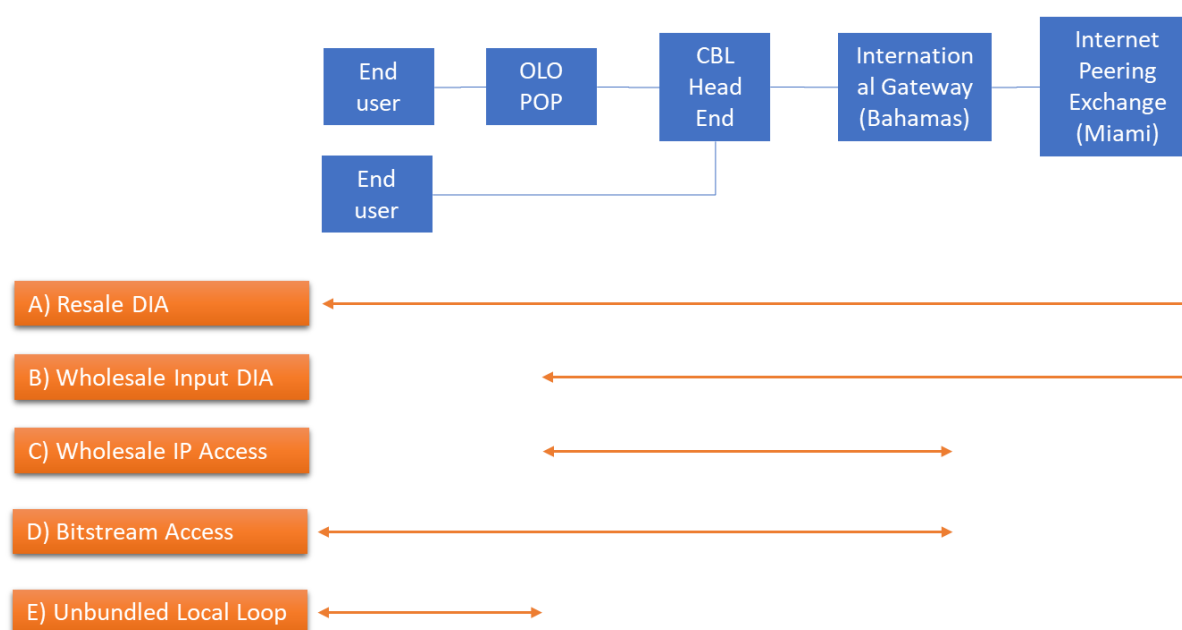


Figure 1: Illustration of service scope of some broadband services

CBL agrees with the focus on W DIA if it is defined as wholesale input DIA. Otherwise, CBL would strongly disagree with URCA's focus.

It is worth noting that URCA's statement that "DIA services sold to OLOs are considered by service providers as "wholesale" DIA service" is not true for CBL. URCA may have mis-understood that CBL was internally using this definition. It is not.

The working definition was agreed during a clarification call with URCA for the purposes of providing the quantitative information about the broadband access market requested by URCA. URCA did

² Whilst URCA has never defined what it views as "the international mainstream", CBL infers from previous interpretations that EU and in particular UK are meant. CBL trusts that URCA understands that it is difficult to prove the absence of regulation but is happy to request a statement from mainstream regulators (if URCA specifies a few examples) indicating that ex-ante cost-based price regulation for resale DIA services depart clearly from the respective NRA's views and/or current practice. For example, Ofcom (UK), Agcom (Italy), BNetzA (Germany), FCC (USA) do not impose ex-ante cost-based pricing for resale DIA services.



initially not provide a definition of what it considered “wholesale”, making it initially impossible for CBL to provide the requested information.

1.2 Comments on URCA’s focus on DIA as opposed to other wholesale services

URCA justifies its focus on WDIA as opposed to other wholesale services typically supplied in other jurisdictions because in The Bahamas

“a number of smaller, niche OLOs focus on serving a relatively small customer base, commonly using FWA technology to deliver “last-mile” services. However, these OLOs typically lack the required core network infrastructure and international connectivity to do so using such services. As such, these OLOs purchase wholesale DIA services, rather than investing in their own connectivity.”

