



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

## **Final Determination**

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

**ECS 13/2020**

**Issued: 8 September 2020**

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# 1. Introduction

In this document, the Utilities Regulation and Competition Authority (“URCA”) issues its Final Determination on specific significant market power (“SMP”) obligations relating to Wholesale Fixed Access (“WFA”) services in The Bahamas. As explained in the Preliminary Determination,<sup>1</sup> URCA first considered the wider set of WFA services, including wholesale business connectivity services and wholesale broadband access (“WBA”) services, before identifying a need to focus on WBA services and, in particular, wholesale Dedicated Internet Access (“DIA”) services.

URCA issued the Preliminary Determination for this consultation on 27 April 2020. That document had the following objectives:

- to set forth URCA’s preliminary findings on whether there is a need to impose additional SMP obligations in the WBA service market(s) in The Bahamas (i.e., whether BTC and CBL, as dominant providers in the respective geographic markets for WBA services, should be required to provide wholesale DIA services on regulated terms), and the rationale for URCA’s proposed intervention;
- to set forth URCA’s specific proposed SMP obligations for the market(s); and
- to invite comments from stakeholders on URCA’s proposals.

The first round of responses to the consultation were due on 27 May 2020. The second round of responses were due on 30 June 2020. In addition to seeking general comments and/or views on URCA’s preliminary findings, URCA’s consultation paper sought respondents’ views on six questions:

**Consultation Question 1:** Please provide comments on URCA’s focus on wholesale DIA services in this Preliminary Determination.

**Consultation Question 2:** Please provide comments on URCA’s market definitions of WBA services as set out above.

**Consultation Question 3:** Please provide comments on URCA’s reconfirmation of the prevailing SMP designations in the WBA markets in The Bahamas.

**Consultation Question 4:** 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.

**Consultation Question 5:** Please provide comments on URCA’s preliminary views on the need for ex-ante regulation of wholesale DIA services.

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

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<sup>1</sup> ECS 04/2020, available at: <https://www.urcabahamas.bs/wp-content/uploads/2020/04/Preliminary-Determination-Review-of-Wholesale-Broadband-Access-ECS-04-2020-1.pdf>

Seven parties submitted initial responses to the consultation, namely:

- Bahamas Telecommunications Company (“BTC”);
- Cable Bahamas Limited (“CBL”);
- Last Mile Communications Limited (“Bahamas Wimax”)
- Coakster Wireless Limited (“Coakster”);
- Global Nexus Limited (“Global Nexus”);
- Secure Hosting Limited (“Secure Hosting”); and
- Wicom Bahamas Limited (“Wicom”).

BTC and Global Nexus made additional submissions as part of the second round. These additional submissions commented on aspects of the initial consultation responses submitted by the other parties. URCA thanks respondents for their written submissions and participation in the consultation process.

In this document, URCA replies to the main comments it has received, followed by its final position on each issue on which it has consulted. In so doing, URCA 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. Under the Communications Act, 2009 (“Comms Act” or the “Act”),<sup>2</sup> URCA is responsible for licensing undertakings that establish, operate or maintain an electronic communications network or provide a carriage service, including by use of any radio spectrum. The Comms Act also provides, in section 5 of the Act, guidelines that URCA must follow for issuing regulatory and other measures (including Determinations). The Comms Act gives URCA wide-ranging powers which are to be exercised in full compliance with the principles of good regulation.

URCA is required to introduce regulatory and other measures which are efficient and proportionate to its purpose and 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 requirements, having due regard to the costs and implications for affected parties.<sup>3</sup> However, as a general principle, market forces should be relied upon as

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<sup>2</sup> Available at <https://www.urcabahamas.bs/wp-content/uploads/2016/08/The-Communications-Act-2009-.pdf>

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

much as possible and regulatory measures should be introduced by URCA only when necessary. 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., a position of SMP).

In ECS 09/2018, URCA reviewed, amongst others, the competitive dynamics in the retail fixed broadband and WBA markets and confirmed BTC's and CBL's SMP positions in their respective geographic markets for WBA services.<sup>4</sup>

Within ECS 09/2018 and URCA's Annual Plan for 2018, URCA also stated its intent to conduct a review of WFA services, including a consideration of whether other regulated WFA services should also be introduced in addition to the broadband resale offer ("BRO"). This question has been posed, in part, due to industry feedback received during the BRO review that URCA's existing ex-ante regulatory remedies and specifically, the regulated wholesale product set offered by BTC and CBL, are inadequate.

Building on the review set out in ECS 09/2018, URCA, during 2019, collected further feedback from key stakeholders, particularly via discussions with access seekers in The Bahamas<sup>5</sup> and subsequent information requests it has sent to Licensees. These access seekers are hereafter referred to as Other Licensed Operators ("OLOs") and include all licensed providers other than BTC and CBL. Based on this feedback, URCA concluded that this review should focus on wholesale DIA services. In particular, URCA understands that OLOs are predominantly buying unregulated WBA services (most notably wholesale DIA services) in order to support the provision of end-to-end retail broadband services, as well as other connectivity services.<sup>6</sup> The OLOs expressed particular concerns regarding the pricing and provisioning of DIA services.

As such, this review has focused on assessing whether there is a need for URCA to impose additional SMP obligations on BTC and CBL beyond the current BRO regulation and, if so, what form of regulatory obligations are required on wholesale DIA services.

For the avoidance of doubt, the focus on wholesale DIA services and thus the WBA market within this document does not imply that URCA may not review the need to impose regulation on other WFA services (such as wholesale business connectivity services, bitstream and/or passive infrastructure access services) in the future. However, based on the industry feedback received at the time, URCA currently sees a heightened need to focus at this time on wholesale DIA services.

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<sup>4</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>5</sup> This included, amongst others, the respondents to this consultation process (ECS 04/2020), listed above.

<sup>6</sup> URCA recognises that OLOs also buy other wholesale inputs, in particular Wholesale Local Loops ("WLLs"), from BTC and CBL. As discussed further in Section 3.2, URCA considers these services outside of the scope of this review process.

## 1.2 Procedures for Making a Determination

URCA has wide-ranging powers under the Comms Act, especially as it relates to SMP Licensees. In particular, URCA's power to impose obligations on SMP Licensees 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.

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 in 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 of the said 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. A person whose rights or interests may be materially adversely affected or prejudiced by the proposed regulatory or other measure shall have sufficient interest. Section 13 of the Comms Act establishes that a regulatory and other measure is of public significance if it can lead to, inter alia, a significant impact on persons carrying on activities in those areas where URCA has functions under the Comms Act.

URCA considers the regulatory and other measures consequential to this consultation are of public significance. As such the consultation provided an opportunity for members of the public, Licensees, and other interested parties to submit written comments to URCA.

## 1.4 Structure of the Remainder of this Document

The remainder of the document is structured in 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; and
- Section 4 presents the conclusions and next steps.

## 2. URCA's Final Determination

### **WHEREAS,**

- (i) Section 39(1) of the Communications Act 2009 ("Comms Act") 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 Comms Act, 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>7</sup>), containing criteria relating to the definition of markets in the electronic communications sector, and against which market power may be assessed;
- (iii) Sections 40 and 5(b) of the Comms Act, respectively, empower URCA to introduce regulatory measures where in its view, *"... market forces are unlikely to achieve the electronic communications policy objectives within a reasonable timeframe"* and, in these circumstances, *"URCA may impose specific conditions on Licensees determined to have SMP in the relevant market or relevant markets, including obligations relating to – (a) cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems"*;
- (iv) Section 99(1)(a) and (b) of the Comms Act empowers URCA to make determinations in respect of any regulatory or other measures it proposes to introduce;
- (v) Pursuant to Section 5(a), (b), (c) and (d) of the Comms Act, containing guidelines that URCA must follow for issuing regulatory and other measures;
- (vi) Having regards to the SMP findings of BTC and CBL in the provisioning of WBA services, set out in ECS 09/2018; and
- (vii) URCA, having considered all submissions made by Licensees as part of this review process;

**NOW URCA HEREBY DETERMINES** as follows:

### **1. Confirmation of Wholesale Broadband Access Market Product Scope**

For the reasons explained in Section 3 below, URCA confirms its 2018 findings (ECS 09/2018) from its market review of wholesale broadband access ("WBA") services in The Bahamas.

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<sup>7</sup> Also referred to as URCA's SMP Guidelines.

Based on its review of the available evidence, URCA concludes that the relevant product and geographic markets for the provision of WBA services in The Bahamas are as follows:

- a. Product Scope. The relevant wholesale market for broadband services provided at a fixed location includes the following products/services: copper and fibre-based WBA services (currently offered by BTC); cable-based WBA services (currently offered by CBL); and fixed wireless access (“FWA”)-based WBA services.

All wholesale Dedicated Internet Access (“DIA”) services fall within the relevant product scope of the WBA market. This includes end-to-end services, which provide connectivity to the customer premises, and “PoP-based” wholesale DIA services, which provide connectivity as far as an OLO’s Point of Presence (“PoP”).

- b. Geographic Scope. Consistent with ECS 09/2018, URCA has defined two geographic markets:
  - Geographic Market 1 - The islands where BTC and CBL both have network infrastructure enabling them to offer WBA 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 WBA services).

## **2. Confirmation of SMP Determination**

Based on its review of the available evidence, URCA has assessed the competitive dynamics in each of the relevant markets (as identified above).

Given this, consistent with ECS 09/2018, URCA has determined that:

- i. CBL holds SMP in the market for WBA services in Geographic Market 1.
- ii. BTC holds SMP in the market for WBA services in Geographic Market 2.

