



## **Adjudication**

**Issued to: The Bahamas Telecommunications Company Limited (“BTC”)**

**In the Matter of a Suspected Breach of a Dominant Position under Section 69 of the Communications Act, 2009**

**ECS 07/2021**

**Issue Date: 6 April 2021**

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# 1. Introduction

The Utilities Regulation and Competition Authority (“URCA”) has today issued this Adjudication in relation to a potential breach or infringement of competition law by The Bahamas Telecommunications Company Limited (“BTC”). The complaint centres on BTC’s refusal or failure to fulfill Global Nexus Limited’s (“GNX”) request for a 500 Mbps circuit upgrades into the islands of Andros, Bimini and Exuma.

A cornerstone of URCA’s mandate is to promote the interests of members of the Bahamian public in relation to the electronic communications sector. Integral to this is URCA’s mandate to ensure that licensees abide by the provisions of the Communications Act, 2009 (“Comms Act” or the “Act”) relating to abuse of a dominant position. Dominant licensees must always adhere to the competition provisions of the Act. URCA’s position is that whenever a dominant licensee operates in contravention of sections 67 and 69 of the Act, the appropriate regulatory action or measure should be taken.

This Adjudication sets out URCA’s findings in relation to the alleged infringement of section 69(2)(b) and (e) of the Act.

## 1.1 Structure for the Remainder of this Document

The remainder of this document is structured as follows:

- Section 2 – Regulatory Framework under which URCA exercise its powers to investigate BTC and issue this Adjudication
- Section 3 – Relevant Markets and Dominance
- Section 4 – URCA’s Investigation
- Section 5 – Conclusion

## 2. Regulatory Framework for this Investigation

URCA, in this Section, sets out the regulatory framework under which it has exercise its powers to investigate BTC's conduct and issue this Adjudication.

Under section 7 of the Comms Act, URCA has the following functions:

- “(a) to regulate the electronic communications sector by exercising the powers given to it under this Act, and in particular to issue licences and exemption determinations in accordance with Part IV and to manage state assets;
- (b) to apply the competition law rules in the electronic communications sector under the terms of Part XI;
- ...
- (f) to perform any other functions assigned to it by this Act or any other law.”

Under section 8(1) of the Comms Act, URCA has power inter alia to:

- “(e) issue directions, decisions, statements, instructions and notifications;
- ...
- (j) conduct inquiries, investigations and oral hearings;
- (l) conduct market investigations and market reviews and publish regular information and reports; and
- (m) exercise any other powers assigned to it by this Act or any other law.”

Section 9(1) of the Comms Act provides for URCA to investigate:

- “(a) any contravention;
- (b) any alleged contravention; and
- (c) any circumstances where it has grounds to suspect a contravention, of any provision of this Act and any regulatory or other measure issued under this Act, including any licence issued under this Act.”

Part XI (Competition Provisions) of the Comms Act prohibits “abuse of dominant position” and provides examples of which behavior by a dominant undertaking is an abusive conduct on the relevant market.

Under section 69 of the Act:

- “(1) Any conduct on the part of one or more licensees which relates to the electronic communications sector and which amounts to an abuse of that licensee's or those licensees' dominant position in a market in The Bahamas is prohibited.
- (2) Conduct may, in particular, constitute such as abuse if it consists of -
  - (b) limiting markets or technical development or the provision of services to the prejudice of consumers;
  - ...
  - (e) without objective justification, limiting or impeding access to a network or a carriage

service in circumstances where access is essential for the provision of an electronic communications service by another operator.”

Section 103 of the Comms Act provides for URCA to make adjudications in respect of any contravention of Part XI. Adjudications must be made in accordance with section 104 of the Comms Act whereby URCA may *“impose behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the contravention to an end.”* Section 104 stipulates the process to be followed in making adjudications and requires that URCA shall establish procedures for making adjudications.

On 17 March 2010, URCA issued *“ECS COMP.9 - How to make a Competition Complaint-Guidance on Investigation Procedures”* which contains details of the procedures which URCA will use in assessing complaints about anticompetitive behavior under sections 67 and 69 of the Comms Act.

URCA further issued Guidelines (*“the Guidelines”*) as to the matters it would consider in determining such complaints in *“ECS COMP. 7 – Abuse of a dominant position- Substantive Guidance.”*

URCA has also issued *“ECS COMP. 5- Market Definition”* which contains details on URCA’s approach to market definition when exercising its competition powers.

### 3. Relevant Markets and Dominance

In conducting this investigation, URCA has considered evidence as to whether BTC holds, or did hold a position of dominance in the economic market that is the subject of GNX's complaint. URCA in this Section, presents its analysis which confirms that BTC holds a position of dominance in the upstream (wholesale) market that is relevant to this ex post inquiry. The analysis is presented in three stages:

- definition of the relevant product market (Stage 1);
- definition of the relevant geographic market (Stage 2); and
- assessing whether BTC is dominant, or jointly dominant in the identifiable markets (Stage 3).