CBL agrees with URCA that, unlike in most other jurisdictions, OLOs (with the exception of BTC) have not invested in networks except for a (very) small number of wireless links. In particular, CBL agrees with URCA that OLOs have typically made no investment in core networks at all, unlike in most other jurisdictions. However, “International mainstream” wholesale broadband products such as bitstream access require a degree of investment in at least core networks by the OLOs, albeit a tiny one relative to CBL’s and BTC’s investment. The absence of such investment makes “international mainstream” wholesale products impractical at the moment and – judging by past investment made by OLOs – highly unlikely in the future. Therefore, the only wholesale product to meet the needs of the OLOs is indeed wholesale input DIA. If URCA’s main objective is to meet these needs, the focus on wholesale input DIA services is justified.



2 Comments on Question 2: market definitions of WBA services

Consultation questions – Market definition

Q2. Please provide comments on URCA’s market definitions of WBA services as set out above. Please substantiate any responses with supporting evidence.

2.1 Comments on URCA’s views on demand-side substitutability

URCA has assessed whether wholesale DIA services are a demand-side substitute for

- a) services listed in the BRO
- b) Wholesale Business Connectivity services and
- c) Retail Business Connectivity services

a) BRO services

With regards to BRO substitutability, URCA states that “both {BRO and wholesale DIA} offer an element of Internet connectivity and provide customers (i.e., OLOs) with a wholesale input that can be used, in conjunction with other services, such as WLLs, to deliver retail broadband services to end-users.” However, URCA does not say if it considers services currently listed in the BRO to be demand-side substitutes for WBA services or if so/not so, why/why not. If wholesale DIA is defined as wholesale input DIA, BRO services are not a substitute because OLOs cannot customise BRO services in a meaningful way to differentiate their own services

b) c) Business Connectivity services

CBL agrees with URCA that business connectivity services alone are not demand-side substitutes for wholesale input DIA or resale DIA. This is because WBC do not include internet connectivity.

It is worth noting that like for DIA services, there is no distinction between retail and wholesale business connectivity services inherent to the products supplied by CBL. As with DIA, what constitutes a retail or a wholesale service depends solely on URCA’s definition. URCA has not provided such definition.

URCA has not tested if retail DIA services are a substitute for resale DIA services. This is consistent with CBL’s assumption that the proposed remedies refer to wholesale input DIA.

Currently, resale DIA and retail DIA services are identical services and therefore perfect substitutes on both supply and demand sides. This suggests that resale DIA services cannot be part of the wholesale DIA market URCA is proposing to regulate in its consultation document.

This view is in line with “the international mainstream” as expressed, for example, by the European Group of Regulators:

“... the new entrant cannot offer a differentiated product (end user product with different technical characteristics), this product is to be classified as “**Simple Resale**” and not bitstream access...”³

³ ERG Common Position on Bitstream Access, ERG (03) 33rev2, p.7



2.2 Comments on URCA's views on supply-side substitutability

CBL agrees with URCA's statement that a leased line alone is not a substitute for DIA. CBL is also of the view that DIA uses similar network inputs as non-dedicated internet access.

2.3 Comments on URCA's product market definition

URCA has not defined the WBA market in terms of services.⁴ In this document, URCA mentions in passing that the WBA market includes broadband resale, DIA and "high-capacity Internet access".

If the WBA is defined to include broadband resale, CBL disagrees with URCA's view that "that wholesale DIA services (as referred to in Section 3.2.1 above) form part of the WBA market".

Broadband resale services of any kind are not a demand substitute for wholesale input DIA services because OLOs cannot customise BRO services in a meaningful way to differentiate their product.

⁴ In its 2018 market review, URCA defined the "wider" WBA market services as "copper and fibre-based WBA services (currently offered by BTC); and cable-based WBA services (currently offered by CBL)". This definition does not provide any clue whatsoever with regards to the service scope of the WBA it has analysed. It merely describes access technologies which are included. In this sense, CBL wonders why broadband services provided over fixed wireless access connections are not part of the WBA market URCA has defined.



