NON-CONFIDENTIAL VERSION

Response to Consultation on

"Preliminary Determination on the Assessment of Significant Market Power in the Electronic Communications Sector in The Bahamas, under Section 39(1) of the Communications Act, 2009"

ECS 10/2014

Submitted to the

Utilities Regulations and Competition Authority

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By

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1. Introduction and Executive Summary

Cable Bahamas Ltd ("CBL"), together with its affiliates Caribbean Crossings Ltd ("CCL") and Systems Resource Group Limited ("SRG") (collectively, "CBL"), hereby responds to Consultation Document ECS 10/2014 published by the Utilities Regulation and Competition Authority ("URCA") on 22 May 2014:

> *Preliminary Determination on the Assessment of Significant Market Power in the Electronic Communications Sector in The Bahamas, under Section 39(1) of the Communications Act, 2009* (the "Preliminary Determination").[1]

CBL has a number of serious concerns about the preliminary conclusions reached by URCA in the consultation document. At a time when URCA should be considering deregulatory approaches in order to stimulate investment and incentivise innovation in the sector, URCA is instead proposing to increase regulation substantially. URCA intends to extend the scope of regulation in a competitive broadband market to include *ex-ante* price regulation of retail broadband services. As CBL will show, this proposal is based on incorrect factual assumptions and a flawed market review methodology. At the same time, URCA is proposing to introduce an elaborate price cap scheme that would apply to CBL's pay television services, even though that market is, at the very least, moving rapidly towards effective competition. The retail pay TV market should, therefore, be a candidate for deregulation, or at the least, lighter-touch regulation -- if not in this review period, then certainly in the next.

Viewed in accordance with market review methods consistent with international best practice, CBL considers that the retail broadband and pay TV markets are not susceptible to *ex-ante* regulation, and that the regulatory obligations which currently apply to CBL should be withdrawn. In the broadband market, the existence of strong competition at retail level obviates the need for continued wholesale broadband regulation. There is strong end-to-end competition between CBL and the Bahamas Telecommunications Company ("BTC") in the broadband market, and there is no reason for any regulation at all. If any need for regulation in this market could be justified, then the existence of a wholesale remedy establishes an additional platform for service-based competition to develop at the retail level. The price cap scheme proposed by URCA is, in any event, ill-timed, intrusive and disproportionate.

The current state of regulation, URCA's proposals and CBL's counter-proposals for the broadband and retail pay TV markets are depicted in the table below:

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[1] CBL is submitting this response to URCA's Preliminary Determination without prejudice to its right to challenge, in any subsequent administrative or judicial proceeding, the material legal and procedural defects in the process that URCA has elected to follow by publishing this Preliminary SMP Determination.

	Current Scope and Form of Regulation	URCA's Proposed Approach	What URCA Should Do
Retail Broadband Access	Interim presumption that CBL has SMP in Geographic Market 1. **No *ex-ante* price regulation imposed.**	CBL designated with SMP in Geographic Market 1. URCA proposes to impose the following new *ex-ante* obligations on the retail broadband market: • **price cap regulation**; • obligation to offer stand-alone retail broadband offers; and • prohibition on launch of new retail product bundled offerings (including broadband services) that cannot be replicated.	**Withdraw current and proposed *ex-ante* obligations** as this market is not susceptible to *ex-ante* regulation: • URCA has failed to demonstrate why these obligations (and **particularly the proposal to impose price cap regulation**) are now necessary – it is also wholly inconsistent in its assessment as to the suitability of the proposed *ex-ante* obligations as a means of addressing the perceived competitive risks that it has identified.
Wholesale Broadband Access	Interim presumption that CBL has SMP. **Resale obligation** imposed (among other obligations).	Continuation of the **resale obligation**.	**Withdraw current wholesale broadband obligations** as the existence of strong competition at retail level negates the need for continued wholesale broadband regulation. If URCA chooses not to remove CBL's current SMP designation on the wholesale broadband market, it should, at a minimum, remove CBL's SMP designation on the downstream retail broadband market.

Retail pay TV	Interim presumption that CBL has SMP. ***Ex-ante* price regulation limited to Superbasic package only**.	CBL designated with SMP. URCA proposes to: • continue *ex-ante* price regulation to Superbasic service (PRIME) via price caps; • **extend the *ex-ant*e retail price cap to apply to other CBL access and content pay TV packages (Prime Select, Prime Plus, Prime Extra)**; and • prohibit the launch of new retail product bundled offerings (including pay TV services) that cannot be replicated.	**Withdraw current and proposed *ex-ante* obligations** as this market is not susceptible to *ex-ante* regulation: • URCA has failed to demonstrate why the proposed obligations (and **particularly the proposal to extend price cap regulation beyond PRIME**) are now necessary – it has also been wholly inconsistent in its assessment as to the suitability of the proposed *ex-ante* obligations as a means of addressing the perceived competitive risks that it has identified. If URCA chooses to ignore the clear evidence that the retail pay TV market is not susceptible to *ex-ante* regulation, it should at a minimum: • **limit *ex-ante* retail price regulation** to the PRIME package only; and • monitor the development of the retail pay TV market over the forthcoming 12-18 months and undertake a fresh market review at the end of this period.

URCA's proposals are also beset by a number of methodological flaws which led URCA to reach conclusions that are unsustainable and will harm CBL, its customers and competition in the marketplace.

URCA's incorrect application of the EU three-criteria test

URCA has incorrectly applied the European Union ("EU") three-criteria test at the remedies stage, instead of at the outset of the market review process in order to determine whether the relevant retail markets are actually susceptible to *ex-ante* regulation. This failure by URCA to firstly determine the suitability or not of *ex-ante* regulation in respect of the relevant retail markets requires that: (i) the Preliminary Determination be immediately set-aside; and (ii) the *ex-ante* market review process be re-commenced on the basis of the correct application of the three-criteria test.

A proper application of the three-criteria test would confirm that, contrary to URCA's preliminary conclusions, the retail broadband and pay TV markets are not susceptible to *ex-ante* regulation. The reason for this is that neither retail market satisfies criteria one and two of the test.

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

Similarly, the possibility of providing licensed TV services over satellite technology or internet protocol television ("IPTV"), coupled with the comparatively lower costs of investing in such technologies, means that the barriers to entry onto the retail pay TV market are not significant. This includes the ability to provide local content similar to that provided by CBL. Furthermore local content providers are offering streaming content such as, ZNS, Jones Communications and Bahamas Christian Network . Given BTC's publicly stated plans to launch IPTV services in the next year, criterion 1 of the three-criteria test is not satisfied in the pay TV market.

Additionally, URCA fails to take into account that further competition is anticipated over the forthcoming 12-18 months in the pay TV market. CBL has been continuously improving the quality of its pay TV offering and the pay TV sales figures confirm that there is no evidence of excessive pricing. Moreover, there is increasing competition from IPTV services and streaming over the Internet and other over-the-top-providers ("OTTP") services which compete with some of the PRIME TV packages. Hence, criterion 2 of the three-criteria test is not satisfied in respect of the pay TV market.