Add to that the analysis is backward-looking and follows precedents elsewhere in addition to URCA's Guidance Note for ex post inquiries.<sup>1</sup>

#### 3.1 Market Review Stage 1 - Product Market Definition

As a first step, URCA notes that this inquiry pertains to an upstream (wholesale) market in areas of The Bahamas in which BTC is the only licensee that could potentially provide the circuit upgrades in Andros, Exuma and Bimini. To be clear, this excludes the islands of Abaco, Eleuthera, New Providence and Grand Bahama where both CBL and BTC operate coaxial cable and/or fibre-based networks and supporting infrastructure.

The requested bandwidth upgrades relate to established operational circuits BTC already provides to GNX and form part of the network and infrastructure that GNX uses to deliver end-to-end broadband Internet (or Direct Internet Access- DIA) to its customers. Given this, URCA has identified the scope of the relevant downstream (retail) market as the market in which BTC and Other Licensed Operators ("OLOs") such as GNX compete for fixed Internet customers.

Consistently with ECS COMP.5 and precedents elsewhere, URCA, in defining the **relevant wholesale market** into which the requested services fall, takes as its starting point, the description of the focal product that is the subject of the complaint. URCA understands from the information gathered from BTC and GNX that the focal product is provisioned as symmetric and dedicated transmission circuits or links between nodes/Point of Presence ("PoP") on the access provider's ("BTC") network or between a node/PoP operated by the access provider ("BTC") and a node/PoP operated by another licensed network. The core elements of the focal product are trunk links (BTC's transmission system) and may include local tails/loops. This service does not provide transmission capacity or links between a node/PoP operated by the access seeker and its end-customer's premises. Further, the access seeker is not allowed to connect the service to networks or infrastructure outside of The Bahamas. BTC explained that the service involves the use of BTC's BDSNi under-sea fibre optic cable network in conjunction with microwave links. However, it noted that in some instances a microwave link is the only technology that provides transmission connectivity directly to some islands. In short, the focal product is wholesale access to high-speed

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<sup>1</sup> ECS COMP 5-Market Definition-Substantive Guidance

symmetric and dedicated domestic circuits or links at different speeds (e.g., 5 Mbps, 25 Mbps, 50 Mbps, 100 Mbps, 500 Mbps, 1 Gbps and 1.5 Gbps).

As mentioned above, GNX said the focal product forms part of its infrastructure/network that provides end-to-end broadband Internet to commercial/business customers. Whilst BTC uses the focal product to deliver retail cellular/mobile, broadband Internet, and domestic connectivity or links/circuits to its own downstream customers in addition to being shared with OLOs such as GNX and ALIV.

URCA infers from the above that a licensee such as GNX may either self-provide the focal product (by building their own infrastructure) or acquire it from another licensed network. URCA, thus, forms the view that self-supply and wholesale access to domestic links or circuits acquired from BTC belong to the same wholesale market that is the subject of GNX's complaint.

Having analyzed demand/supply-side substitutability and competitive constraints URCA has not identified any other wholesale products that act as substitutes to the focal product such that a wider wholesale market definition is warranted.

All things considered, URCA has determined that the product market boundary with regards to GNX's complaint is:

- wholesale access to domestic links/circuits that enables symmetric and dedicated transmission on the access provider's ("BTC") network or between a node/Point of Presence ("PoP") operated by the access provider ("BTC") and a node/PoP operated by another licensed network;
- the service is delivered using BTC's BSDNi under-sea cable in conjunction with microwave links or microwave technology only; and
- OLOs may self-provide the service or acquire it from another licensed network such as BTC.

### **3.2 Market Review Stage 2 - Geographic Market Definition**

The geographic market pertains to the territorial area in which licensees provide the upstream (wholesale) service in question and in which the conditions of competition are sufficiently uniform.

URCA's starting point is that the territorial reach of the defined product market comprises all islands of The Bahamas where only BTC has infrastructure to potentially provide the wholesale product. This excludes the islands of Abaco, Eleuthera, New Providence and Grand Bahama where both CBL and BTC operate coaxial cable and/or fibre-based networks. This geographic reach also corresponds with the geographic reach determined for the relevant downstream market. In that, the determined geographic markets for retail Internet at a fixed location are:

- Geographic Market 1 - the islands (i.e., New Providence, Grand Bahama, Abaco and Eleuthera) in which BTC and CBL have enabling infrastructure; and
- Geographic Market 2 – all other islands in which only BTC has enabling infrastructure.

Given the requested locations for the circuit upgrades, Geographic Market 2, as defined above, is the only territorial scope that seems relevant and appropriate in this case. As well, this scope corresponds with URCA’s thinking that the competition dynamics for the upstream (wholesale) product market is similar throughout this geographic area with BTC being the only licensee with infrastructure to provide the wholesale service.

In respect of this inquiry, URCA has determined that the geographic reach of the wholesale product market covers all islands of The Bahamas in which only BTC has enabling infrastructure to potentially provide the requested circuit upgrades (i.e., Geographic Market 2).