## **3. Obligations Imposed on SMP Licensees**

Given the position of economic strength held by BTC and CBL in the respective relevant markets and in light of the potential challenges to competition which URCA’s review has indicated may arise, URCA has determined that the following obligations shall apply to both SMP Licensees:

- i. BTC and CBL shall continue to 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 wholesale DIA products. At a minimum, the product offered by each Licensee must cover the service scope and configurations offered by the respective SMP operators at the date this Final Determination is published. However, both Licensees are also required to meet any reasonable request from other Licensees for alternative bandwidths or service specifications of their wholesale DIA services.
- iii. Within two months of the date on which this Final Determination is published, BTC and CBL shall submit to URCA for approval their proposed price and non-price terms for their PoP-based wholesale DIA services.

The proposed service offerings should include, at the minimum, the following:

- the pricing of the PoP-based wholesale DIA services in the form of a table setting out any recurring and non-recurring wholesale charges for each bandwidth of PoP-based wholesale DIA service currently offered; and
- the non-price terms and conditions including, at the minimum:
  - a detailed description of the PoP-based wholesale DIA service offerings;
  - service ordering and delivery process and timings;
  - quality of service standards (including key performance indicators and financial compensation owed to access seekers should the SMP operator fail or refuse to meet such standards);
  - billing and payment requirements;
  - details of a dispute resolution scheme; and
  - operations and maintenance procedures.

As part of this submission, BTC and CBL shall:

- demonstrate that each proposed tariff is reflective of the efficiently incurred costs (including a reasonable return on those costs) of providing the services in question; and
- provide a detailed justification for any differences in the proposed non-price terms and conditions of the wholesale DIA service offerings to those of their other regulated wholesale services.

For the avoidance of doubt, BTC and CBL will be responsible for ensuring that the terms and conditions of the PoP-based wholesale DIA services are compatible with the terms and conditions of BTC's and CBL's other regulated wholesale services, 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. All Licensees will then be given the opportunity to comment on the proposed terms and conditions for the regulated wholesale DIA services.
- v. After assessing the proposals and taking into account feedback from Licensees, URCA will then conclude as to whether it considers these terms to be reasonable and consistent with URCA's Access and Interconnection Guidelines and other relevant documents,<sup>8</sup> and the proposed charges cost-reflective. If this is not the case, URCA will intervene to set the terms and conditions it considers reasonable (including cost-based charges).
- vi. BTC and CBL shall then publish the approved tariffs and non-price terms and conditions on which their PoP-based wholesale DIA services<sup>9</sup> 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).

For the avoidance of doubt, the existing BRO obligations set out in ECS 09/2018 remain in place.

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<sup>8</sup> Such as, for example, the Comms Act, the current reference offers, and the relevant licence conditions.

<sup>9</sup> As further discussed in the Preliminary Determination, URCA notes that the ways in which wholesale DIA services are used in The Bahamas fall into two categories: (i) an "end-to-end" service (i.e., providing connectivity to the customer premises), which allows OLOs to offer retail DIA services to their customers; and (ii) a "PoP-based" service which provides connectivity 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 Broadband Access services. In line with OLO's current demand for wholesale DIA services, URCA's requirement for the SMP operators to provide pricing proposals for wholesale DIA services applies only to PoP-based DIA services.

### 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.

In order that this document provides a useful and succinct assessment of the parties' views provided throughout the consultation process, URCA only discusses in this section first round responses and those second round responses which provide further material for discussion (for example, critical reviews of other parties' submissions which are backed by arguments or evidence, or the expression of further opinions or facts not already submitted as part of a first round response). Where the parties have within their second round responses simply restated their arguments from their first round response, or dismissed the arguments of others without any reasoning, URCA has not, for each consultation question, provided a lengthy summary of those statements along with the reasons they do not merit further discussion.

#### 3.1 General Comments

BTC, Coakster, and Wicom provided general comments as part of their first round responses.<sup>10</sup> BTC also provided general comments as part of its second round response.

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

As part of its first round response, BTC argued that the Preliminary Determination is not in line with the principles of fairness and non-discrimination; that the market review set out in the document was incomplete; and provided criticism of claims made by the OLOs which were described within. It also argued that the SMP remedies proposed by URCA in the Preliminary Determination are disproportionate and that the specific regulated services proposed by URCA are not appropriate. Although BTC explicitly sets out its comments on these issues under a "General Comments" section of its first round response, URCA notes that these comments are used to support its answers to specific consultation questions. As such, these comments are discussed in the context of the specific consultation questions to which they relate.

As part of its second round response, BTC commented on the lack of evidence in the OLOs' first round responses. BTC noted that it would be inappropriate for OLOs to put forward new evidence for consideration by URCA in their second round responses:

- BTC noted that Coakster did not provide evidence or an explanation in relation to its margin squeeze reference, including a lack of specificity in its comment regarding the cost of bandwidth.

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<sup>10</sup> Other Licensees provided comments which were not presented within responses to specific consultation questions. However, to the extent that these were repetitions of statements made in response to specific consultation questions they are not repeated in this section.

BTC argued that URCA should not consider such unsubstantiated claims as evidence for the purposes of designing regulatory policy.

- In reply to Global Nexus's first round response, BTC again noted a lack of supporting evidence from Global Nexus to justify its proposals for increased regulatory intervention, which included reporting requirements and structural separation. BTC considered that the impact of Global Nexus's proposals would be significant and unnecessary.

BTC also disagreed with Global Nexus's proposal to introduce interim rates for wholesale DIA services on the basis that no discussion of interim rates was included in the Preliminary Determination and so interested parties have not been able to comment on any possible methodologies that might be used to set such rates. BTC suggested that rates should instead be set in the context of a follow-up proceeding as originally proposed by URCA in the Preliminary Determination.

- BTC was also critical of Bahamas Wimax's first round response, commenting that its request for URCA to regulate WLLs, which BTC disagrees with, in addition to wholesale DIA services, was not substantiated with reasoning or evidence.
- BTC made a similar point with respect to Secure Hosting's submission, as it too did not submit any explanations or evidence, beyond a comment regarding what it considers to be high prices, to support its request for URCA to assess whether there was a need to regulate WLLs.
- In response to Secure Hosting's claim regarding the alleged poor quality of service offered to OLOs, BTC explained that without specific evidence it would be unable to comment further and asserted that OLOs cannot blame all quality of service issues on SMP operators.
- In relation to Wicom's first round response, BTC argued that the costs of DIA and IP transit services in other jurisdictions do not represent a suitable benchmark against which to assess wholesale DIA prices in The Bahamas. BTC explained that factors including population density and traffic volumes may vary significantly between jurisdictions, implying that the cost of wholesale DIA and other connectivity services should not necessarily be expected to be comparable. BTC further noted that Wicom has not provided any evidence or explanation as to why DIA prices in The Bahamas are excessive, nor has it made comparisons to the cost of DIA services in the Caribbean region, which BTC considered would be a more appropriate point of comparison.

BTC also explained its view that Wicom's proposals for benchmark-based DIA wholesale rates were not based on a consideration of the cost of providing wholesale DIA services and should therefore not be used to inform regulated wholesale rates.

In response to clarification questions issued by URCA, BTC disagreed with URCA's procedure for clarifying statements made in the consultation responses. That is, BTC claimed that without allowing a further round of comments, any party could submit arguments without facing challenge from other parties, therefore violating the principles of transparency, fairness, and non-discrimination.

Finally, in response to the aforementioned clarification questions, BTC explained that URCA had misinterpreted an argument in BTC's first round response relating to IP transit prices. BTC provided further explanations as to the significance of network costs for a Bahamian provider of DIA services.

### **Coakster's comments**

As part of its first round response, Coakster explained that, as a result of the prices charged by the SMP operators for wholesale access services, OLOs offer much lower speeds than the SMP operators. Coakster argued that if OLOs are to offer higher speeds, they must either use what Coakster considers to be significant contention ratios, at the expense of quality of service, or charge higher prices. To support its explanation, Coakster provided a comparison of bandwidth-adjusted retail prices (i.e., expressed on a per-Mbps basis) for BTC, CBL, and Coakster.<sup>11</sup> This showed that bandwidth-adjusted retail prices faced by Coakster customers were at least ten times those offered by the SMP operators. Coakster acknowledged that to some degree, OLOs operating in "off-grid" locations would inevitably face higher bandwidth costs. However, it pointed out that ultimately it would be the end users in those areas that would be subject to the higher prices.

Coakster argued that the lower range of speeds available as part of its service offerings was not a result of the fixed wireless technology it used, but a direct consequence of the SMP operators' charges for the wholesale inputs it uses. However, Coakster did not elaborate on this further within its submission and in particular it did not discuss the extent to which retail prices are driven by the cost of any wholesale inputs, or provide a view as to what prices and speeds it might expect to offer if the cost of wholesale inputs were lower.

### **Wicom's comments**

As part of its first round response, Wicom argued that the wholesale DIA services offered by the SMP operators do not cater adequately for the needs of OLOs. Wicom explained that the availability of structured bandwidth pricing (for example, prices for a predetermined menu of bandwidth options) would help OLOs to plan for the growth of their businesses.