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

The existence of strong competition on the retail broadband market, coupled with the fact that the pay TV market is at least trending towards effective competition, is confirmed by the findings of a report prepared for CBL by the leading international telecoms consultancy firm, Analysys Mason. This firm has provided an independent expert assessment of URCA's analysis and conclusions relating to the retail broadband market and the retail pay TV market, which can be found at Appendix 1 to this submission. This report demonstrates that the second criterion in the three-criteria test (i.e. the market does not trend towards effective competition within the review period) is also not satisfied in respect of both relevant markets.

The correct application of the three-criteria test in the manner as described above also confirms that the *ex-ante* regulation of the wholesale broadband access market is no longer necessary. Practice in the EU confirms that the starting point for identifying whether a wholesale market is susceptible to *ex-ante* regulation is the definition and assessment of the corresponding retail market. Accordingly, if the retail market is found to be effectively competitive from a forward-looking perspective absent *ex-ante* wholesale regulation, such wholesale regulation upstream of that market is no longer required and should be withdrawn.

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

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

However, if URCA chooses to ignore the compelling arguments set out in this submission, and decides not to withdraw CBL's current *ex-ante* obligations on the wholesale market, it should, at a minimum, withdraw its current *ex-ante* obligations on the downstream retail broadband market.

Fundamental deficiencies and inconsistencies exist in URCA's assessment of the remedies that it proposes to apply to the relevant retail markets

A number of fundamental deficiencies and inconsistencies undermine URCA's assessment of the remedies that it proposes to apply to the relevant retail markets.

With regard to the retail broadband market, URCA refers to the existence of "*excessive pricing*" when seeking to justify the expansion of retail price regulation onto this market. In spite of this, it has not presented any evidence of the excessive pricing of retail broadband services in The Bahamas. Instead, URCA relies solely on the findings of a benchmark study prepared by Ofcom, which it appears to have both misunderstood and misrepresented in the context of The Bahamas. Contrary to URCA's assertion, and as demonstrated in the independent report prepared by Analysys Mason, CBL's broadband prices for a basket of services have actually decreased, are not "*excessive*" and are broadly in line with relevant international and regional benchmarks.

In addition, URCA is inconsistent in its assessment of whether *ex-ante* regulation is actually being proposed to address the risk of excessive pricing or predatory pricing at the retail level. URCA also reaches conflicting conclusions on the remedies to be applied to retail broadband and business connectivity services, despite the existence of similar competitive conditions and price performance on both markets. Finally, CBL believes that URCA's proposal to impose a replicability remedy is inconsistent with its proposal to impose a retail price cap remedy on the retail broadband market.

The same or similar concerns exist in respect of URCA's assessment of the remedies that it proposes to impose on the retail pay TV market. Once again, URCA fails to present any credible evidence of the existence of excessive pricing for the supply of pay TV services, despite arguing that the expansion of price regulation is required in order to address excessive retail pricing on that market.

Moreover, and as is the case with the retail broadband market, URCA is inconsistent in its assessment of whether *ex-ante* regulation is actually required to address excessive pricing, or to address predatory pricing for retail pay TV services. URCA has also failed to explain what has changed since 2010 to now warrant the extension of price regulation to pay TV services other than PRIME/Superbasic. Finally, URCA's imposition of the replicability remedy is inconsistent with its proposal to impose a retail price cap remedy on the retail pay TV market.

For these reasons, CBL submits that, if URCA chooses to ignore the compelling arguments set out in this document, and decides to continue to regulate the retail pay TV market, *ex-ante* price regulation should be limited to the PRIME/Superbasic service only, and should not now be extended to premium TV packages as URCA proposes.

CBL believes that there is a strong case for URCA to defer from taking any final decision on the extension of *ex-ante* regulation into the pay TV market at this point. Instead, URCA should monitor the development of this market over the forthcoming 12-18 months, and undertake a market assessment and review at the end of this period. This approach will ensure that URCA's *ex-ante* review of this market takes adequate account of the strong competitive dynamic at play. It will also allow for the relaxation of existing retail regulation on PRIME/Superbasic, and the removal of current *ex-ante* obligations as soon as BTC acquires, for example, a 15 per cent share of the TV market.

CBL has a number of general concerns regarding the selection of retail price caps as a remedy and the consultation procedure followed by URCA

CBL also has a number of more general concerns in respect of the contents of the Preliminary Determination as well as the procedure followed by URCA when preparing this document.

CBL notes, in particular, that the details of the price cap methodology and implementation process have not been consulted upon by URCA. CBL also notes the significant drawbacks of the proposal to implement price caps in respect of both the broadband and pay TV retail markets, including the fact that this proposal constitutes a very complex form of *ex-ante* regulation, will require up-front investment and could take at least another 12-18 months to implement.

Finally, CBL is concerned that, when preparing the Preliminary Determination, URCA failed to draw from important lessons learned during prior consultation processes, including the 2009/10 market review process and timeframes. CBL underlines the importance of the market review process for the sector, and the fact that the regulatory remedies imposed on SMP designated operators are likely to remain in place throughout the whole of the review period. It is therefore critical that URCA take a measured and proportionate approach before making a final determination, and that it uses every opportunity to engage with industry and stakeholders during this process.

Structure of this Response

The remainder of this submission is structured as follows:

- In Section 2, we demonstrate how URCA has incorrectly applied the EU three-criteria test and how the correct application of this test confirms that there is no need for: (i) *ex-ante* regulation in the retail broadband and retail pay TV markets; and (ii) continued *ex-ante* regulation in the wholesale broadband market. In addition, this section highlights a number of fundamental deficiencies and inconsistencies that exist in respect of URCA's assessment of the remedies that it proposes to apply to the relevant retail markets, as well as a number of concerns associated with the consultation and market engagement process followed by URCA.

- In Section 3, we set out responses to the specific consultation questions. These responses draw heavily on the arguments and evidence set out in the main body of this response under Section 2 below.

- Appendix 1 contains the independent report prepared by Analysys Mason on URCA's analysis and conclusions relating to the relevant retail markets.

- Appendix 2 provides confidential information on usage of video services by broadband customers.

- Appendix 3 presents the confidential summary of results from a consumer survey conducted by CBL.

2. General Comments

This section covers CBL's general comments and observations about the Preliminary Determination:

- In Section 2.1 CBL outlines how URCA has incorrectly applied the EU three-criteria test at the remedy stage, rather than up front to determine whether there is actually a need for *ex-ante* regulation.
- Section 2.2 demonstrates that the correct application of the three-criteria test confirms that criteria one and two are not satisfied in the case of both the retail broadband and pay TV markets. Contrary to URCA's preliminary conclusions, therefore, these markets are not susceptible to *ex-ante* regulation.
- Section 2.3 demonstrates how the correct application of the three-criteria test to the retail broadband market also confirms that the wholesale regulation of this market is no longer required, and that the currently applicable *ex-ante* remedies should be withdrawn from this market.
- Sections 2.4 and 2.5 focus on URCA's assessment of the remedies that it proposes to impose on the retail broadband and pay TV markets. These Sections highlight the numerous deficiencies and inconsistencies that exist in URCA's assessment of the remedies that it proposes to impose in respect of both retail markets.
- A number of general concerns with the Preliminary Determination, as well as the consultation and engagement process, are set out in Section 2.6. CBL urges URCA to adopt a more realistic consultation timeframe, and encourages it to engage extensively with stakeholders. Reference is made to various lessons learned from the SMP process in 2009/10 in this context.