### **3.3 Market Review Stage 3 – Dominance/Competition Assessment**

Paragraph 18 of the relevant Guidance Note, defines a dominant market position as:

“...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its customers.”<sup>2</sup>

URCA has found evidence that BTC holds a dominant position in the relevant upstream market and therefore is able to behave to an appreciable extent independently of competitive forces, consumers and subscribers. No other licensee is jointly dominant with BTC with regards to GNX’s complaint.

URCA concludes that the principal factors contributing to this finding are:

*Market structure* – This is a function of the number of licensees operating in the identifiable upstream market, market share and other factors which affect the level of competition. Because BTC is the only licensee with enabling infrastructure to provide the circuit upgrades into Andros, Exuma and Bimini, no other licensee imposes a competitive constraint on BTC. BTC by default holds 100% market share in the relevant geographic area/market. Given these factors, the market structure does not tend towards effective competition.

*Control of Essential Facilities* - A facility is essential if its duplication is impossible or extremely difficult to replicate due to physical, geographical, legal or economic constraints. Control over an essential facility or infrastructure that is not easily replicable is a primary source of market power in communications markets. Self-provisioning of an equivalent product to BTC’s is likely to require environmental and other planning approvals which might not have been feasible within the timeframe. Limited access to financial markets may prevent OLOs from self-provisioning of the essential input. URCA finds in the absence of an

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<sup>2</sup>This definition corresponds with the concept of Significant Market Power in section 39 of the Comms Act.

alternative infrastructure, GNX would be unable to offer improved broadband connectivity in the requested locations. Clearly, BTC has control over an essential facility that is indispensable for the development of downstream competition.

*Countervailing Buyer Power (“CBP”)* - This represents the relative strength of GNX in negotiations with BTC. URCA has not found any supporting evidence for the existence of CBP by GNX and others that could counteract BTC’s market power.<sup>3</sup> BTC has significant bargaining power over OLOs including GNX. BTC’s position is reinforced by the absence of equivalent products to BTC’s, and the required or refused input being indispensable to BTC. Given the likely level of capital outlay required and other factors (see below), it is unlikely GNX could self-provide the refused circuits in a reasonable timeframe.

*High and Non-Transitory Barriers to Entry and/or Expansion* – As the upstream market in question exhibits high barriers to entry and/or expansion, high market share and other features BTC may have an incentive to deny access for 500 Mbps upgrades into the three islands. In this case, amongst the obvious barriers to GNX’s expansion strategy, is BTC’s absolute control over a wholesale input that is not easily replicable. The fact that GNX has very limited buying power vis-à-vis BTC reinforces BTC’s dominance on the relevant economic market.

Owing to the above, BTC is dominant and may have an economic incentive to deny access to its network and supporting infrastructure. Indeed, the structure of the market and the absence of CBP on the part of OLOs reinforced BTC’s market position. URCA finds that no other licensee is jointly dominant with BTC in this market.

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<sup>3</sup>The standard conditions conducive to CBP include:

- the buyer has alternative sources of supply;
- the buyer is well informed, especially about alternative sources of supply;
- the buyer could switch to alternative sources of supply without incurring significant costs;
- the buyer could produce the service itself or could sponsor new entry by another supplier; and
- the buyer is an important outlet for the seller.

## 4. URCA’s Investigation

### 4.1 Overview of GNX’s Complaint

By letter dated 25 February 2020, GNX alleged that BTC in respect of a wholesale service, *inter alia*:

- failed or refused to fulfill GNX’s order for circuit upgrades into Andros, Bimini and Exuma; and
- in doing so abused its dominant position and thereby breached section 69 of the Comms Act.

According to GNX, the upgrades relate to established operational circuits BTC already provides to GNX and are vital for GNX’s strategy to expand its customer base in the three islands. GNX expressed that BTC did not fulfill its January 2019 order for 500 Mbps upgrades into the three islands because of billing arrears and issues relating to bank guarantee. Having remedied and complied with BTC’s demands, GNX renewed its effort to have BTC upgrade the circuits in October 2019. Then on 28 November 2019, BTC advised GNX that BTC could not fulfill GNX’s order for technical reasons and offered to facilitate the upgrades on BTC’s new Cisco network by April 2020 if GNX pays a significant capital contribution to BTC. Table 1 below sets out by island GNX’s request for services and the corresponding financial contribution BTC proposed.

[REDACTED]			
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

As part of its 25 February 2020 complaint, GNX referenced the abuse of a dominant position sections of the Act and alleged that BTC’s behavior:

- is limiting markets ... or the provision of services to the prejudice of consumers, in contravention of 69(2)(b); and
- without objective justification, limiting or impeding access to a network or a carriage service in circumstances where access is essential for the provision of an electronic communications service by another operator, in contravention of 69(2)(e).

GNX said the proposals set out in BTC’s 28 November 2019 letter to GNX were an attempt at “economic blackmail” by BTC and urged URCA to invoke its powers under the Act and end BTC’s anticompetitive behavior.

### 4.2 Information considered by URCA

In conducting this investigation URCA considers various submissions provided by GNX and BTC to URCA (summarised in Table 2 below).