Wicom provided a comparison between DIA prices in The Bahamas and the United States<sup>12</sup> and argued this showed that the current prices of end-to-end wholesale DIA prices in The Bahamas are significantly higher than those available in the United States (even when controlling for bandwidth and/or distance). Wicom, therefore, argued that this casts doubt on whether such differences can be justified by underlying differences in the cost of providing these services. Wicom asked URCA to consider applying fixed per-Mbps rates for wholesale DIA services, set according to a benchmarking of these rates. Wicom did not provide any further explanation regarding the source of the pricing information, however; nor did it

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<sup>11</sup> The information provided by Coakster referred to copper- and fibre-based retail broadband services in the case of BTC and CBL, and for FWA-based retail broadband services in the case of Coakster.

<sup>12</sup> Wicom did not provide details of whether the pricing information it referred to related to wholesale or retail services. However, in the case of DIA services in The Bahamas, Wicom referred to "DIA for resale", which URCA understands to refer to end-to-end wholesale DIA services.

explain how the price and non-price terms of these services compared to the wholesale DIA services offered by BTC and CBL in The Bahamas.<sup>13</sup>

To support its view that wholesale DIA prices are not cost-reflective, Wicom also claimed that *“there has been no significant reduction in data cost within the last 10-15 years when compared to reduction in bandwidth prices within the data centers directly connected to the Bahamas subsea fiber cables”*.<sup>14</sup> However, Wicom provided no supporting data or source information to enable URCA to evaluate Wicom’s assessment.

### **URCA’s responses to comments received and final determination**

URCA notes **BTC’s** various concerns set out in its first round response. However, as explained above, the main arguments contained in BTC’s first round response were used to support its answers to specific consultation questions. As such, URCA responds to BTC’s specific concerns in the context of the respective consultation questions.

URCA notes BTC’s general concerns regarding a lack of evidence provided by OLOs in the first round responses. URCA agrees that arguments which are unsubstantiated by evidence, or requests for extension of regulations to include additional services without any supporting explanation, cannot be taken into account for the purposes of determining whether ex-ante regulation or other regulatory intervention would be appropriate. URCA also agrees that parties should be given the opportunity to comment on evidence and arguments put forward by others during the consultation process. It is for this reason that URCA urged parties to provide clear explanations and substantiate their responses with supporting evidence in the first round of this consultation.

URCA also notes that BTC has raised concerns in respect of what it considers to be unsubstantiated allegations of anticompetitive behaviour made by OLOs. In particular, it raised concerns that such unsubstantiated allegations should not form the basis for ex ante regulatory intervention. URCA understands these concerns. It would, therefore, like to assure all parties that the purpose of including, in the draft determination, any descriptions of the OLOs’ concerns was to explain how URCA identified particular areas of focus within the WBA market. As such, these complaints have no bearing on the outcome of this consultation process. Therefore, URCA has not presented an assessment of BTC’s comments on these matters, or any party’s responses to same, within this Final Determination. URCA may however launch a separate, ex-post competition investigation into the provisioning of WBA services at a future point if, following the implementation of the measures set out in Section 2 of this Final Determination, URCA receives formal complaints from OLOs in relation to alleged anti-competitive behaviour by SMP operators in providing these services.

URCA notes BTC’s criticism of Wicom’s approach to benchmarking DIA prices in different jurisdictions and of its proposal to use benchmarking data to determine prices. URCA agrees that any benchmark information should be used carefully and provides its view on Wicom’s proposal later in this subsection.

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<sup>13</sup> This information was requested by URCA following receipt of Wicom’s submission.

<sup>14</sup> Page 2 of Wicom’s first round response to ECS 04/2020.

URCA further notes BTC's concerns in relation to the use of further evidence submitted by parties in response to URCA's clarification questions. URCA reassures BTC and other parties that the purpose of issuing these clarification questions was only to allow URCA to verify the validity of arguments, and assess supporting explanations for unsubstantiated requests and claims, which were made in the first round responses. URCA notes, however, that all the parties were invited to submit additional supporting evidence during the second round of consultation, as per the standard consultation procedure, in order to counteract or support arguments made by other parties in the first round responses. This means that any evidence submitted in response to URCA's clarification questions is treated in the same way as the second round consultation responses. In any case, URCA did not receive any supporting evidence in response to its clarification questions which changed its views from those set out in the Preliminary Determination.

Regarding BTC's explanation of its arguments around the significance of network costs, URCA thanks BTC for this clarification and confirms that this does not impact URCA's interpretation of BTC's arguments or affect URCA's resulting conclusions.

URCA notes **Coakster's** concerns regarding its ability to compete with BTC and CBL on speeds and price. However, Coakster does not provide any evidence of the underlying costs faced by Coakster in providing the service, or even information relating to its own contention ratios relative to typical contention ratios. As a result, it is unclear to what extent the higher prices charged by Coakster are a result of high wholesale input costs.

URCA notes **Wicom's** explanation as to how a menu of wholesale DIA prices based on structured bandwidths might be beneficial to OLOs and help to reduce uncertainty. URCA's SMP remedies set out in this Final Determination take this suggestion into consideration.

However, when considering the appropriate charges for wholesale DIA services in The Bahamas, URCA has concerns around the relevance and comparability of DIA prices charged in other jurisdictions. URCA is of the view that Wicom's approach does not provide a convincing case for rates to be set based on a benchmarking exercise, and it does not, in any case, consider that Wicom's analysis is sufficiently transparent to form the basis for any regulated charges. In particular, it is not possible for URCA to assess whether Wicom has made any relevant adjustments to ensure benchmarked rates from other jurisdictions are comparable with each other and with the relevant market in The Bahamas. In the absence of any explanation from Wicom, URCA is unable to consider this evidence in its assessment. URCA notes that Wicom also provided no supporting data for its other argument that the reduction in bandwidth prices over time observed elsewhere is not reflected in BTC's or CBL's wholesale charges. URCA is therefore unable to take this into account in its Final Determination.

## 3.2 Focus on wholesale DIA services

### Consultation question – 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.**

As part of their first round consultation responses, BTC, CBL, Bahamas Wimax, Global Nexus, and Secure Hosting provided comments on this consultation question. None of the parties provided further comments on it as part of their second round responses.

#### **BTC’s comments**

As part of its first round response, BTC explained that it *“has serious concerns with this consultation process and the substantive regulatory rationale used by URCA to justify the proposed DIA Obligation”*.<sup>15</sup> BTC attributed these concerns to URCA’s communications with the OLOs, which it considers to have placed BTC at a disadvantage. That is, BTC alleged that URCA has taken information and arguments put forward by the OLOs at face value without requesting supporting information from the OLOs or giving BTC an opportunity to respond. BTC also alleged that the Preliminary Determination is simply a mechanism by which URCA seeks to address requests made by OLOs.

BTC further stated that it believes the Preliminary Determination should have been based on an *“updated and comprehensive market analysis”*<sup>16</sup> of retail and wholesale broadband access markets.

#### **CBL’s comments**

As part of its first round response, CBL described URCA’s *“proposals and the way it reaches its conclusions”* as *“exceptional and therefore well outside the international mainstream”*<sup>17</sup> and argued that the impact of some of the proposed measures, specifically regulation of end-to-end wholesale DIA services, might have a negative impact on CBL’s investment plans and the wider economy.

CBL also sought to clarify the distinction between retail and wholesale DIA services, as well as between the two types of wholesale DIA services described by URCA (end-to-end and PoP-based wholesale DIA services<sup>18</sup>), in order to explain its views on whether the focus of the Preliminary Determination was appropriate. CBL also explained that it considered URCA’s description of the differences between retail and wholesale DIA services was unclear, pointing out what it considered to be contradictory statements in the Preliminary Determination regarding service characteristics.

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<sup>15</sup> Page 10 of BTC’s first round response to ECS 04/2020.

<sup>16</sup> Ibid.

<sup>17</sup> Page 2 of CBL’s first round response to ECS 04/2020.

<sup>18</sup> The two types of wholesale DIA services described by URCA are: (i) an “end-to-end” service (i.e., providing connectivity to the customer premises), which allows OLOs to offer retail DIA services to their customers; and (ii) a “PoP-based” service which provides connectivity 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 services.



Despite this, CBL suggested that if URCA were to regulate any wholesale DIA services, it should focus only on PoP-based wholesale DIA services, as it recognised the specific situation in The Bahamas, where OLOs have not invested into their own core network infrastructure and thus relied on these DIA services as an input to providing their retail services. This, according to CBL, made any “mainstream” wholesale products (such as bitstream) impractical in The Bahamas and meant that instead PoP-based wholesale DIA services represented the “*only wholesale product to meet the needs of OLOs*”.<sup>19</sup>

CBL also argued that end-to-end wholesale DIA services are in a separate market to PoP-based wholesale DIA services and should therefore be treated separately.<sup>20</sup>

### **Bahamas Wimax’s comments**

As part of its first round response, Bahamas Wimax agreed with URCA’s focus on wholesale DIA services. Bahamas Wimax also shared its view that URCA should, in addition, review the provision of Wholesale Local Loop services (“WLLs”). However, it did not provide any supporting evidence or explanation to support this position.

### **Global Nexus’s comments**

As part of its first round response, Global Nexus agreed with URCA’s focus on wholesale DIA services. Global Nexus also suggested that URCA should assess whether there is a need to impose further ex-ante regulation, in relation to “*the services contained in BTC’s commercial wholesale offer*”, including WLLs.<sup>21</sup>

### **Secure Hosting’s comments**

As part of its first round response, Secure Hosting did not express a clear view as to whether the focus on regulation of wholesale DIA services was appropriate but explained that it “*believes that the focus on DIA services represent the beginning*”<sup>22</sup>, before setting out other services it would like to be regulated. URCA therefore understands this to mean that Secure Hosting was in agreement with URCA’s focus on wholesale DIA services.