2.1 URCA's incorrect application of the EU three-criteria test

2.1.1 Introduction

URCA has fundamentally misunderstood the purpose and application of the three-criteria test. This means that it has failed to determine at the outset of the market review process whether the relevant retail markets addressed in the Preliminary Determination actually warrant *ex-ante* regulation:

This is a fundamental error, considering that:

- the regulatory obligations that currently exist on the relevant retail markets have been imposed on BTC and CBL in the absence of any SMP assessment (and are based instead on an interim statutory "*presumption*" of SMP); and
- the current round of market review therefore constitutes the first opportunity for URCA to substantively determine whether *ex-ante* regulation is actually warranted in respect of these markets.

Therefore, URCA should set-aside its preliminary SMP findings, and re-commence the market review process by properly applying the three-criteria to firstly determine whether *ex-ante* regulation is actually required on the relevant retail markets.

2.1.2 How the three-criteria test is applied under the EU Regulatory Framework

In this section we set out how the Commission Recommendation on Relevant Product and Service Markets (the "Recommendation"),[2] is applied in practice by National Regulatory Authorities (NRAs) in the EU. Par. 5 of the Recommendation provides that NRAs in the EU should apply the following three cumulative criteria test to "*identify*" whether a specific market has the characteristics that may make it "*susceptible to ex-ante regulation*":

1. the existence of high and non-transitory barriers to entry;
2. the market does not trend towards effective competition; and
3. the insufficiency of *ex-post* competition law alone to address market failure.

The application of the three-criteria test therefore allows the NRA to determine whether:

- the application of *ex-ante* regulation in respect of a particular market would be appropriate; or
- where such *ex-ante* regulation already exists, whether it should be withdrawn.

Importantly, the Commission's Explanatory Note accompanying the Recommendation confirms that it is "*appropriate*" that an NRA "***first***" consider the presence of any such characteristics that may make a particular market susceptible to *ex-ante* regulation.[3] The European Regulators Group, the former "*umbrella group*" for NRAs and the precursor of the current Body of European Regulators for Electronic Communications ("BEREC"), has also acknowledged that the three-criteria test serves as a "***first tool***" for NRAs when considering whether a market may be subject to *ex-ante* regulation.[4]

This is confirmed by the manner in which NRAs approach market reviews at national level, the three-criteria test is always applied **prior** to the SMP assessment (if such assessment is actually required), as is demonstrated by:

[2] Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Brussels (2007/879/EC).

[3] Explanatory Note accompanying document to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, Brussels, SEC(2007) 1483 final, Section 2.2.

[4] ERG Report on Guidance on the application of the three criteria test, June 2008, ERG(08) 21, p. 6.

- the decision of the Finnish NRA (FICORA) to withdraw *ex-ante* regulation from the wholesale call origination market (May 2013) which identifies the application of the three-criteria test as the "*starting point*" for its analysis;[5]
- the decision of the Romanian NRA (ANCOM) to withdraw *ex-ante* regulation from both the retail fixed telephony market in Romania and the upstream wholesale call origination market (December 2013);[6]
- the decision of the French NRA (ARCEP) to regulate the wholesale market for digital terrestrial television broadcasting service (July 2012);[7] and
- the decision of the Dutch NRA (OPTA) to withdraw ex-ante regulation from the retail fixed telephony market in The Netherlands (April 2012).[8]

2.1.3 URCA's flawed understanding/application of the three-criteria test and its consequences

URCA acknowledges on a number of occasions in the Preliminary Determination that, under the EU Regulatory Framework, the need for *ex-ante* regulatory intervention is essentially determined on the basis of the three-criteria test. For example, URCA notes that:

> "[…] *best practice, including in the EU Regulatory Framework, suggests that the need for ex-ante intervention should be based on three criteria*".[9]

It also explicitly acknowledges at another point that the purpose of the three-criteria test is to determine whether or not *ex-ante* regulation is actually required:

> "[…]*, establishing the need for ex-ante regulation should be based on the (EU) three criteria test. This states that ex-ante obligations can be necessary if the relevant market is found to have the following three characteristics*: […]".[10]

In spite of this, URCA has inexplicably chosen to ignore the three-criteria test at the outset of the market review process, and to address this test after the SMP assessment stage; i.e.; when assessing the *ex-ante* remedies to be imposed. It has also chosen to ignore the first two criteria, and to focus only on the third criterion.

[5] Commission Decision concerning Case FI/2013/1444: Wholesale call origination on the public telephone network at a fixed location in Finland, C(2013) 2862, Brussels, 08/05/2013, pp. 2 – 3.
[6] Commission Decision concerning Case RO/2013/1533: Access to the public telephone network at a fixed location for residential and non-residential customers in Romania, Commission Decision concerning Case RO/2013/1534: Call origination on the public telephone network provided at a fixed location in Romania, C(2013) 9619, Brussels, 16/12/2013, pp. 3 – 6.
[7] Commission Decision concerning case FR/2012/1354: Wholesale market for digital terrestrial television broadcasting services, C(2012) 5844, pp. 4 – 5.
[8] Commission decision concerning Case NL/2012/1306: Fixed Telephony Markets in the Netherlands, C(2012) 2663, Brussels, 16/04/2012, p. 3.
[9] ECS 10/2014, pp. 20 & 21.
[10] ECS 10/2014, p. 105.

This represents a fundamental misunderstanding on the part of URCA in respect of the following two important issues:

The purpose of the three-criteria test

URCA incorrectly states at Section 3.2.1 of the Preliminary Determination that the three-criteria test:

> "[…] *provides a helpful framework to ensure that ex-ante remedies are targeted* […]"

This confirms that URCA has mistakenly concluded that the three-criteria test is to be applied after the SMP assessment is carried out, and specifically in the context of the development and application of *ex-ante* remedies. It also demonstrates a clear confusion on URCA's part regarding the analysis required in respect of the development and implementation of *ex-ante* remedies capable of remedying any SMP.

The application of the three-criteria test

URCA incorrectly states at Section 7.1 of Preliminary Determination that:

> […] *once a licensee has been found to have SMP, the three criteria test primarily requires an assessment on whether ex-post competition law would be sufficient to remedy any abuses*."

While this once again indicates a flawed understanding on the part of URCA in respect of the purpose of the three-criteria test, it also demonstrates the mistaken belief that the three-criteria test "*primarily*" requires an assessment of the adequacy of *ex-post* competition law (criterion 3); the three-criteria test is cumulative in nature, and each step is of equal importance.