**Table 2: Summary of Correspondence and Information Considered**

<i>Date</i>	<i>From</i>	<i>To</i>	<i>Overview of Contents</i>
25 February 2020	GNX	URCA	Judith Smith*/Ted Boyle** submitted Formal Complaint to URCA
3 March 2020	URCA	BTC/Judith Smith	Notification of Complaint and requesting specific information on BTC's links into Andros, Bimini and Exuma
3 March 2020	Judith Smith	URCA	e-mail providing copy of the February 2016 Commercial Wholesale Offer ("CWO") between BTC and GNX
25 March 2020	BTC	URCA/GNX	Provision of requested information on BTC's links into the requested sites
5 April 2020	Judith Smith	URCA	Response to BTC's 25 March 2020 letter to URCA
22 April 2020	URCA	GNX***	Response to Judith Smith's 5 April 2020 letter to URCA
28 April 2020	URCA	BTC	Response to information provided by BTC and request for additional information/clarification
6 May 2020	Judith Smith	URCA	Response to URCA'S 28 April 2020 letter
7 May 2020	URCA	Judith Smith	Response to GNX's 6 May 2020 letter
27 May 2020	BTC	URCA	Provision of requested clarification/additional information
30 June 2020	URCA	BTC/GNX	Directive to BTC and GNX in relation to information exchange/clarification and need for agreed technical solution by the companies
15 July 2020	BTC	GNX/URCA	E-mail describing the two technical solutions discussed by BTC and GNX: (i) Layer 1 capacity-based service, and (ii) MPLS-based service
15 July 2020	Ted Boyle	BTC/URCA	Response to BTC's 15 July 2020 e-mail
17 July 2020	Judith Smith	BTC/URCA	Response to BTC in relation to URCA's directive
19 July 2020	Judith Smith	BTC/URCA	Response to BTC's email and URCA's directive
20 July 2020	BTC	Ted Boyle/URCA	Clarification of GNX's 15 July 2020 response to BTC's e-mail
27 July 2020	Judith Smith	BTC/URCA	A further response to BTC's 15 July 2020 e-mail
11 August 2020	BTC	URCA	e-mail copy of amended Commercial Wholesale Offer Agreement for 100 Mbps into each island
14 September 2020	BTC	Judith Smith/URCA	Response to GNX on Layer 1 capacity-based service and MPLS-based service
22 September 2020	Ted Boyle	BTC/URCA	Response to BTC's 14 September 2020 letter

2 October 2020	BTC	Ted Boyle/URCA	Response to Ted Boyle's letter of 22 September 2020
29 October 2020	URCA	BTC	URCA advised BTC of in-depth investigation
2 November 2020	URCA	BTC	Request for clarification and additional market information
3 November 2020	URCA	GNX	Request for additional market information
10 November 2020	Judith Smith	URCA	Provision of additional market information
11 November 2020	BTC	URCA	Provision of clarification and additional market information
17 November 2020	URCA	BTC	Request for additional market information and clarification
19 November 2020	BTC	Judith Smith/URCA	Response to GNX's 22 September 2020 letter
25 November 2020	Judith Smith	BTC/URCA	e-mail to BTC with clarification questions and meeting request
27 November 2020	BTC	Judith Smith/URCA	e-mail response to GNX regarding possible meeting dates
30 November 2020	Judith Smith	BTC/URCA	e-mail response to BTC regarding possible meeting dates
30 November 2020	BTC	Judith Smith/URCA	e-mail response to GNX's 30 November 2020 e-mail
3 December 2020	BTC	URCA	Response to request for additional information and clarification
20 December 2020	BTC	URCA	Response to GNX's formal complaint
12 February 2021	Judith Smith	BTC/URCA	e-mail regarding implementation of the circuit upgrades

\* Legal Counsel for GNX    \*\*Director for GNX    \*\*\*Judith Smith/Ted Boyle

**4.3 Assessment of Abuse of a Dominant Position**

URCA notes that the abuse of a dominant position section of the Act relates:

"... to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."<sup>4</sup>

<sup>4</sup>Case 85/76 Hoffman-La Roche v. Commission [1979] ECR 46, Para 91.

The concept of abuse is an objective one. Therefore, the party seeking access to BTC's network must show that BTC engage in conduct that has the *purpose, effect or likely effect of lessening, preventing or precluding/excluding competition* in one or more markets for electronic communications in The Bahamas.