3 Comments on Question 3: SMP designations in WBA markets

Consultation questions – SMP designations

Q3. Please provide comments on URCA’s reconfirmation of the prevailing significant market power (SMP) designations in the WBA markets in The Bahamas. Please substantiate any responses with supporting evidence.

CBL does not consider it has SMP in the WBA markets in the Bahamas since it must compete for every customer with BTC. Furthermore, there is significant countervailing buyer power in the business market for broadband services.

Notwithstanding, CBL understands that a plausible regulatory case resulting in CBL’s and BTC’s SMP designation could be presented.

It is unclear why BTC has not been designated with SMP in Geographic Market 1 despite its 45% traffic share if it is charging the same DIA prices in as in Geographic Area 2, where it has been designated with SMP.



4 Comments on Question 4: competition problems or market failures resulting from SMP in wholesale DIA

Consultation questions – The need for ex-ante regulation of wholesale DIA services

Q4. 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 of the provisioning of wholesale DIA services.

4.1 Comments on potential competition problems

Excessive Charging

According to URCA, “CBL and BTC (respectively), have the incentive and ability to engage in excessive charging”.

Having control over essential network infrastructure facilities does not necessarily imply that CBL has the incentive or ability to engage in excessive pricing.

CBL and BTC own extensive telecommunications networks, which overlap almost perfectly in Geographic Market 1. As a result, CBL’s pricing is constrained by BTC, who has the incentive and ability to compete with CBL.

Refusal to Supply.

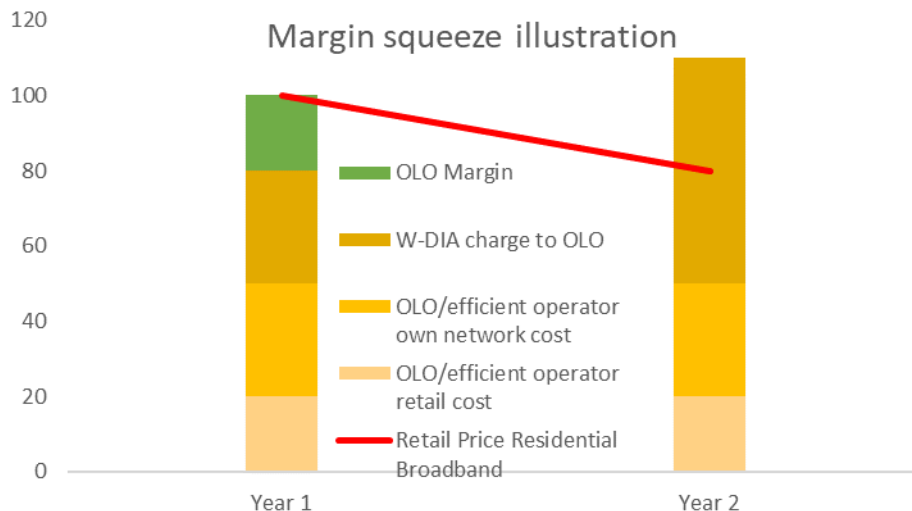
A good indicator of how unlikely refusal to supply would be going forward is that it has not happened in the past, as far as CBL is concerned. Given how unlikely it is, CBL believes that URCA should explore less onerous instruments than the ex-ante remedies it is proposing to deal with refusal to supply.

Refusal to supply is particularly unlikely because CBL makes no difference between retail and wholesale DIA. CBL cannot know if a DIA customer will use its service in to surf the www, or to attach a fixed-wireless access connection to it, thereby converting it into a network input.

Margin Squeeze

The chart below illustrates the concept of margin squeeze described by URCA, whereby a vertically integrated operator with SMP in both the retail market for e.g. residential broadband connections and the wholesale DIA market drives retail prices down and/or wholesale charges up, leading to a squeeze, i.e. reduction of OLO’s profit margin.