The manner in which URCA proposes to apply the three-criteria test is also at variance with its Methodology for the Assessment of SMP (the "Methodology").[11]

To begin with, the Methodology does not make any reference to the application of the three-criteria test when assessing what *ex-ante* regulatory remedies should be applied following a finding of SMP. In addition, Section 4 of the Methodology, which relies on Sections 5(b)(i) & (ii) and 5(c)of the Communications Act (the "Act"), only requires that URCA take account of the whether "*market forces*" alone are unlikely to achieve the core policy objectives within a reasonable timeframe when considering whether to introduce "*regulatory measures*" (this analysis should be undertaken "*with due regard for the costs and implications for the affected parties*").

It is submitted that the question as to whether "*market forces*" alone are unlikely to achieve the core policy objectives within a reasonable timeframe can only be answered **after** the completion of a comprehensive SMP assessment, and not on the basis of an improper application of the three-criteria test at the *ex-ante* remedies stage of the market review process, as URCA has done.

[11] Methodology for Assessment of Significant Market Power (SMP) under Section 39(2) of the Communications Act, 2009, Final Decision ECS 20/2011, 13 October 2011.

URCA has therefore failed to determine prior to its SMP market assessment whether the relevant retail markets addressed in the Preliminary Determination actually display the characteristics that would make them susceptible to *ex-ante* regulation.

This is a fundamental error, considering that the existing retail regulatory obligations have been imposed on BTC and CBL in the absence of any SMP assessment – the proposed market review therefore constitutes the first opportunity for URCA to substantively determine whether *ex-ante* regulation is actually required on the relevant retail markets (which it has failed to do). This is because the retail SMP obligations set out in Document ECS 11/2010 have been imposed under the interim statutory "*presumption*" that BTC and CBL have SMP on these markets (Section 1 of Schedule 5 of the Act).

For the reasons stated above, URCA should set-aside its preliminary SMP findings, and re-commence the market review process by properly applying the three-criteria to firstly determine whether *ex-ante* regulation is actually required on the relevant retail markets.

2.2 The correct application of the three-criteria test confirms that the relevant retail markets are not susceptible to *ex-ante* regulation

If URCA had properly applied the three-criteria test in the manner as described above, it would have concluded that the retail broadband and pay TV service markets no longer display the characteristics that require the imposition of *ex-ante* regulation. This is because:

- neither of these retail service markets satisfy the first criterion of the three-criteria test, which examines whether the relevant market is subject to high and non-transitory barriers to entry; and
- neither of these retail service markets satisfy the second criterion of the three-criteria test, which examines whether the relevant market trends towards effective competition within the relevant "*time horizon*" of the review period.

Instead of applying the correct analytical framework, URCA simply assumes that *ex-ante* regulation is required in respect of the retail broadband and pay TV markets, relying on a number of dubious grounds to support this contention (including, for example, the fact that there has been limited price change for retail broadband services in recent years). URCA therefore ignores the existence of a number of important and clear indicators that confirm that the three-criteria test is not satisfied in respect of either retail market.

2.2.1 Correct application of the three-criteria test to the retail broadband service market

CBL demonstrates below that, if correctly applied in respect of the retail broadband market, the first and second criteria of the three-criteria test are not satisfied. In doing so, CBL relies on empirical data from the retail broadband market.

Barriers to entry

There are no other legal or regulatory constraints that would prevent or frustrate new market entry in the retail broadband market in The Bahamas:

- There are no licensing restrictions on the number of broadband providers; and
- Spectrum is available in a number of bands (and licensed to existing operators) that could make use of Fixed Wireless Access to provide broadband. We believe that URCA's analysis of barriers to entry is unduly restricted to fixed wireline broadband provision.

In addition, URCA's assessment of the existence of high and non-transitory barriers to entry in the broadband market does not differentiate between Geographic Market 1 (where both BTC and CBL offer broadband services) and Geographic Market 2 (where BTC is the sole broadband provider). On page 11 of their report (Appendix 1), Analysys Mason has stated that, in a geographic market characterised by the presence of two (broadband service) networks, additional investments in BTC's existing network could enable it to deliver higher bitrates.

In conclusion, criterion one of three-criteria test is not satisfied in respect of the retail broadband market in The Bahamas. As this test is cumulative,[12] a failure to satisfy one criteria will mean that the entire test is nullified. CBL therefore submits that the correct application of the three-criteria test confirms that the retail broadband access market in The Bahamas is not susceptible to *ex-ante* regulation.

It is important to note that this conclusion is fully compliant with international practice:

- No retail price regulation is applied in markets that have similar broadband and cable TV penetration to The Bahamas – this includes, as illustrated on page 13 of the Analysys Mason report found at Appendix 1, Belgium, Canada, USA, Malta, Romania, Netherlands.
- No retail price regulation is applied in similar regional markets– this includes, as illustrated on page 14 of the Analysys Mason report, Barbados, Costa Rica, Dominica, Panama, St Lucia, Trinidad and Tobago.

<u>Market trending towards competition</u>

URCA's competitive assessment in the Preliminary Determination is limited to a cursory analysis of the development of broadband shares over time, a limited review of the existence of barriers to entry and expansion and a brief assessment of the existence of countervailing buyer power ("CBP").

Importantly, URCA's appraisal of these factors is backward-looking only, and fails to establish whether or not the retail broadband market trends towards effective competition within the time frame of the proposed market review. This is in spite of the fact that the application of the second criterion of the three-criteria test is exclusively

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[12] See: Par. 5 of the Recommendation. The ERG states as follows at p. 16 in its 2008 Report on Guidance on the application of the three criteria test, June 2008, ERG(08) 21:

> "*It is worth noting that the three criteria are cumulative criteria, and in ERG's view <u>should be applied as a unity</u>. Failure to meet one of the criteria will in any event necessarily lead to the conclusion that the market is not a candidate market for ex-ante regulation.*"

forward-looking in nature, and requires an analysis of whether or not the retail broadband market is likely to trend towards competition over the market review period.

The forward-looking nature of criteria one and two is confirmed by Recital 6 of the Recommendation, which states as follows:

> "*The main indicators to be considered when assessing the first and second criteria are similar to those examined as part of a forward-looking analysis* […]"

It is also important to note that the Methodology explicitly prohibits URCA from confining its competitive analysis to "*static market share*", and requires that it "*consider trends in market share*", provided that such information is available to it.[13]

Rather than undertaking a comprehensive forward-looking competitive assessment of the retail broadband market, URCA appears to have formed the assumption that the presence of two infrastructure operators is insufficient to guarantee effective competition on the Bahamian fixed telecommunications market.

Unlike certain other electronic communications markets where BTC retains a legal or *de facto* monopoly (or near-monopoly), the retail broadband market benefit from robust fixed infrastructure-based competition. CBL and BTC are therefore strong competitors at retail level, not only in terms of price, but also in respect of service quality, reliability, innovation and customer support.