Secure Hosting expressed a preference for regulation of “*some of the other services, specifically local loops*”.<sup>23</sup> Secure Hosting did not provide further information regarding the other services it referred to, but explained that its demand for regulated wholesale services was driven by a need to connect some of Secure Hosting’s customers to its data centres rather than to support the provision of retail broadband services.

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<sup>19</sup> Page 6 of CBL’s first round response to ECS 04/2020.

<sup>20</sup> CBL provides further arguments in its response to Question 1 of the Preliminary Determination but these relate to market definitions and the scope of the proposed remedies. These arguments are therefore addressed in the relevant sections of this document.

<sup>21</sup> Page 1 of Global Nexus’s first round response to ECS 04/2020.

<sup>22</sup> Page 1 of Secure Hosting’s first round response to ECS 04/2020.

<sup>23</sup> Ibid.

## URCA's responses to comments received and final determination

URCA notes **BTC's** concerns around the consultation process, in particular pertaining to the assessment of information submitted by OLOs in advance of the formal industry-wide consultation process and the starting point for the market review.

However, as explained in response to **BTC's** general comments, the information submitted by the OLOs prior to the consultation was only used to help URCA to identify areas of concern in the market and therefore the need for and focus of its review. The information was not used to come to any conclusions set out in the Preliminary Determination.

Regarding **BTC's** expectation of a comprehensive review of retail and wholesale broadband access markets, URCA restates that the purpose of this exercise, as set out within the Preliminary Determination, was only to clarify the market definition determined in the 2018 market review. URCA does not believe there was a need to undertake an entire market review from first principles given the very limited elapsed time since the 2018 market review. In particular:

- As stated in Section 4.1 of the Preliminary Determination, URCA has only clarified the treatment of wholesale DIA services in terms of whether these form part of the WBA market, which URCA considers they do. As such, there was not a need to conduct a full review of the WBA market, as suggested by **BTC**.
- URCA has not simply reapplied the 2018 market review results as suggested by **BTC**. Instead, URCA has used these as a starting point for the WBA market definition in order to then assess whether wholesale DIA services form part of that market. Even though such an assessment is not required, as set out above, URCA has further reviewed the current market structure, market characteristics and market shares of wholesale DIA services since these services are the main focus of this review.
- URCA further fundamentally disagrees with **BTC's** claim that the 2018 WBA market review only relied on the results from the 2014 review of retail broadband and other retail services. In particular, at the time, URCA built on the 2014 retail market definition which URCA reviewed based on 2017 information. It then defined the corresponding WBA market. URCA's 2018 SMP assessment was based on market data available at the time, covering the period after 2014 (i.e., not considered in the 2014 review).
- Lastly, in terms of approach, **BTC** may have (again) misunderstood the EC Recommendation it refers to in footnote 8 of its first round submission. Wholesale services are indeed an input to retail services and thus these service markets need to be defined consistently. However, even if the relevant retail market is considered not to be susceptible to ex ante regulation (i.e., competitive), this does not automatically imply that there is no need to review and/or regulate the relevant upstream wholesale markets. In reality, regulated access to prevailing wholesale bottlenecks is typically one of the drivers of retail downstream competition.

Concerning CBL's claim that regulating wholesale DIA services is not within the international mainstream, as set out in Section 3.2.2 of the Preliminary Determination and recognised by CBL (see above), URCA's decision to impose ex-ante regulation on these services is based on its assessment of the market environment in The Bahamas and the current wholesale services procured by OLOs as an input to providing retail broadband services. The focus on wholesale DIA services reflects the feedback received from OLOs at the time of preparing the Preliminary Determination (in terms of the wholesale products they procured and which they considered to be in need of further review by URCA). URCA recognises that there may be limited precedent for regulating wholesale DIA services; however, this in itself should not preclude URCA from reviewing these services and, where deemed necessary, imposing ex-ante regulation on these services, where these services are provided by operators who hold a position of SMP in the relevant product markets. Instead, the need to review wholesale DIA services in The Bahamas arises from OLOs procuring these services as a key input to delivering retail fixed wireless broadband services to their end customers. The importance of these wholesale services as an input to retail broadband services means that it is important for the PoP-based wholesale DIA services to be provided on reasonable terms.

As part of the market definition exercise, URCA then, based on its understanding of the various wholesale services offerings, differentiated between two types of wholesale DIA services (i.e., the PoP-based DIA service and the end-to-end wholesale DIA services). As described in more detail in the Preliminary Determination, both types of wholesale DIA services offer different functionalities and form inputs to different retail services in The Bahamas (i.e., PoP-based wholesale DIA services are used as an input to delivering retail fixed wireless broadband services, whilst end-to-end wholesale DIA services form an input to retail DIA services sold to business customers). URCA preliminarily concluded at the time (and remains of the view, as set out below) that both types of wholesale DIA services form part of the WBA service markets. However, as set out further in Section 3.6 below, URCA has decided, for now, to focus regulation on PoP-based wholesale DIA services. This is because these services are used by OLOs as an input to their retail broadband services, and URCA understands that OLOs have experienced issues in obtaining these wholesale inputs on reasonable terms.

Concerning CBL's (and BTC's) concerns on the potential adverse impact of the proposed regulation on SMP operators' investment incentives and the wider economy, URCA considers it unlikely that this would be the case. In particular, revenues from wholesale DIA services constitute only a small share of the SMP operators' total revenues. As such, any change in the charges for PoP-based wholesale DIA services is unlikely to fundamentally change the SMP operators' financial position and investment decisions. This is particularly the case for the latter given the SMP operators' networks are largely used to support their own downstream retail services (i.e., as they self-supply their own wholesale inputs), which means that investment decisions are unlikely to hinge on the prices SMP operators are able to charge OLOs for wholesale DIA services (and any associated revenues/returns from these services).<sup>24</sup> More importantly, in line with common practice, any regulated charges should be set at a level to allow SMP operators to earn a reasonable return on capital efficiently employed.

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<sup>24</sup> Given the small overall size of the OLOs and their prevailing low market share in the downstream retail market, URCA further expects any indirect impact on the SMP operators' overall returns from the regulated wholesale DIA charges to be limited.

URCA further notes the requests from **Bahamas Wimax, Global Nexus** and **Secure Hosting** to also review other wholesale services offered by BTC and CBL, in particular WLL services. URCA considers these services outside of the scope of this review process, which has focused on wholesale DIA services (in line with the initial feedback URCA received from the industry). Going forward, URCA may separately review other wholesale service markets (including WLL services) to assess the need for ex-ante regulation.

#### **URCA's Final Determination – Focus on wholesale DIA services**

Having considered the consultation responses received in relation to the focus on wholesale DIA services, URCA concludes that its focus set out in its Preliminary Determination remains valid.

### **3.3 Market definition**

#### **Consultation question – Market definition**

**Q2. Please provide comments on URCA's market definitions of WBA services as set out above.**

As part of their first round consultation responses, BTC, CBL, Bahamas Wimax, Global Nexus, and Secure Hosting provided comments on this question. None of the parties commented on it as part of their second round responses.

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

As part of its first round response, BTC disagreed with URCA's approach to defining the market for WBA services. In particular, BTC was of the view that the Preliminary Determination should have included a full market assessment in order to determine the relevant market, beginning at the retail level (i.e., defining the relevant retail service market to be considered).

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

As part of its first round response, and as explained in Section 3.2 above, CBL:

- -argued that end-to-end wholesale DIA services belong in a separate market to PoP-based wholesale DIA services and should therefore be treated separately (i.e., potentially jointly with retail DIA services). CBL's argument was based on the similarities between end-to-end wholesale DIA services and retail DIA services.
- was of the view that resale broadband is not a demand-side substitute for a PoP-based wholesale DIA service, and therefore that these two services cannot be in the same product market. According to CBL, it therefore follows that, if resale broadband services form part of the WBA market, PoP-based wholesale DIA services do not belong in that product market.

- agreed that wholesale business connectivity services are not a demand-side or supply-side substitute for wholesale DIA services.
- noted that URCA defined the WBA market based on access technologies (i.e., copper-, fibre- and cable-based WBA services), but does not specify the services covered within that market. CBL also suggested that fixed wireless access (FWA)-based WBA services should also form part of the WBA market.
- further argued that URCA’s WBA market was not a market, but a “*randomly defined*”<sup>25</sup> group of markets based on similar service characteristics. In CBL’s view, separate markets for these wholesale services should be defined and analysed.

### **Bahamas Wimax’s comments**

As part of its first round response, Bahamas Wimax agreed with URCA’s market definitions of WBA services, as set out in the Preliminary Determination.

### **Global Nexus’s comments**

As part of its first round response, Global Nexus agreed with URCA’s market definitions of WBA services, as set out in the Preliminary Determination.

### **Secure Hosting’s comments**

As part of its first round response, Secure Hosting agreed with URCA’s market definitions of WBA services, as set out in the Preliminary Determination.

### **URCA’s responses to comments received and final determination**

URCA notes the agreement of **Bahamas Wimax**, **Global Nexus** and **Secure Hosting** with URCA’s market definitions.

URCA has already addressed, as part of Section 3.2, **BTC**’s comment that URCA should conduct a full market assessment (including updated market definitions) in order to determine the relevant market, covering both retail and wholesale services.