The fact that BTC is in a position of dominance (see Section 3 above) is not in itself contrary to the section 69 prohibition of the Comms Act. Rather, the section 69 prohibition is on the abuse of the dominant position, not on the holding of a dominant position. That said, an operator that is found to be in a position of dominance is under a special responsibility not to allow its conduct to impair genuine undistorted competition on communications markets in The Bahamas.<sup>5</sup>

#### 4.3.1 Refusal to Supply

GNX framed its complaint against BTC as an abusive or anticompetitive refusal to supply.<sup>6</sup> Given the fundamentals of the complaint, URCA agrees that the potential form of abuse is refusal to supply. URCA, within the relevant Guidance Note, illustrates various instances of anticompetitive refusal, including a refusal to supply essential inputs to an existing customer, a refusal to provide interface information, or more generally a refusal to grant access to an essential (bottleneck) facility or network. Refusal to supply also includes offering trading conditions so unreasonably that they amount to a constructive refusal to supply. Constructive refusal could, for example, take the form of unduly delaying or degrading the supply of a product or service, or involve the imposition of unreasonable conditions in return for the supply or charging unreasonably high prices (also called "raising rival's costs") for the products and services.<sup>7</sup>

URCA, in ECS COMP.7, formulates that cases of refusal to supply are most likely to give rise to concerns if the following conditions are met simultaneously:<sup>8</sup>

- (i) the refusal relates to a product or service that is objectively necessary for the other licensees to be able to compete effectively on a downstream market;
- (ii) the refusal is likely to lead to the elimination of effective competition on the downstream market; and
- (iii) the refusal is likely to lead to consumer harm.

As regards to item (i), URCA is satisfied that the refused upgrades/inputs that are the subject of this inquiry are **objectively necessary** for the growth of competition in a downstream (retail) market. Another noteworthy point is that the refused upgrades/inputs fall within the purview of "essential" facilities as defined in paragraph 86 of ECS COMP.7:

"An essential facility is one where access is essential to enable competition in the relevant market. For example, a network or part of a network may constitute an essential facility where access is essential for a licensee to provide a specified service. However, a facility will not be regarded as

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<sup>5</sup> Michelin v Commission [1983] ECR 3461

<sup>6</sup>Judith Smith's 5 April 2020 letter to URCA

<sup>7</sup>See "Cost-Raising Strategies", Journal of Industrial Economics, 36(1), 19-34

<sup>8</sup>See paragraph 78

essential if there are other similar facilities available that are substitutes or if it is reasonably feasible to replicate the facility.”

These inputs also fall within the scope of the relevant wholesale market defined at Section 3 above. These are services OLOs must have to effectively compete for retail customers. As GNX explained, it requires the services to expand its position in the retail market for broadband Internet. Based on the supporting evidence (see Section 3.3 above), GNX has no viable alternative to using BTC’s network in the relevant locations. However, BTC did not fulfill GNX’s request for the circuit upgrades. URCA notes that there are instances in which a dominant licensee’s refusal to supply is defensible from a competition law perspective (See Section 4.3.2 below).

Taking the second and third conditions together, the evidence further reveals that BTC’s conduct is **potentially detrimental to competition and harmful to consumers**. BTC and GNX expressed different opinions on the effect or likely effect of BTC’s action on competition and consumers. In considering the actual or potential effect of BTC’s behavior, URCA first summarizes and responds to the views expressed by the respective companies:

#### **GNX’s Comments and URCA’s Response**

From GNX’s standpoint, BTC’s behavior has caused it substantial loss (in terms of sales/revenue) and caused competitive damage to the industry. It noted that BTC has the potential to provide the same retail service and compete with GNX.

GNX held the view that BTC violated section 69(2)(b) and (e) of the Act and asserted that the following constitute abusive behavior by BTC:

- “...residents noticed a significant degradation in LTE service at the time GNX service was throttled.”<sup>9</sup>
- BTC’s action stem from its belief that GNX circuits are providing services to ALIV.
- BTC’s proposed a ‘wet charge’ in 2018 and this seems to have an impact on BTC’s refusal to process its January 2019 order. GNX said, in 2018, it considered the circuit upgrades to increase its customer base, but its effort was thwarted when BTC proposed the imposition of a ‘wet charge’ for all services to the Family Islands. BTC later changed its position on a ‘wet charge’ but this meant GNX had to forego exploring that strategy and its revenue potential. GNX then urged URCA to investigate the link between the ‘wet charge’ in 2018 and BTC’s refusal to process its January 2019 order.

Regarding the first and second bullets, URCA finds no evidence that there exists a causal link between BTC’s action and the issues raised.

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<sup>9</sup>Judith Smith’s 10 November 2020 letter to URCA

On the third bullet, BTC advised URCA that the “present ... leadership is unaware of the discussions or decisions relating to a proposed ‘wet charge’ and its subsequent withdrawal. ... the Carrier and Interconnection team was at that time headed by Counsel who has since exited the Company...”<sup>10</sup>

GNX said BTC employed delaying tactics in regard to GNX’s order, including (i) withholding information indispensable for GNX; (ii) failure to notify GNX that its request for additional bandwidth could not be accommodated; and (iii) failure to provide responses to inquiries and requests for information on a timely basis. URCA, however, finds no compelling evidence that these claims are directly or indirectly linked to BTC’s misuse or exploitation of a dominant position.