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

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

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

- the fact that the penetration rate of broadband services in Malta was "*not low*", and the evidence of an upward trend in this respect;
- the existence of price competition at retail level (and related price decreases); and

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[13] Section 3.2 of the Methodology ("Criteria for Assessing Market Power (Single SMP)") states as follows:

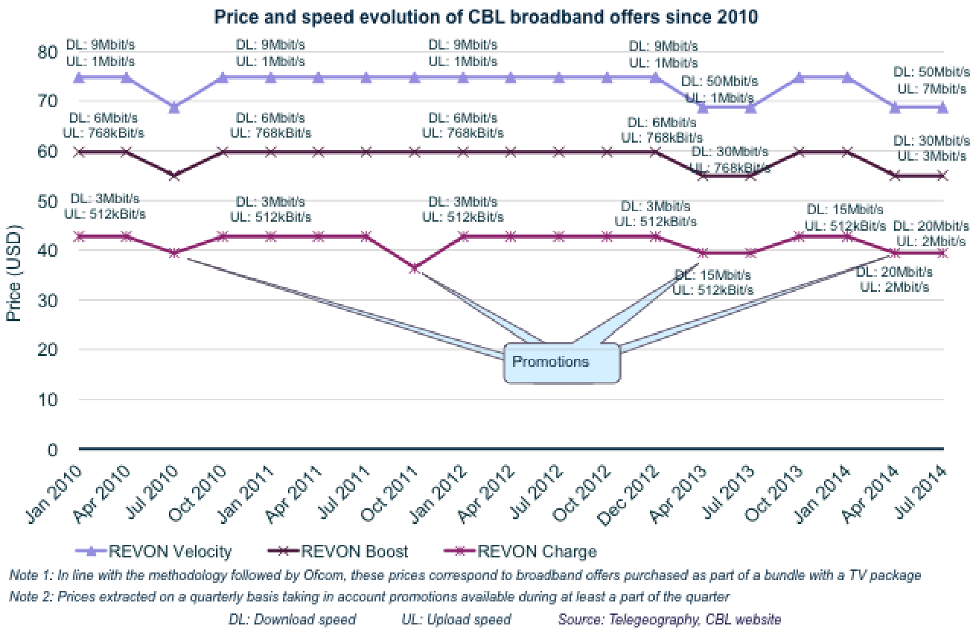
> "*URCA will not confine its analysis to a static market share but would also consider trends in market share, provided such information is readily available to URCA*."

- the existence of a "*variety*" of retail broadband offers, and evidence of service and technology innovation.[14]

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

Firstly, fixed broadband penetration in The Bahamas in 2013 stood at 19.7 per cent[15] and the number of households connected grew by 10,000 during 2012.[16] Secondly, the overall value of the broadband offer to the customer has been enhanced over the last three years. CBL's broadband services have added significant value to the customer. Figure 1 below shows how the value of content to CBL's broadband subscribers has changed since 2010.

Figure 1 – Even if headline prices for CBL's broadband offers have not decreased over time, their content has significantly increased



Source: Analysys Mason, Appendix 1 (page 15)

As a result of this change in the content of offers, the price per Mbit/s paid by customers has fallen sharply. This is shown in Figure 2.

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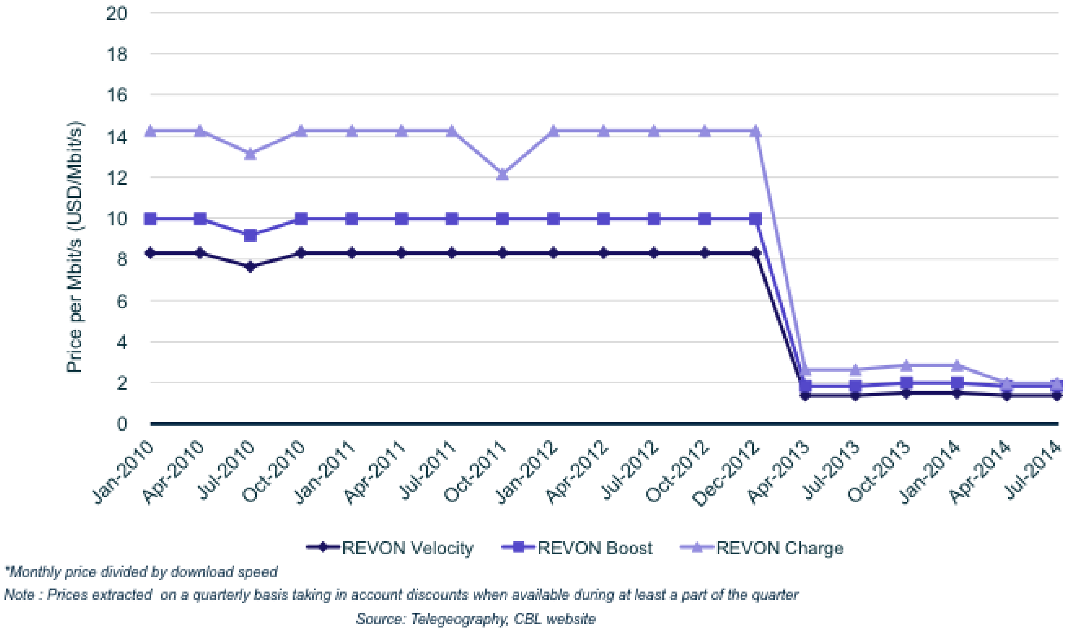
[14] Case MT/2007/0563: Wholesale broadband access, Opening of Phase II investigation pursuant to Article 7(4) of Directive 2002/21/EC, SG-Greffe (2007) D/200366, Brussels, 29.1.2007, p. 7.
[15] URCA 2013 Annual Report and 2014 Annual Pan.
[16] Electronic Communications Policy 2014.

Figure 2 – Price per Mbit/s evolution of CBL broadband offers since 2010



Source: Analysys Mason, Appendix 1 (page 16)

Similarly, the content of BTC's offers to consumers has increased together with the significant increase in BTC's retail broadband offers. In 2009, BTC had two residential offerings:

- Autospeed - download speed of 384kbps for $34.99; and
- Cruisespeed - download speed of 1Mbit/s for $54.99.

BTC's current broadband services provide significantly higher bitrates:

- Up to 8Mbit/s for $29.99—this speed was doubled from 4Mbit/s in 2011; and
- Up to 16Mbit/s for 34.99—speed was doubled from 8Mbit/s in 2011.

All of these factors point towards a competitive broadband market that is dynamic, innovative and capable of enhancing consumer value.

Furthermore, BTC has invested more than $80 million in its NGN over the last five years,[17] a further $200 million investment is expected over the next three years.[18] The impact of the NGN investments is already showing results in the broadband market. Earlier this year, BTC stated that:[19]

> *"product bundling and competitive pricing had increased its broadband Internet sales by 400 per cent over the*

[17] http://www.thebahamasinvestor.com/2013/btc-upgrades-telecommunications-systems-video/
[18] http://www.thebahamasinvestor.com/2014/cw-to-invest-200-million-in-btc-video/
[19] http://www.tribune242.com/news/2014/feb/13/btc-discloses-400-internet-sales-rise/

> *previous year.* […] *Additionally, BTC is recognised as the truly national telecommunications provider by virtue of its active commitment to the expansion of broadband and Internet access throughout the entire Bahama Islands via Next Generation Network (NGN) now close to completion.* […] *Sales have been driven by NGN implementation, and now that we are 90 per cent complete in the Family Islands we are seeing increased uptake*."