Although URCA does not believe such an analysis is necessary, it also notes that even if a wider retail product market were to be defined, for example, covering both retail fixed broadband and MiFi internet (offered by Aliv) services, this would not result in any changes to the relevant product scope of the WBA market considered in this review. This is because the high capacities and dedicated connectivity characteristics associated with wholesale DIA services mean that no form of wholesale mobile service could act as a viable substitute for wholesale DIA services.

Concerning **CBL**’s comments on the WBA market definition, URCA addresses each comment in turn below:

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<sup>25</sup> Page 3 of CBL’s first round response to ECS 04/2020.

- URCA disagrees with CBL’s view that end-to-end wholesale DIA services should be treated separately to PoP-based wholesale DIA and other WBA services.
  - a. Whilst end-to-end wholesale DIA services and retail DIA services are similar in their functionality and require similar network infrastructure, they are not demand-side substitutes. This is because only Licensees can purchase end-to-end wholesale DIA services since they are wholesale services. Retail customers (hotels, banks, etc.) can only buy retail DIA services, even if they may have a demand for wholesale DIA services (for example, if the wholesale DIA services were available for a lower, regulated price than the equivalent retail services). URCA notes that a similar reasoning applies to resale broadband and retail broadband services.
  - b. End-to-end and PoP-based wholesale DIA service may not be perfect demand-side substitutes for all prospective customers as using each as an input to a retail broadband services requires different levels of investment by the OLO. They also act as wholesale inputs to different retail broadband services. However, this does not imply that they belong in different product markets, as insinuated by CBL. For example, both services are deemed to be supply-side substitutes as a result of the identical infrastructure used to provide the services and the ability of the SMP operators to switch between offering the different types of wholesale DIA services.
- URCA notes CBL’s agreement that wholesale business connectivity services are not part of the WBA service market.
- Defining the WBA market based on access technologies (i.e., copper-, fibre- and cable-based WBA services) without necessarily specifying the wholesale services covered within that market is common elsewhere<sup>26</sup> and also seems appropriate in the context of this review process. This is due to the WBA market in The Bahamas being mostly characterised by self-supply, thus meaning there is no well-defined set of wholesale services in this market. However, for further clarity, URCA would consider the following services to be covered within the WBA market, independent of the technology used: bitstream, wholesale DIA (i.e., end-to-end and PoP-based), and resale broadband services.<sup>27</sup>

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<sup>26</sup> For example, Ofcom, in its 2018 WBA Market Review, found that “*broadband services provided over copper, cable and fibre access networks are within the same market*”. Available at [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0030/116994/statement-wba-review.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0030/116994/statement-wba-review.pdf)

<sup>27</sup> URCA has not fully assessed whether FWA-based retail broadband services should form part of the relevant retail broadband market, and thus whether the associated wholesale services belong in the WBA market. However, URCA notes that FWA-based retail broadband service offerings in The Bahamas are very similar to BTC’s and CBL’s fixed broadband service offerings. However, in URCA’s view, the inclusion of FWA-based retail broadband services in the relevant retail broadband market does not have a significant bearing on this review due to the niche nature of the OLOs and their negligible market shares in the overall Bahamian market.

- URCA disagrees with CBL’s view that separate markets for the wholesale services covered within URCA’s WBA market should be defined and analysed.<sup>28</sup> URCA understands that it is common to define a single market for WBA services which covers a range of wholesale services which are considered demand-side and/or supply-side substitutes based on their service characteristics.

URCA notes that no Licensee has commented on the proposed geographic scope of the WBA service markets.

**URCA’s Final Determination – Market definition**

Having considered the consultation responses received in relation to market definition, URCA concludes that the product scope and geographic scope set out in its Preliminary Determination remains valid.

### **3.4 SMP designations**

**Consultation question – SMP designations**

**Q3. Please provide comments on URCA’s reconfirmation of the prevailing SMP designations in the WBA markets in The Bahamas.**

As part of their first round consultation responses, BTC, CBL, Global Nexus, and Secure Hosting provided comments on this consultation question. BTC also commented further as part of its second round response.

**BTC’s comments**

As part of its first round response, and as explained in Section 3.3 above, BTC argued that the Preliminary Determination should have included an updated competition assessment for both the retail and wholesale broadband access markets.

BTC explained that it believes the retail broadband market is already highly competitive, with technological and market developments meaning it has the potential to become even more competitive. To support this argument, BTC referred to its overlapping network footprint with CBL in Geographic Market 1; the presence of OLOs who are able to self-supply retail broadband and DIA-equivalent services;

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<sup>28</sup> In its response to the 2017 WBA consultation, which culminated in ECS 09/2018, CBL agreed with URCA’s product market definition. It is unclear why CBL’s view has changed significantly in this consultation, given there have been no changes to URCA’s product market definition, besides the clarification that wholesale DIA services form part of the WBA market.

low barriers to entry and expansion for FWA operators, and the role of mobile broadband as a competitive constraint on fixed broadband. In relation to mobile broadband, BTC explained that “CBL’s subsidiary, Aliv, offers MiFi broadband service using 4.5G LTE wireless technology at prices that are competitive with existing wireline products, including substantial data allowances (starting at 50 to 200 GB per month)”.<sup>29</sup> BTC further referred to the potential of 5G technology in the next 2 years.

As part of its second round response BTC explained, in response to CBL’s comment concerning its own position in Geographic Market 1, that it does not consider either itself or CBL to have SMP in the WBA market. BTC argued that, if URCA were to impose the proposed remedy in Geographic Market 1, BTC would have to charge the same price as CBL in order to compete for customers in that geographic market and so any regulation of CBL would act as an indirect constraint on BTC’s prices in the overall market given BTC’s national pricing.

### **CBL’s comments**

As part of its first round response, CBL explained that it does not consider itself to have SMP in the WBA market, citing competition from BTC everywhere in CBL’s footprint and countervailing buyer power (“CBP”) from business broadband customers.

CBL questioned why BTC has not also been found to have SMP in Geographic Market 1, and referred to BTC’s market share of 45% and national pricing of DIA services. CBL also described URCA’s SMP findings as reliant on the analysis of (relatively static) market shares over time, arguing that such market shares are common in many competitive telecommunications markets.

CBL accepted, however, that URCA has a “*plausible regulatory case*”<sup>30</sup> for the SMP designations described in the Preliminary Determination.

### **Global Nexus’s comments**

As part of its first round response, Global Nexus agreed with URCA’s SMP designations in the WBA markets.

### **Secure Hosting’s comments**

As part of its first round response, Secure Hosting agreed with URCA’s SMP designations in the WBA markets.

### **URCA’s responses to comments received and final determination**

URCA notes **Global Nexus** and **Secure Hosting**’s agreement with URCA’s proposed SMP designations.

URCA has already addressed, as part of Section 3.2, **BTC**’s comment regarding the need for a full market assessment (including updated SMP designations), covering both retail and wholesale service markets.

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<sup>29</sup> Page 7 of BTC’s first round response to ECS 04/2020.

<sup>30</sup> Page 9 of CBL’s first round response to ECS 04/2020.



URCA further notes that within its submissions, BTC only considers the retail broadband market, without making any statements on the competitiveness of the WBA market, despite this being the focus of the Preliminary Determination.<sup>31</sup> For the reasons set out in the consultation, URCA does not believe it is necessary or appropriate to conduct a full competition assessment of the relevant markets. However, notwithstanding this, URCA respectfully disagrees with BTC's characterisation of the retail market. In particular:

- URCA notes the overlapping coverage of BTC's and CBL's fixed networks within CBL's network footprint. However, in URCA's view, this in itself does not result in a competitive market outcome.
- As set out in more detail in the Preliminary Determination, given their limited network infrastructure and scale, neither Global Nexus nor the other OLOs can be considered a true competitive constraint on BTC and CBL. Instead these providers are niche players. URCA further disagrees with BTC's statement that there are OLOs who are able to self-supply retail broadband and DIA-equivalent retail services. Based on URCA's understanding of the market, all OLOs currently rely on wholesale DIA and other wholesale inputs from BTC and CBL to serve their retail customers.
- URCA notes BTC's comment that FWA operators face low barriers to entry and expansion. As mentioned above, the OLOs in The Bahamas are currently mostly small providers of retail broadband services who use FWA technologies in specific parts of the country which are underserved by BTC and CBL. This, in URCA's view, has allowed them to co-exist with the SMP operators, without necessarily competing with them directly. Expanding their service coverage would require these providers to deploy more FWA infrastructure and secure additional domestic and international connectivity, either by deploying their own infrastructure or procuring this from BTC and CBL. In doing so, OLOs are likely to face a range of internal and external barriers in the form of, for example, the need to access external financing for the underlying capital expenditures, the lack of in-house capabilities and capacity to deploy such network infrastructure, and the economies of scale and scope enjoyed by BTC and CBL. Thus, URCA expects OLOs will remain niche providers for the foreseeable future.
- URCA also notes BTC's view that retail mobile broadband services represent a competitive constraint to retail fixed broadband services. However, URCA notes that this is unlikely to be the case. First, in URCA's view, retail mobile broadband services do not form part of the same market as retail fixed broadband services, owing to a number of significant factors.
  - On the supply side, different network infrastructure is used to deliver fixed and mobile services and so there is no supply-side substitution, given the significant network investments required.

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<sup>31</sup> URCA notes that this may, in part, be driven by BTC's view that there may not be a need to review the WBA market if the retail broadband market is considered to be competitive (as discussed further in Section 3.2 above).