As there is only one product and one price for DIA regardless of who buys the service, an increase in prices for DIAs sold to OLOs would automatically be an increase in prices to non-OLOs. The latter would reduce CBL's revenue and margin as CBL would lose customers and incremental revenue from the price increase would not compensate for it. OLO's account for a negligible part of both the retail and the wholesale market. As a result, CBL has no incentive to margin squeeze if there continues to be only one DIA price, regardless of the customer buying it.

4.2 Comments on URCA's assessment of potential market failures with a specific focus on wholesale DIA services

Excessive Charging

URCA's justification of CBL's SMP designation in the retail broadband market rests primarily on its opinion that there is no evidence of "BTC successfully gaining market share in recent years, which URCA sees as a barrier to expansion." Many telecommunications markets that are considered competitive (e.g. retail mobile markets in many countries) present stable market shares. Whilst CBL has made significant investments in the network and other infrastructure supporting its internet services and ensuring the highest quality standards are met, the degree of possible service innovation in broadband markets is limited.⁵

URCA's claim that "both SMP operators also have the incentive to raise prices" because it is profitable for them to do so does not hold if, as is currently the case, no distinction is made between OLOs and non-OLO pricing.

URCA provides no specific evidence supporting its claim, but rather presents its own, assumption-based SMP decision as evidence.

Refusal to supply

Since it is rather vague (even more so by the presumed standards of a section entitled "Assessment of *specific* market failures"), CBL cannot comment on URCA's claim that "there have been concerns around potential refusal, by the SMP operators, to supply wholesale DIA services".

CBL has no knowledge of any refusal to supply complaints concerning itself and URCA has made no attempt to contact CBL to resolve any specific "potential refusal" matter. It could easily have done so

⁵ Innovation is often used by mainstream regulators in conjunction with technological aspects, e.g. the migration of ATM to Ethernet based solutions. It refers to a lesser degree to retailing innovations, for which there is limited scope.



and could certainly do so in the future, which would be more efficient than resolving refusal to supply issues via onerous ex-ante obligations.

Margin squeeze

Unless it is impossible for there to be a margin squeeze, URCA's claim that there "may be a margin squeeze" is true. However, the mere possibility of a margin squeeze test does not support the need for onerous ex-ante regulations as proposed by URCA. Competition law could easily address this potential issue as and when it arises.

Furthermore, URCA's proposed remedy of setting wholesale DIA prices at cost, does not preclude the possibility of a margin squeeze. It does not even reduce the likelihood of a margin squeeze occurring.

4.3 Comments on Specific Concerns raised by OLOs according to URCA

The table below summarises the specific concerns raised by OLOs according to URCA, and CBL's comment on each.



OLO Name	Concern Raised	URCA's assessment	CBL's comment
Bahamas WiMax	Margin Squeeze "CBL's current DIA pricing structure" does not allow it to compete with over-subscription ratios below 15:1 or 20:1, beyond which QoS declines according to the OLO.	"To URCA, these examples indicate that an OLO, regardless of how efficient it is, would be unable to compete with either BTC or CBL in terms of price, using their current unregulated wholesale DIA offerings as an input.	It is unclear how URCA has reached its conclusion. In order come to a reasoned view, URCA would need to assess e.g. existing retail over-subscription ratios.
Wicom	Excessive Pricing "wholesale DIA prices charged by BTC and CBL are excessive "	Based on unspecified benchmarking carried out by the OLO, URCA concludes "that the significant reductions in the IP Transit cost {between 1998 and 2015} have not been reflected in any DIA price reductions {within this URCA review period} in The Bahamas as it has elsewhere {unspecified places} "	It is unclear how URCA has reached its conclusion and why it has not presented the evidence it is relying on. Unless it is presented, CBL can obviously not comment on it. It is worth noting that the cost of IP transit represents a small portion of the total cost of a DIA connection. CBL has reduced the DIA price in the period the evidence on IP cost reduction refers to.
Coakster	Refusal to Supply a) BTC's failed to respond to "a request to subscribe to wholesale DIA services." b) "BTC failed to provide updates regarding other elements of wholesale access (tower sharing).	"Such behaviour could possibly constitute constructive refusal to supply."	Regarding a) BTC's failure to respond to a request to provide DIA: If the request was reasonable and BTC had infrastructure in place to supply, CBL agrees with URCA. However, CBL does not have enough information to express a view. URCA has not presented any evidence of CBL refusing to supply. Regarding b) CBL is aware of BTC refusing to supply tower access to Aliv, thereby endangering Aliv's competitive position and making it impossible for Aliv to meet its coverage obligations where it was forced to rely on towers only BTC was entitled to supply. CBL understands that URCA was slow to instruct BTC to provide tower access to Aliv. However, the Competition Guidelines (ECS COMP. 7 - Abuse of a dominant position) seem to provide the basis for doing so. It is unclear why URCA needs further regulation to force operators to respond to reasonable requests.