Furthermore, strategies to increase the content of broadband offers, such as those by CBL and BTC, are fully in line with strategies adopted by a number of international broadband providers. In the Analysys Report at Appendix 1 of this submission (pages 19 and 20), a summary is provided of increased content offers by Verizon in the USA and Free in France. In both cases, these operators have not decreased prices over time, but have actually increased them as the content of the service was enhanced.

Finally, broadband prices for a basket of broadband of services in The Bahamas have, in fact, fallen over time, and cannot be considered—as URCA has incorrectly concluded—to be excessively priced. We support this contention in the context of our discussion on URCA's use of the Ofcom report on broadband prices immediately below, and by presenting additional international benchmarks to demonstrate that CBL's prices are not excessive.

<u>Comparison of CBL Broadband Prices to Markets covered in the Ofcom report</u>

URCA has cited a report prepared by Ofcom (the "Ofcom Report") that shows falling broadband prices in five Organisation for Economic Cooperation and Development ("OECD") markets. URCA has compared price reductions observed in the market covered in the Ofcom Report to its own finding in The Bahamas—where there have been no headline price reductions by CBL. URCA presents this as evidence that The Bahamian market is either not competitive, or is not trending towards competition. Hence, *ex-ante* retail price regulation is necessary.

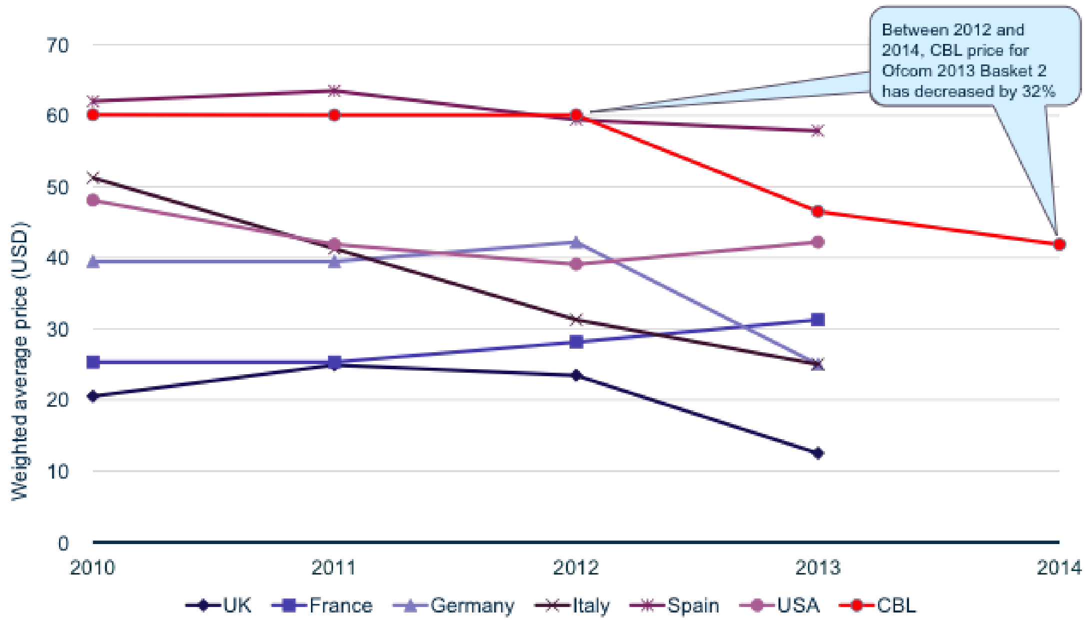
CBL disagrees with the simplistic comparison undertaken by URCA in respect of these services. As Analysys Mason point out (page 14 of their report at Appendix 1) that:

> "*it seems that the methodology followed by Ofcom was not fully understood* […] *this methodology is based on baskets of usage* […] *it is, in fact, normal for competition to result in the evolution of broadband offers, rather than prices* […] *the use of Ofcom's methodology and results leads to a conclusion that prices in the Bahamas are in the range of prices benchmarked by Ofcom and have recently decreased."*

Contrary to URCA's representations, CBL's absolute prices have, in fact, fallen for a basket of services. Moreover, these absolute prices are also within the price ranges for those countries included in the Ofcom Report cited by URCA. Our application of the Ofcom basket based approach to price comparisons demonstrates that:

- For Ofcom basket 2 (4Mbit/s), CBL's price has fallen by over 30 per cent – from \$60/month to \$40 per month. Additionally, CBL absolute prices for this service are within the benchmark countries considered by Ofcom where prices range from \$10-60 per month. This is shown on page 22 of the Analysys Mason report (Appendix 1) and repeated here as Figure 3. Moreover, CBL's service that is comparable to the 4Mbit/s Ofcom basket being compared in fact offers significantly higher download speeds of 20Mbit/s.

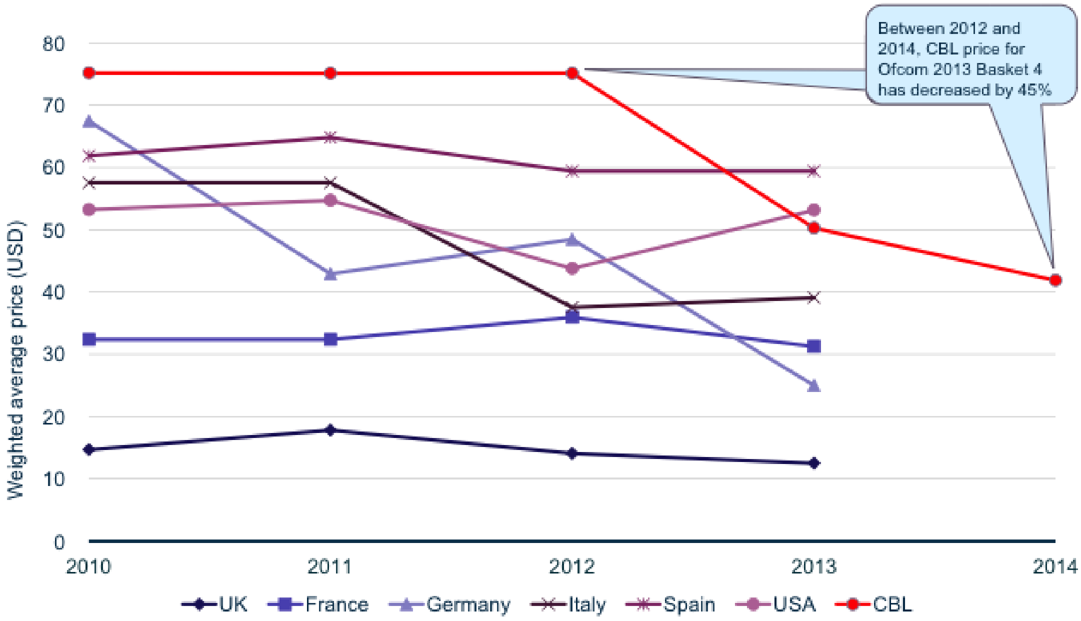
Figure 3 – CBL's price for Basket 2 considered by Ofcom (2013) has fallen by over 30 per cent