- On the demand side, it is unlikely that the cellular/mobile broadband services offered by Aliv and referred to by BTC are demand-side substitutes for fixed broadband services. First, providers of mobile services compete for customers on different characteristics than providers of fixed services, advertising download allowances with little or no variation in relation to speeds whereas fixed broadband services typically allow unlimited downloads and compete on speeds. Secondly, prices of mobile broadband services are typically much higher than fixed broadband services and so the prices of fixed broadband services would likely have to increase significantly before consumers would consider switching to mobile broadband services on the basis of price. As an example, Aliv's MiFi service costs from \$65/month for a 50GB download allowance,<sup>32</sup> which compares to \$34/month for BTC's fixed broadband service which includes unlimited data and higher speeds.<sup>33</sup>

URCA acknowledges that services which do not formally belong in the same market may still exert an (indirect) competitive constraint on one another. However, for retail mobile broadband services to represent a significant competitive constraint to retail fixed broadband services, consumers of fixed broadband services would have to consider mobile broadband services to represent a feasible alternative, i.e., be willing to substitute demand away from fixed broadband services towards mobile broadband services. Given the significant differences in the characteristics of these services and the way these services are used, described above, URCA considers that consumers are unlikely to consider the two types of service to be substitutes, and therefore remains of the view that retail mobile broadband services are unlikely to represent a competitive constraint on retail fixed broadband services.

- Finally, URCA notes BTC's argument that any regulation of CBL in Geographic Market 1 would act as an indirect constraint on BTC's prices in the overall market (i.e., across Geographic Markets 1 and 2). However, URCA notes that for this to hold, BTC would need to face a national pricing obligation for WBA services. Imposing such an obligation may, however, constrain URCA's ability to set cost-reflective wholesale prices for BTC, if there are significant and justified differences in the efficiently incurred costs of providing these services between geographic markets. That is, if costs differ across the different geographic markets, URCA may deem it appropriate that BTC and CBL set different cost-based (wholesale) prices in their respective geographic markets.

On the points raised by **CBL**, URCA notes CBL's concern that URCA has, in its view, relied heavily on market shares. URCA is aware that static market shares alone are not necessarily indicative of SMP. However, nor are they a sign of a competitive, dynamic market. URCA has also taken into consideration other factors including the overall lack of changes in the market since URCA's most recent market review in 2018. Indeed, in the Preliminary Determination, URCA set out its analysis of the role of barriers to entry and expansion as well as the role of (a lack of) CBP.

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<sup>32</sup> <https://www.bealiv.com/aliv-go-faqs>

<sup>33</sup> CBL also offers similar fixed broadband services starting from \$50/month.

URCA further notes CBL's acceptance that there is a "*plausible regulatory case*" for the SMP designations in the WBA market.

As stated above in response to BTC's comment, in URCA's view, the overlapping network coverage of BTC and CBL in Geographic Market 1 does not in itself result in a competitive market outcome. In the context of wholesale DIA services, any dual sourcing by OLOs (i.e., buying wholesale DIA services from multiple providers, for example to improve resilience) would further increase any concerns around market power, given the market structure in which only two main players are present in Geographic Market 1. URCA is also not aware of any active price competition for wholesale DIA services between BTC and CBL. That is, as discussed in the Preliminary Determination, URCA understands that the BTC and CBL list prices have remained unchanged since 2017 and neither of the SMP operators is likely to face price competition from OLOs within The Bahamas (as explained in the Preliminary Determination).

Lastly, and for the reasons set out in more detail on page 28 of the Preliminary Determination, URCA remains of the view that it is unlikely that OLOs have CBP. In summary, in order to possess CBP, an OLO would need to be of significant size (in terms of their share of BTC's or CBL's total wholesale broadband sales). URCA considers this unlikely to be the case and has not seen any evidence to the contrary. Further, any dual sourcing conducted by OLOs (discussed above) further reduces any CBP by OLOs. And contrary to BTC's claim, OLOs are currently not able to self-supply the wholesale inputs procured from BTC and CBL. See URCA's evaluation of internal and external barriers/constraints facing OLOs above.

#### **URCA's Final Determination – SMP designations**

Having considered the consultation responses received in relation to SMP designations, URCA concludes that its preliminary SMP designations remain valid.

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

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

**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.**

As part of their first round consultation responses, BTC, CBL, Bahamas Wimax, Global Nexus, and Secure Hosting provided comments on this consultation question. BTC and Global Nexus provided further comments as part of their second round responses.

### **BTC's comments**

As part of its first round response, BTC claimed that there is no substantiated evidence of competition problems or market failures in relation to wholesale DIA services, citing an absence of evidence within the Preliminary Determination.

As part of its second round response, BTC agreed with CBL's argument that URCA had not provided specific evidence in relation to market failure concerns.

### **CBL's comments**

As part of its first round response, CBL argued that URCA had provided "*no specific evidence*"<sup>34</sup> to support its claim that SMP operators have an incentive and ability to engage in excessive pricing. It presented some reasons for why it believed it would be unable to engage profitably in anticompetitive behaviour: namely competitive constraints from BTC; pricing parity between retail and wholesale DIA services; and an inability to identify different types of customers.<sup>35</sup>

### **Bahamas Wimax's comments**

As part of its first round response, Bahamas Wimax agreed with URCA's preliminary views on the main competition problems and market failures that could arise in relation to wholesale DIA services.

### **Global Nexus's comments**

As part of its first round response, Global Nexus agreed with URCA's preliminary views. Global Nexus also expressed its concerns around the SMP operators' positions as vertically integrated operators, specifically noting that the SMP operators have the ability, and potentially the incentive, to discriminate against OLOs when providing access to wholesale inputs.

As part of its second round response, Global Nexus criticised BTC for dismissing the OLOs' complaints regarding the behaviour of the SMP operators and provided comments regarding its own experience with BTC. It further pointed out that whilst dismissing the IP transit pricing evidence provided by Wicom, BTC did not provide any information which would demonstrate that its DIA prices are reasonable.

### **Secure Hosting's comments**

As part of its first round response, Secure Hosting agreed with URCA's preliminary views on the main competition problems and market failures that could arise in relation to wholesale DIA services. Secure Hosting also explained that URCA should consider quality of service as a market failure, which it links to a concern that the SMP operators provide a poor quality of service to OLOs.

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<sup>34</sup> Page 11 of CBL's first round response to ECS 04/2020.

<sup>35</sup> CBL also provided comments regarding specific concerns about anticompetitive behaviour relating to OLOs' experiences, which were noted by URCA in the Preliminary Determination. However, as clarified in this document, the purpose of any descriptions of the OLOs' concerns was to explain how URCA identified particular areas of focus within the WBA market. As such, these have no bearing on the outcome of this consultation process and therefore URCA has not presented an assessment of CBL's comments on these matters, or any party's responses to same, within this Final Determination.

## URCA's responses to comments received and final determination

Concerning **BTC's** and **CBL's** comments on the lack of evidence in support of the SMP operators' ability to engage in anticompetitive behaviour, Section 4.2.1 of the Preliminary Determination has set out URCA's reasoning for why the SMP positions enjoyed by BTC and CBL create a clear ability and incentive for each operator to set excessive wholesale charges, to refuse to supply these services to OLOs, and/or engage in a margin squeeze. As such, URCA will not repeat these here. URCA further wishes to reiterate that the ability and incentive of SMP operators to engage in such behaviour is sufficient to warrant ex-ante regulation. That is, URCA does not need to demonstrate that anti-competitive conduct has actually occurred.

On the comments raised concerning excessive pricing:

- As recognised in the Preliminary Determination, the information available to URCA does not allow it to compare BTC's and CBL's wholesale DIA charges against underlying unit costs. For example, URCA does not have access to sufficiently granular information in the SMP operators' separated accounts to undertake this analysis. However:
  - As stated in Preliminary Determination and reiterated in Section 3.4 above, URCA understands that BTC's and CBL's list prices for wholesale DIA services have remained unchanged since 2017 and neither of the SMP operators is likely to face price competition from OLOs within The Bahamas.<sup>36</sup> URCA considers that the absence of wholesale DIA price changes is inconsistent with a competitive market dynamic.
  - URCA shares Global Nexus's view that despite objecting to URCA's preliminary view on excessive pricing and the IP transit pricing information submitted by OLOs, neither BTC nor CBL has provided any evidence to demonstrate that the current DIA prices are in line with the underlying costs, or that DIA prices have fallen in recent years.
- URCA disagrees with CBL's view that it has no incentive to charge excessive wholesale DIA prices. CBL's view is that it does not have such an incentive because it does not differentiate its retail and wholesale DIA prices. However, given its position in both markets, CBL could, all other things being equal, simply charge excessively at both the retail and wholesale level.

CBL claimed that refusal to supply is unlikely, as it has not occurred in the past and as CBL is currently not differentiating between retail and wholesale DIA services and thus has an incentive to maximise sales. URCA respectfully disagrees with this statement. Whilst CBL may not differentiate its DIA service offerings for business and wholesale customers, URCA considers it likely that CBL will know whether its customer is an OLO and as such whether it is competing with CBL in the downstream broadband market.

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<sup>36</sup> Global Nexus is unlikely to be a viable supplier of wholesale inputs for many OLOs wishing to supply retail services to end-users in The Bahamas. Although Global Nexus has the technical ability to offer these services, it is unclear whether it would be able to effectively compete on price with BTC and CBL. Importantly, URCA understands that one reason for this lack of price competition may relate to Global Nexus's dependence on inputs from BTC and CBL.