URCA notes BTC’s response that it is entitled to decline GNX’s order until GNX honors its financial terms to BTC. BTC stated that GNX does not appreciate that if it is in breach of financial terms, it cannot expect BTC to fulfill its obligation under the agreement.<sup>11</sup> As URCA sees it, even if an OLO is in breach of the CWO, it would be unreasonable for a dominant licensee to withhold information from a party seeking access to its network. As BTC is in a position of dominance it is under an obligation to provide information about wholesale electronic communications services on a reasonable and timely basis. That said, BTC also cited resource constraints associated with rebuilding of its network and connectivity in the affected islands following the passage of hurricane Dorian. Implying that this would have diverted scarce resources away from other pressing matters that BTC must attend. As well, the unique circumstances of the pandemic and the nature of the interaction between the technical teams of the respective companies further stymied or slowed the process.

GNX described the proposals set out in BTC’s November 2019 letter as an attempt at “economic blackmail”. On this, URCA interprets the contents of the letter to be saying BTC is willing to facilitate the upgrades on its new Cisco network but for financial/or budgetary reasons, the associated costs for implementing the upgrades should be borne by GNX. BTC explained that successive hurricanes have caused it to delay its planned upgrade exercises and focus its scarce financial resources on rebuilding infrastructure and connectivity in the affected islands. Additionally:

- BTC could not have contemplated GNX’s demand for additional capacity into the requested locations.
- GNX is the only customer requesting additional bandwidth at the three locations.
- BTC does not have the flexibility or abundance of financial resources to keep running spare capacity.

As explained in Section 4.3.2 below, URCA finds that BTC has no spare capacity into the three islands to meet GNX’s service requests. Therefore, it was reasonable for BTC to require a financial contribution from GNX towards the costs of implementing the circuit upgrades in the three islands.

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<sup>10</sup>Judith Smith’s 11 November 2020 letter to URCA

<sup>11</sup>BTC’s 20 December 2020 letter to URCA

URCA notes that following receipt of GNX’s complaint in February 2020 the meetings and exchange of letters between the companies centered on two possible solutions to meet GNX’s requests: Layer 1 wholesale service and MPLS-based service.<sup>12</sup> As described by BTC, the Layer 1 product GNX proposed is a capacity-based solution (with related commercials for Dense Wavelength Division Multiplexing (“DWDM”)). Although this solution is not currently offered on BTC’s network, BTC (in July 2020) offered to work with GNX on the feasibility of the service.<sup>13</sup> Then in November 2020, BTC informed GNX that it lacks the in-house skillsets to “(1) assess and understand GNX’s proposed request (2) design a solution and (3) develop a commercial proposal by way of an IRU.” While BTC is prepared to work with GNX in developing the Layer 1 service BTC said GNX should bear the cost of this assessment exercise.

URCA has no reason to think that the technical viability of the MPLS option which BTC proposed would impose unreasonable or difficult technical conditions on GNX. BTC has the experience and technical know-how to design and implement the upgrades on its MPLS network. BTC currently sells an equivalent service to GNX and GNX said it finds the service robust and “is happy to continue growing our business on BTC’s MPLS network.”<sup>14</sup> To URCA the MPLS service appears to have a shorter planning horizon than the Layer 1 option. The proposed costs by island to implement the upgrades are presented in Table 3 below.<sup>15</sup>

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]

URCA notes that where an implementation charge is proposed and agreed, the following general principles would normally result in a fair and reasonable outcome for the respective companies:

- Only actual, efficiently incurred one-off costs for implementing GNX’s upgrades should be recovered through a one-off charge, with the burden of proof resting on BTC to demonstrate this.
- BTC will only be able to recoup costs which are specific to the circuit upgrades (i.e., equipment and related labour costs).
- The one-off costs must not include any costs elements which are recovered through monthly recurring or usage related charges.
- Efficiently incurred, actual (rather than estimated) labour costs associated with the implementation of the circuit upgrades. These may relate to BTC staff or third-party suppliers supporting BTC during the implementation of the circuit upgrades.
- One-off implementation costs must be location specific, verifiable and transparent to GNX.

<sup>12</sup>BTC’s 15 July 2020 e-mail to GNX

<sup>13</sup>BTC’s 15 July 2019 e-mail to GNX

<sup>14</sup>Ted Boyle’s 15 July 2020 e-mail to BTC

<sup>15</sup> URCA now understands that the plan is to put the upgrades on BTC’s Nokia network

- BTC may recoup one-off implementation costs in instalments unless otherwise agreed by the parties.

### **BTC's Views and URCA's Response**

From BTC's standpoint, its action did not interfere with the competitive process on the relevant retail market and harmed consumers. In respect of section 69(2)(b) and (e) of the Act, BTC denied that:

- it has limited markets ... or the provision of services to the prejudice of consumers; and
- without objective justification, limited or impeded access to its network or carriage service in circumstances where access is essential for the provision of an electronic communications service by another operator.

BTC claimed it has not "acted capriciously and monopolistically" towards GNX. It reasoned that GNX provides services to a subset of customers not targeted by BTC. Meanwhile, GNX's entry to the market has been revenue enhancing for BTC and BTC wishes to sustain the partnership with GNX. BTC also denied knowledge of the service degradation in Andros, Bimini and Exuma. BTC noted that GNX did not provide the list of persons identified by GNX who experience service degradation so that investigation can be done to understand the nature of the issues being experienced by them. As well, GNX did not clarify the meaning of the term "uncongested service" and provide proof to substantiate GNX's claims.