Note: For CBL, the annual price is calculated as the average of the quarterly prices
Source: Ofcom, 'The Communications Market Report 2011: International', 'The Communications Market Report 2012: International' and 'The Communications Market Report 2013: International'; CBL; OANDA; Analysys Mason

- For Ofcom basket 4 (10Mbit/s), CBL's price has fallen by over 45 per cent – from \$75/month to \$40 per month. Additionally, CBL absolute prices for this service are within the benchmark countries considered by Ofcom, where prices range from \$10-60 per month. This is demonstrated on page 23 of the Analysys Mason report (Appendix 1), and repeated here as Figure 4. Moreover, CBL's service comparable to the 10Mbit/s actually has significantly higher download speeds of 20Mbit/s – offering customers extra value and with no extra charges for exceeding the number of hours or exceeding the download limits assumed in the Ofcom basket.

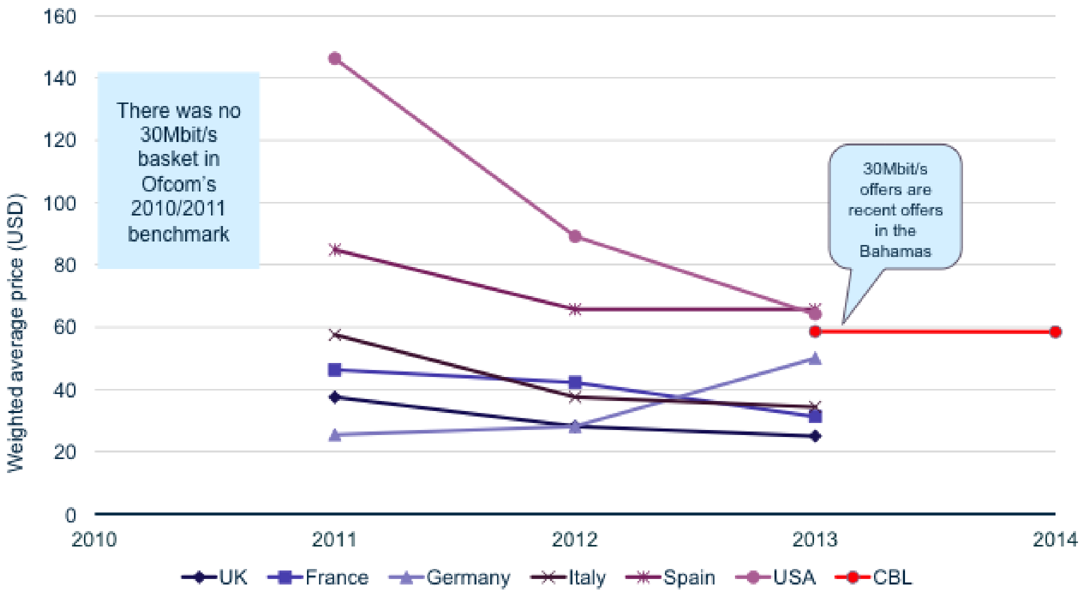
Figure 4 – CBL's price for Basket 4 considered by Ofcom (2013) has fallen by over 45 per cent



Note: For CBL, the annual price is calculated as the average of the quarterly prices
Source: Ofcom, 'The Communications Market Report 2011: International', 'The Communications Market Report 2012: International' and 'The Communications Market Report 2013: International'; CBL; OANDA; Analysys Mason

- For Ofcom basket 5 (30Mbit/s), CBL has only recently introduced this service at a price of $60/month. This price is nonetheless within the range observed in the benchmark countries considered by Ofcom where prices range from over $22-65 per month (page 24 of the Analysys Mason report in Appendix 1 and repeated here as Figure 5.).

Figure 5 – CBL's price for Basket 5 considered by Ofcom (2013) is within the range of prices benchmarked



Note: For CBL, the annual price is calculated as the average of the quarterly prices
Source: Ofcom, 'The Communications Market Report 2011: International', 'The Communications Market Report 2012: International' and 'The Communications Market Report 2013: International'; CBL; OANDA; Analysys Mason

Comparison of CBL Broadband Prices to Similar Global and Regional Markets

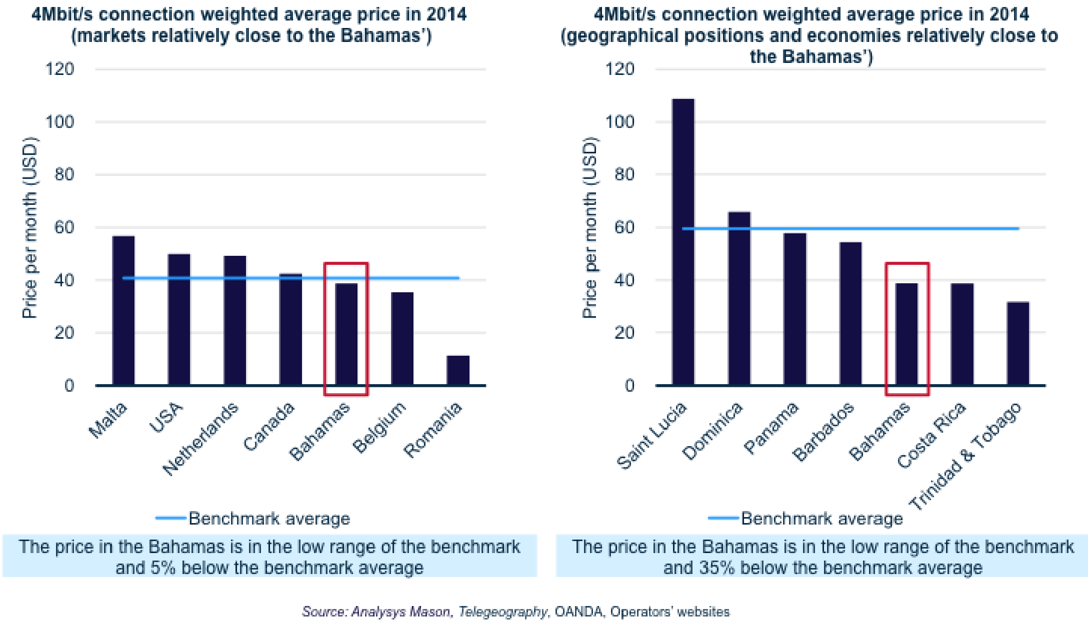
If the broadband market in The Bahamas is not trending towards competition, then retail broadband prices should be excessive. However, international benchmarking confirms that CBL's prices are already in line (and typically below) both global and regional averages.