With respect to CBL's specific comments relating to the risk of margin squeeze:

- URCA notes CBL's position that the uniform pricing of its retail and wholesale DIA services and the small share of wholesale DIA sales in total DIA sales removes any incentives to conduct a margin squeeze. However, given how OLOs currently use the wholesale DIA service, any margin squeeze concerns are discussed in the context of retail broadband, rather than retail DIA services. Further, whilst CBL may not differentiate its retail and wholesale DIA service offerings at the moment, there is no guarantee that this may not happen in future.
- URCA disagrees with CBL's view that the proposed regulation of wholesale DIA charges would not reduce the possibility or likelihood of a margin squeeze going forward. In particular, cost-based wholesale charges (as proposed for DIA services) generally reduce the risk of margin squeeze as they remove one possible source for such practice (i.e., excessive wholesale pricing). However, URCA acknowledges that such behaviour would be more difficult when wholesale DIA services are used as an input to retail broadband services rather than retail DIA services.
- URCA notes CBL's point that specific ex-ante regulation to address the risk of a margin squeeze is not merited in the context of wholesale DIA services. As set out in Section 2 above, URCA is not imposing any specific measure to address this potential market failure. Instead it considers the cost-based pricing requirement, the need to amend the reference offers to include wholesale DIA services, and the general non-discrimination requirement to sufficiently reduce any risk of margin squeeze in this market.

URCA notes the agreement of **Bahamas Wimax**, **Global Nexus** and **Secure Hosting** with URCA's views on the main competition problems and market failures in the WBA market.

URCA agrees, in principle, with Global Nexus that BTC's and CBL's vertical integration allows for discrimination against OLOs. However, in line with other regulated wholesale services offered by BTC and CBL, regulated wholesale DIA services will also be subject to the general non-discrimination obligation. URCA is further of the view that the obligation to publish reference offers enhances transparency and allows URCA to better monitor the SMP operators' adherence to the non-discrimination provisions of the Act, as well as their licence conditions. The proposed measures should also address Secure Hosting's concern around SMP operators offering poor quality of services to OLOs (compared to the perceived quality service underlying the SMP operators' self-supply).

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

Having considered the consultation responses received in relation to the expected competition problems and market failures, URCA remains of the view that, in absence of ex-ante regulation, the three competition problems and market failures described in the Preliminary Determination (i.e., excessive pricing, refusal to supply and margin squeeze) could arise as a result of a Licensee having SMP in respect of the provisioning of wholesale DIA services.

## **3.6 Ex-ante regulation of wholesale DIA services**

### **Consultation question – Ex-ante regulation of wholesale DIA services**

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

As part of their first round consultation responses, BTC, CBL, Bahamas Wimax, and Global Nexus provided comments on this consultation question. BTC also commented on this as part of its second round response.

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

As part of its first round response, BTC explained that it does not consider ex-ante regulation of wholesale DIA services to be necessary. It argued that competition from OLOs, market shares, price trends, low barriers to entry, and CBP are all factors which mean it is not appropriate for URCA to introduce ex-ante regulation of these services. BTC also argued that any ex-ante regulation should not be extended to Geographic Market 2. This is because of the smaller share of the population of The Bahamas who live in the islands covered by that market and the relative costs of serving customers in that market.

BTC also stated that it views the regulated wholesale services proposed in the Preliminary Determination as impractical and infeasible. First, BTC considered that regulation of a standalone (PoP-based) wholesale DIA service is not practical since OLOs which purchase wholesale DIA services from BTC typically purchase a range of wholesale services rather than standalone DIA services. BTC also claimed that the use of different technologies to provide wholesale DIA services, depending on the topology and infrastructure available at the locations where the services are provided, means that it would not be feasible to develop a single consistent service definition of PoP-based wholesale DIA services. Additionally, BTC expressed its concerns that the regulation of 'standalone' services would impact the provision of customised services to its wholesale customers.

Further, BTC argued that since end-to-end DIA services include an element of connectivity, a review of the wholesale business connectivity (“WBC”)<sup>37</sup> market would be required before URCA considers ex-ante regulation of such services.

As part of its second round response, BTC agreed with CBL’s position that ex-ante regulation of wholesale DIA services, in particular end-to-end wholesale DIA services, is too onerous.<sup>38</sup> Given the BRO, BTC argued that there was no need for any further, regulated “resale” obligation.

### **CBL’s comments**

As part of its first round response, CBL explained that, despite URCA’s consideration of proportionality in setting out its proposals for intervention in the WBA market, it believed ex-ante regulation to be a disproportionate response to URCA’s concerns.

CBL instead asked URCA to consider a number of alternatives that would be less onerous, in particular: commercial negotiation, URCA enforcement of licence conditions, and enforcement of competition law. CBL did not, however, expand on its proposals for these types of regulatory intervention.

### **Bahamas Wimax’s comments**

As part of its first round response, Bahamas Wimax agreed with URCA’s preliminary views on the need for ex-ante regulation of wholesale DIA services. Bahamas Wimax explained that it believes all “downstream services” provided to OLOs should also be regulated.

### **Global Nexus’s comments**

As part of its first round response, Global Nexus agreed with URCA’s preliminary views on the need for ex-ante regulation of wholesale DIA services.

### **URCA’s responses to comments received and final determination**

URCA notes, but disagrees with, **BTC’s** position that ex-ante regulation of wholesale DIA services is not required. URCA considers that BTC’s position is based on its view that the retail broadband and WBA markets are competitive and that there are no market failures in these markets. Both of these matters are already addressed in Sections 3.4 and 3.5 above.

Concerning the need for ex-ante regulation of BTC in Geographic Market 2, URCA notes the difference in population between the two Geographic Markets (and thus, potential addressable market sizes at the retail downstream level); however, this does not, in itself, mitigate the need for ex-ante regulation of BTC. BTC is the sole provider of wholesale DIA services in Geographic Market 2. Further, several of the OLOs serve end-users in Geographic Market 2 and depend on BTC’s wholesale DIA services to provide retail

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<sup>37</sup> BTC’s first round submission describes this connectivity service as “wholesale *broadband* connectivity” (emphasis added). However, given the context, URCA understands this to mean wholesale *business* connectivity (i.e., wholesale leased lines).

<sup>38</sup> BTC made reference to subsidisation of CBL’s Basic TV package, arguing that if CBL were to receive a subsidy as a result of the introduction of URCA’s proposed ex-ante regulation, BTC should also receive a similar subsidy. However, URCA does not comment on this matter within this Final Determination as it does not consider this to be relevant for wholesale DIA services.



services to these customers. Lastly, as discussed above in Section 3.4, in order to ensure any regulatory remedy is cost-reflective, URCA may deem it appropriate that BTC and CBL set different cost-based prices in their respective geographic markets (in case there are significant and justified differences in the efficiently incurred cost of providing these services between geographic markets). This could not be achieved by imposing a national pricing obligation for wholesale DIA services on BTC. URCA therefore remains of the view that imposing ex-ante regulation on CBL in Geographic Market 1, but not on BTC in Geographic Market 2, is unlikely to achieve a desirable outcome.

URCA notes, but disagrees with, BTC's concerns with respect to the feasibility of introducing regulated wholesale DIA services. In particular, the fact that OLOs are purchasing wholesale DIA services as part of a wider set of wholesale inputs from SMP operators should not prevent the SMP operators from defining a service description (including pricing) for the regulated PoP-based wholesale DIA service. This is particularly the case as both BTC and CBL already offer these services and thus will have already prepared service definitions, prices and non-price terms and conditions for these services. URCA further understands that the current wholesale DIA service offerings from BTC and CBL are technology neutral and priced uniformly (i.e., do not vary by technology, distance or geographic location). As set out in Section 2 above, as part of the process of determining the price and non-price terms of the regulated PoP-based wholesale DIA service, SMP operators will have the opportunity to submit, to URCA, their proposed cost-based prices and service descriptions. Based on these submissions and taking into account any feedback from OLOs on the proposed service offerings, URCA will then conclude as to whether it considers these terms to be reasonable and the proposed charges cost-reflective. Only if this is not the case will URCA intervene to set the terms and conditions it considers reasonable (including cost-based charges).

Lastly, given the focus on PoP-based wholesale DIA services, URCA considers BTC's two comments relating to end-to-end wholesale DIA services to no longer be relevant.

URCA notes CBL's proposed, alternative approaches to address the concerns observed in the Preliminary Determination. However, URCA does not consider these alternatives adequate to address the market failures discussed in Section 4.2.1 of the Preliminary Determination (as well as Section 3.5 above). CBL, in effect, proposes not to impose any ex-ante regulation on these services, but instead to continue to rely on commercial negotiations between access seekers and providers, and on ex-post competition law to address any concerns around alleged anticompetitive behaviour exhibited by access providers. Under such an arrangement, price and non-price terms would be set through a process of bilateral negotiations between BTC or CBL and the OLOs. URCA considers there to be a high risk that such bilateral negotiations may not lead to an efficient outcome, especially not within a reasonable period of time. This is due to the competing incentives of both negotiating parties, with BTC and CBL having an incentive to use their SMP in the relevant market to achieve higher prices for the wholesale DIA service. Moreover, this represents the approach adopted to date and has resulted in the current market dynamics and concerns raised by OLOs. As such, URCA does not consider it appropriate to continue applying this approach going forward, but instead sees a need to impose further regulatory safeguards, in the form of the ex-ante regulatory obligations set out in Section 2 above.