As explained below, URCA finds that BTC's refusal is potentially harmful to competition and consumers.

### **URCA's Position on Impact of BTC's Conduct on Competition and Consumers**

The information gathered and reviewed by URCA confirms that BTC did not process GNX's order. As such, BTC's action is capable of limiting access to an upstream (wholesale) service that is indispensable for another operator such as GNX to effectively compete in a downstream (retail) market. As noted previously, GNX must either self-supply the refused inputs or acquire them from BTC. But for reasons stated above, self-supply of the refused inputs might not be feasible for GNX. As such, GNX has no credible alternative to using BTC's network in the relevant islands.

As well, BTC's refusal would have been harmful or disadvantageous to consumers in the relevant locations. GNX explained to BTC that the circuit upgrades are essential to GNX's plan to replace "..., high latency, limited bandwidth, satellite-delivered internet services..." in the Family Islands.<sup>16</sup> Access to the upgrades would not be contrary to the national interest. Including the national interest in having competitive communications markets and specifically both URCA and the Government of The Bahamas' ambition to promote robust and improved broadband connectivity in the Family Islands. In view of this, URCA finds that BTC's action is capable of limiting or delaying GNX's deployment of high quality, low latency broadband connectivity to the prejudice of residents and visitors to the three islands. This relates to URCA's finding that the refused inputs are vital to the infrastructure GNX uses to deliver broadband connectivity to existing and new customers in the Family Islands.

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<sup>16</sup>See Ted Boyle's 24 January 2020 letter to BTC

Further still, BTC’s conduct on the upstream market is capable of limiting or restricting the growth of competition on the relevant downstream (retail) market. The refused upgrades are vital to GNX’s plan to expand its coverage footprint to “many more private islands, resorts and marinas that are also served satellite.”<sup>17</sup> Although in August 2020 BTC installed 100 Mbps upgrades into the three (3) locations, this was about 18 months after GNX’s order in January 2019 and less than the requested bandwidth.

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

[REDACTED]

Much more, GNX relies on BTC for the provision of high-speed transmission capacity while at the same time BTC is a potential competitor to GNX in the relevant retail market. Given the characteristics of the relevant markets identified (in Section 3 above), URCA agrees that there is scope for BTC to leverage its dominant position in the downstream (retail) market to the detriment of an existing competitor. This, for example, may take the form of unreasonable conditions in return for supply or charging excessively for the service.

In the totality of the above, URCA finds that BTC’s conduct consists of potentially exclusionary behavior towards the party seeking access to its network.

**4.3.2 Whether BTC’s Conduct Amounts to an Anticompetitive Refusal to Supply**

Pursuant to section 69(e) of the Comms Act, BTC may escape the prohibition of section 69 of the Comms Act if it can provide an objective justification for its behavior or if it can demonstrate that its conduct generates efficiencies which outweigh the negative effect on competition.<sup>18</sup> With that stated, the onus is upon BTC to demonstrate that the conduct in question is not an exploitation or improper use of a dominant position. That is, the conduct is objectively justified and indispensable and proportionate to the aim alleged pursued by BTC.

BTC did not fulfill GNX’s request for the circuit upgrades, as mentioned. Although admitting that it did receive GNX’s order in January 2019, BTC said its reasons for denying the request is twofold:<sup>19</sup>

<sup>17</sup>Ted Boyle’s 24 January 2020 letter to BTC  
<sup>18</sup>Paragraph 42 of ECS COMP.7  
<sup>19</sup>BTC’s 20 December 2020 letter to URCA

- (i) For the period January – October 2019, “BTC did not consider GNX’s request because its payments were in arrears and its bank guarantee was expired.”
- (ii) For the period November 2019 – February 2020, “After consideration by BTC’s technical team BTC advised GNX that it did not have the capacity to accommodate its requests.”

#### **URCA’s Assessment of BTC’s Reasons**

On the first point, BTC argued that GNX has breached relevant financial terms of the BTC/GNX Commercial Wholesale Offer (“CWO”). To BTC, GNX either failed or refused to renew the bank guarantee and liquidate payment arrears and in doing so contravened key financial terms of the CWO.<sup>20</sup> BTC underscored its position not to entertain GNX’s order until the outstanding matters are resolved. BTC described GNX’s payment history “as ... one that is always late, seldom pays the full amounts and often requires prompting.”<sup>21</sup> BTC admitted that GNX paid off the payment arrears by November 2019, as per the 17 July 2019 Settlement Letter, but its commitment to keep its account current was not honored. Further, GNX “failed and refused to increase its bank Guarantee in the amount of \$27,033.00 (total Guarantee of \$77,913.00) by 31 August 2019, as per the said Settlement Letter,...”<sup>22</sup>

Following on from the above, BTC felt it “acted within its contractual rights pursuant to Clause 12.2 of the CWO, which states inter alia viz:-

“The financial security will be subject to review by the Parties every six months starting from the Commencement Date of this Agreement and may be amended if the projected revenues or any of the factors described in clause 12.1 have changed or are likely to change. **Failure to provide a suitable guarantee for payment of sums due for actual levels of service within 30 days (or such longer period as BTC may reasonably allow) will be sufficient reason for BTC to suspend this Agreement under clause 7.**”<sup>23</sup>

BTC further elaborated that the CWO is an exempt agreement under section 68(1)(a) of the Act and so its “... actions under the exempt CWO is permissible if warranted under the CWO and GNX was at all material times in breach of the terms of the agreement then it cannot be seen to have contravened section 69.”