The specific concerns raised by OLOs mainly relate to DIA. Therefore, CBL believes it is plausible for URCA to focus on DIA services.



5 Comments on Question 5: need for ex-ante regulation of wholesale DIA

Q5. Please provide comments on URCA's preliminary views on the need for ex-ante regulation of wholesale DIA services.

Please substantiate any responses with supporting evidence.

CBL appreciates URCA's consideration of proportionality and agrees with URCA's view that ex-ante regulation can come at a high cost, which may outweigh its benefits, especially in the Bahamian telecommunications market.

CBL believes that **less onerous alternatives to onerous ex-ante regulation should be explored**, such as:

- commercial negotiation, especially given the existence of a very small number of OLOs ;
- enforcement of licence conditions by URCA and or;
- enforcement of competition law (ex-post regulation).



6 Comments on Question 6: proposed SMP remedies in the WBA service markets

Consultation questions – Proposed SMP remedies

Q6. Please provide comments on URCA’s preliminary views on the proposed SMP remedies in the WBA service markets.

URCA proposes that:

- BTC and CBL shall be subject to an obligation to **amend their reference offers to include wholesale DIA services** (in line with the service description in Section 3.2.1), which shall then be reviewed and approved by URCA; and
- the charges contained in these reference offers shall be subject to cost-based regulation (i.e., wholesale DIA service charges shall be reflective of the **efficiently incurred underlying costs of these services**, including a reasonable return on those costs).

6.1 Comments on Wholesale DIA services to be included in reference offers

In CBL’s view, the term “wholesale DIA services” should be defined more accurately. URCA should not regulate resale DIA. A resale offer does not address a bottleneck in an OLO’s network. It is the entire bottle. As a result, an OLO has no opportunity to differentiate its product or to innovate. Resale DIA, does not offer remedy to the competition issue of lacking innovation. Furthermore, it potentially facilitates inefficient market entry if a reseller can purchase resale DIA at low prices and profitably resell them despite operating inefficiently.

6.2 Comments on setting reference offer charges for DIA

URCA suggests “BTC and CBL’s charges for wholesale DIA services shall be cost-based”. URCA promises to be more specific about what this means in a separate document to be released at an unspecified date. Depending on the chosen approach and quality of inputs and processing thereof, a cost calculation can provide a wide range of results.

This implies equally large risks affecting CBL’s current and future investments, whose returns URCA could impact arbitrarily via the prices it sets based on its choices⁶.

It is also worth noting that the required cost calculations are complex, time-consuming, and expensive if URCA adheres to best practice cost modelling. To CBL’s knowledge URCA does not have any relevant hands-on experience with complex cost modelling, further increasing investment risk for CBL.

Finally, URCA is currently forcing CBL to subsidise its Basic TV package, i.e. selling it substantially below cost. A contribution towards this subsidy needs to be taken into account when setting cost-based reference prices.

⁶ Most costs related to a DIA product are allocated fixed and common costs for which there is no causal relationship and therefore its allocation is entirely based on judgment, i.e. arbitrary. These costs include, e.g. ducts and fibres, which convey a range of services but that are not traffic sensitive.



Respectfully submitted

On behalf of CBL

RESERVATION OF RIGHTS

CBL expressly reserves all rights including the right to comment further on any and all matters herein and categorically states that CBL's decision not to respond to any matter raised herein in whole or in part, or any position taken by CBL herein does not constitute a waiver of CBL's rights in any way.