However, based on the industry feedback received since publishing the Preliminary Determination (including the clarification questions to Licensees), URCA will only apply the ex-ante obligations on PoP-based wholesale DIA services (i.e., end-to-end wholesale DIA services will be exempted from ex-ante regulation, until further notice from URCA). This reflects the current demand for these services (i.e., URCA understands that OLOs are currently only purchasing PoP-based wholesale DIA services, but not end-to-end based wholesale DIA services, from BTC and CBL, for the purpose of providing FWA-based retail broadband services). This is reflected in the Final Determination in Section 2 above.

URCA notes **Bahamas Wimax** and **Global Nexus**'s agreement with URCA's preliminary views on the need for ex-ante regulation of wholesale DIA services.

URCA further notes Bahamas Wimax's reference to a need to regulate all "downstream services" provided to OLOs. This review process has focused on wholesale DIA services. Going forward, URCA may review other wholesale (and retail) service markets in order to assess the need for ex-ante regulation.

#### **URCA's Final Determination – Ex-ante regulation of wholesale DIA services**

Having considered the consultation responses received in relation to ex-ante regulation of wholesale DIA services, URCA remains of the view that ex-ante regulation of wholesale DIA is required to address the potential competition problems and consumer harm identified in the context of these services. However, based on further industry feedback, the ex-ante obligations will only apply to PoP-based wholesale DIA services (i.e., end-to-end wholesale DIA services will be exempted from the ex-ante regulation imposed on licensees as a result of this Determination).

### **3.7 SMP remedies**

#### **Consultation question – SMP remedies**

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

As part of their first round consultation responses, BTC, CBL, Global Nexus, and Secure Hosting provided comments on this consultation question. BTC also commented on it as part of its second round response.

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

As part of its first round response, BTC disagreed with URCA's proposed SMP remedies on wholesale DIA services in the WBA service markets. The reasons for its objections appeared to follow from its view that

it should not be designated as SMP and that the imposition of any form of ex-ante regulation would be inappropriate and were unnecessary.

BTC was further concerned that URCA failed to consider the practicality or feasibility of establishing a standalone, regulated wholesale DIA service subject to URCA-mandated pricing. According to BTC, *“attempting to separate DIA services from existing custom designed service arrangements provided to OLOs for mandated regulated pricing purposes would be misguided and disruptive to long-established service provisioning practices”*<sup>39</sup>.

As part of its second round response, BTC agreed with CBL’s view that, if URCA decided to impose any SMP obligations on wholesale DIA services, these should be limited to PoP-based wholesale DIA services (i.e., end-to-end wholesale DIA services should not be subject to ex ante regulation).

### **CBL’s comments**

As part of its first round response, CBL disagreed with URCA’s proposed SMP remedies in the WBA service markets. Following from its concerns, outlined earlier, regarding the appropriateness of regulating different types of wholesale DIA services, CBL argued that regulation of end-to-end wholesale DIA services would be unlikely to promote innovation and may incentivise inefficient entry.

CBL argued uncertainty over the specific methodology for setting cost-based prices would present investment risks to CBL, and expressed concerns that the costing exercise required to derive cost-based prices is complex and costly, commenting that it understands URCA does not have any relevant experience with complex cost modelling.

Finally, CBL referred to the regulated pricing of its Basic TV package, stating that it sells the package *“substantially below cost”*<sup>40</sup> and arguing that URCA would need to take this into account when setting any cost-based regulated prices.

### **Global Nexus’s comments**

As part of its first round response, Global Nexus agreed with URCA’s preliminary views on the proposed SMP remedies in the WBA service markets, but expressed concern that URCA’s proposal to conduct a costing exercise in order to set regulated rates would lead to a delay in the determination of appropriate charges. Global Nexus therefore suggested that URCA should set interim rates for those wholesale DIA services, which would apply until forward-looking, cost-based rates could be determined.

Furthermore, Global Nexus suggested that URCA might consider structural separation of the vertically integrated SMP operators in order to prevent anticompetitive behaviour and, via the imposition of regulatory reporting requirements, increase transparency around the network capacity and network evolution plans of those operators.

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<sup>39</sup> Page 2 of BTC’s second round response to ECS 04/2020.

<sup>40</sup> Page 15 of CBL’s first round response to ECS 04/2020.

### Secure Hosting's comments

As part of its first round response, Secure Hosting agreed with URCA's proposed SMP remedies in the WBA service markets.

### URCA's responses to comments received and Final Determination

URCA notes **BTC** and **CBL's** position that ex-ante regulation of wholesale DIA services is not required. Again, these views appear to be predicated on BTC's view that the relevant markets are competitive and that there are no market failures in these markets. Both of these matters have already been addressed in Sections 3.4 and 3.5 above.

This also holds for BTC's concerns around the practicality or feasibility of establishing a standalone, regulated wholesale DIA service. This has been addressed in Section 3.6 above.

Lastly, URCA notes BTC's agreement with CBL on the focus of any ex-ante regulation on PoP-based wholesale DIA services only. This again has been covered in Section 3.6 above.

Concerning **CBL's** statement that determining cost-based wholesale DIA prices would be a complex undertaking with URCA not having any experience in such costing analysis, URCA is aware of the complexity of such analysis. However, this in itself cannot be a reason not to impose and implement cost-based wholesale charges. Cost-based wholesale charges have been determined in a range of regional jurisdictions of similar size to The Bahamas. Further, URCA will require the SMP operators to submit to URCA proposed charges including a justification on why these charges are cost-reflective. Only if URCA believes these proposed charges are inappropriate would it conduct its own costing analysis.

CBL's comment on Basic TV package pricing is noted. However, this is not the subject of this review process. In any case, CBL has flexibility under the current Retail Pricing Rules as they relate to cable TV pricing. URCA further does not consider it appropriate to allow for any explicit cross-subsidisation of other (retail) prices when determining regulated wholesale DIA services. These should instead only reflect the efficient costs incurred<sup>41</sup> in delivering wholesale DIA services.

URCA notes **Global Nexus** and **Secure Hosting's** agreement with URCA's proposed SMP remedies set out in the Preliminary Determination.

Concerning Global Nexus's call for interim rates whilst determining cost-based wholesale DIA charges, URCA considers that this concern will be addressed by its process for deriving the appropriate tariffs, as set out in Section 2 above. In particular, within two months, both SMP operators must submit to URCA proposed charges including a justification as to why these charges are cost-reflective. Only if URCA disagrees with these proposals would URCA determine its own cost-based charges. This approach is expected to lead to an expedited implementation of cost-based wholesale DIA charges. Further, setting

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<sup>41</sup> Including a reasonable return on capital efficiently employed.

interim rates for these services is likely to be challenging and may lead to setting these rates incorrectly due to the limited costing or benchmark information available to URCA.

Lastly, URCA notes Global Nexus's call for structural separation of the SMP operators. Whilst this would resolve any concerns around anticompetitive behaviour resulting from vertical integration, structural separation is a complex and highly intrusive regulatory intervention. As such, it requires careful examination of potential benefits and costs and should only be considered if the expected benefits clearly exceed any costs associated with it. Structural separation is also commonly regarded as a last resort, if no other regulatory intervention can deliver similar outcomes. URCA does not consider this to be the case in the context of the wholesale fixed service markets in The Bahamas.

#### **URCA's Final Determination – SMP remedies**

Having considered the consultation responses received in relation to SMP remedies, URCA concludes that the following SMP remedies are required to address the potential competition problems and consumer harm identified in the context of these services:

- BTC and CBL shall be subject to an obligation to amend their reference offers (i.e., the BTC RAIO and CBL's terms and conditions for fixed call termination services) to include wholesale DIA services (in line with the service description in Section 2 above), 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).

However, as set out in Section 3.6 above, these ex-ante obligations will only apply to PoP-based wholesale DIA services (i.e., an obligation to offer cost-based end-to-end wholesale DIA services will not be imposed on licensees as a result of this Determination).

Further, URCA has clarified its process for determining cost-based wholesale DIA charges, with SMP operators having to first submit cost-based price proposals for PoP-based wholesale DIA services to URCA. Only if URCA does not consider the proposed terms to be reasonable will URCA intervene to set cost-based charges.

For the avoidance of doubt, the existing BRO obligations set out in ECS 09/2018 remain in place.

## 4. Conclusions and Next Steps

This Final Determination sets out URCA's position on the need for ex-ante regulation of wholesale DIA services. For the reasons set out above, URCA concludes that the obligations and next steps set out in Section 2 shall apply to both SMP Licensees. The key next process steps are summarised as follows:

- BTC and CBL shall submit to URCA for approval their proposed price and non-price terms for their PoP-based wholesale DIA services, in accordance with the specific requirements and timelines outlined in Section 2. In submitting their proposals, BTC and CBL shall demonstrate that each proposed tariff is cost-oriented and clearly justify any material variations in the price and non-price terms and conditions of the wholesale DIA service offerings.
- All Licensees will then be given the opportunity to comment on the proposed terms and conditions for the regulated wholesale DIA services. URCA shall communicate the timings and specifics of this process in due course.
- Following the steps above, URCA will then conclude as to whether it considers the price and non-price terms to be reasonable, compatible with the requirements set out in Section 2, and consistent with URCA's guidelines, terms and conditions, and relevant documents. If this is not the case, URCA will intervene to set the terms and conditions it considers reasonable (including cost-based charges).
- BTC and CBL shall then publish the approved tariff and non-price terms and conditions on which their PoP-based wholesale DIA services 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).

URCA will communicate with the SMP operators in due course to explain the process for submission of the aforementioned pricing proposals.