URCA has thoroughly examined the various arrears and bank guarantee related communications between BTC and GNX. To URCA, the facts relating to arrears and bank guarantee issues, as summarized, are not in dispute or out of step with URCA’s own understanding. Notably, GNX agreed that it was in arrears and its bank guarantee had expired. Also, it never denied that its refusal or failure to comply with financial terms constitute a breach of the CWO. URCA sees merit in the points presented by BTC. In particular, URCA shares BTC’s view that OLOs that are not in good financial standing may pose a credit risk to BTC. This is also in light of BTC’s desire to maintain cash flow amidst decreasing revenues and other factors. From

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<sup>20</sup>Clauses 12 and A.4.15/A.4.16

<sup>21</sup> BTC’s 11 November 2020 letter to URCA

<sup>22</sup>22 December 2020

<sup>23</sup>BTC’s 20 December 2020 letter to URCA

URCA's viewpoint, a refusal to supply because of a dispute relating to breach of contract terms likely falls outside the remit of the abuse of a dominant position sections of the Comms Act.

Turning to BTC's defense of *no spare capacity into Andros, Bimini and Exuma*, URCA, having assessed BTC and GNX's submissions is inclined to accept BTC's reason. In assessing BTC's claim, URCA analyzed monthly traffic data and utilization graphs for the period January 2018 to March 2020 plus data on BTC's subscribership for key communications services in the named sites. That said, the information gathered appears to support BTC's claim of no available capacity on the existing links into the three islands. Also, URCA considers that a refusal to supply due to technical limits likely falls outside the scope of the abuse of a dominant position sections of the Comms Act.

As the prohibition in section 69 of the Comms Act is closely aligned with European Union competition law, URCA wishes to ensure that its investigation is consistent with the approach taken by countries that have adopted the European model. In regard to this, URCA finds that this investigation and the resulting findings are not out of step with precedents elsewhere. Within the competition law framework established by the EU<sup>24 25</sup> and Australia<sup>26</sup>, a dominant licensee is not automatically required to supply or deal with all potential business partners. There are instances in which a dominant licensee's refusal to supply is defensible from a competition law perspective. The competent authorities in these jurisdictions identified several potential justifications for refusal to supply that escape the prohibition of abuse of a dominant position. Notably a dominant licensee's refusal that is due to non-payment for services, insolvency and/or credit risk concerns are acceptable from a competition law viewpoint. This means that the refusal is not viewed as an abusive conduct for the purposes of competition law. This principle is also established in a 1998 Notice on the application of the competition rules to access agreements in the EU telecommunications sector, which identifies a number of potential justifications for refusal to supply, including applicants which represent a potential credit risk.<sup>27</sup> Same is true in respect of a dominant licensee's refusal to give access to its network due to capacity constraints, a shortage of raw materials, or disruption to production or distribution capabilities.

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<sup>24</sup>[https://ec.europa.eu/competition/international/multilateral/2007\\_oct\\_refusals\\_to\\_deal.pdf](https://ec.europa.eu/competition/international/multilateral/2007_oct_refusals_to_deal.pdf)

<sup>25</sup><https://www.kkv.fi/en/facts-and-advice/competition-affairs/abuse-of-dominant-position/forms-of-abuse-of-dominant-position/other-types-of-abuse-of-dominant-position/>

<sup>26</sup><https://www.accc.gov.au/system/files/Refusal%20to%20deal%20January%202007%20with%20notices.pdf>

<sup>27</sup><https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:265:0002:0028:EN:PDF>

## 5. Conclusion

URCA's assessment of BTC's behavior is based on the framework set out in URCA's COMP Guidelines, information available to URCA to date, and precedents elsewhere. Based on this, URCA concludes that BTC's action does not meet the section 69 standards of the Act for proving that such behavior amounts to an anticompetitive refusal to supply as described in the relevant Guidance Note and precedent elsewhere. This, in view of URCA's finding, confirms that BTC had objective justification for refusing to process GNX's order. This is because GNX is in default of its financial obligations under the CWO with BTC and thus it would not be an abuse on the part of BTC to deny services. Furthermore, BTC has no spare capacity into the three islands to meet GNX's upgrade requests. So, in accordance with paragraph 42 of ECS COMP.7, URCA will not treat BTC's conduct as an abuse under section 69 of the Act. Put another way, BTC's refusal falls outside the strictures of section 69 of the Act. In View of this, URCA is unable to impose remedies for resolution of GNX's complaint.