Using a number of other global and regional comparators, the price benchmarking by Analysys Mason demonstrates:

- For comparable 4Mbit/s broadband services, CBL's prices are 5 per cent below the average for global comparators,[20] and priced lower than those in the USA and Canada. Additionally CBL's prices are 35 per cent lower than the average for regional comparators,[21] and priced lower than similar services in Panama and Barbados. This is demonstrated on page 26 of the Analysys Mason Report at Appendix 1 and repeated here as Figure 6.

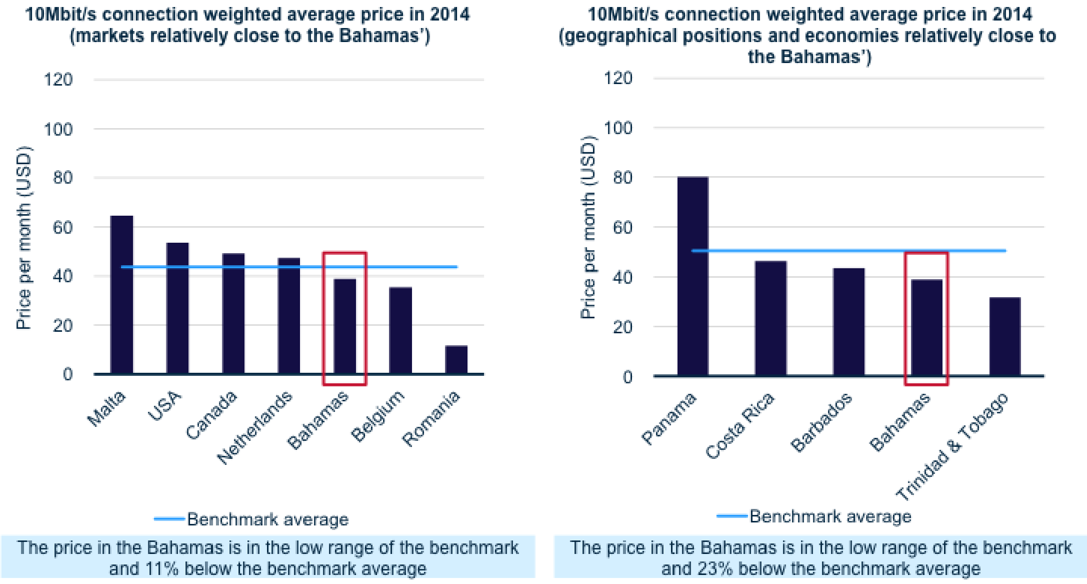
[20] Malta, USA, Netherlands, Canada, Belgium and Romania.
[21] St Lucia, Dominica, Panama, Barbados, Costa Rica, Trinidad and Tobago.

Figure 6 – CBL's prices for 4Mbit/s services are not excessive compared to global and regional benchmarks



- For comparable 10Mbit/s broadband services, CBL's prices are 11 per cent below the average for global comparators and priced lower than those in the USA and Canada. They are 23 per cent lower than the average for regional comparators, and cheaper than Panama and Barbados. This is demonstrated on page 27 of Appendix 1 and repeated here as Figure 7.

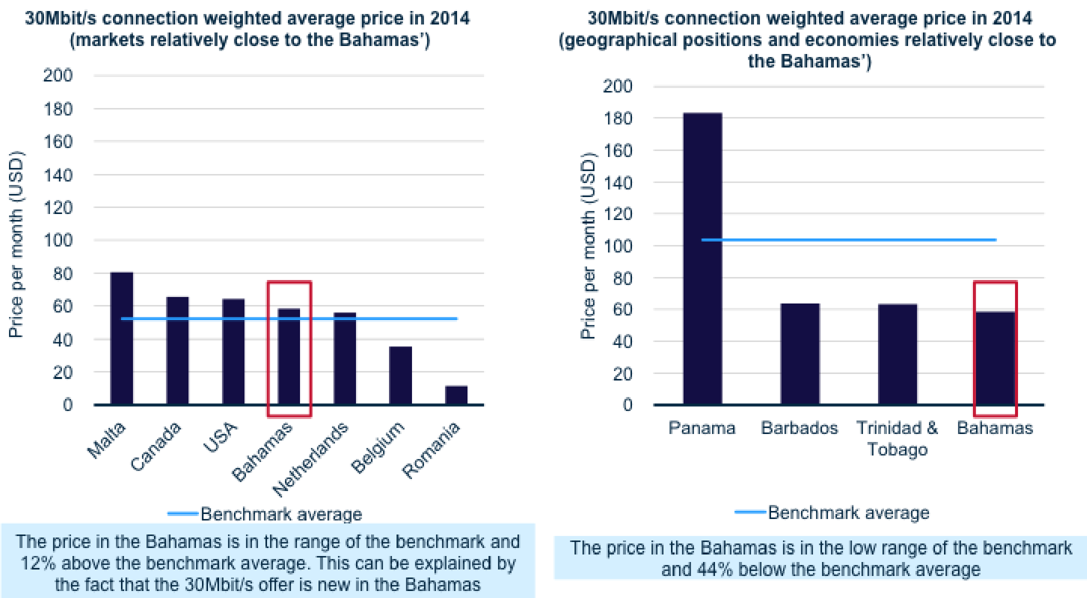
Figure 7 – CBL's prices for 10Mbit/s services are not excessive compared to global and regional benchmarks



Source: *Analysys Mason, Telegeography*, OANDA, Operators' websites

- For comparable 30Mbit/s broadband services, CBL's prices are 12 per cent above global comparators. This is explained, however, by the fact that, when compared with other markets, this is a new service for CBL. Notwithstanding this, the 30Mbit/s broadband service still offers better value than similar services in the USA and Canada. CBL's prices are 44 per cent lower than average for regional comparators, and amongst the lowest in the region. This is shown on page 28 of the Analysys Mason report at Appendix 1 and repeated here as Figure 8.

Figure 8 – CBL's prices for 30Mbit/s services are not excessive compared to global and regional benchmarks



Source: *Analysys Mason, Telegeography*, OANDA, Operators' websites

All of the benchmarking evidence presented above confirms that, contrary to URCA's assumption, the presence of strong competition between BTC and CBL is sufficient to deliver significant benefits to the market in terms of price, quality, innovation, reliability and customer support.

In conclusion, the second criterion of the three-criteria test is not satisfied in respect of the retail broadband market. As this test is cumulative, a failure to satisfy one criteria will mean that the entire test is nullified. CBL therefore submits that the correct application of the three-criteria test confirms that the retail broadband access market in The Bahamas is not susceptible to *ex-ante* regulation.

In addition, and as demonstrated in Section 2.3 below, CBL submits that the correct application of the three-criteria test in respect of the retail broadband market confirms that the continued *ex-ante* regulation of the wholesale broadband access market is no longer necessary.

2.2.2 Pay TV

Barriers to entry

When assessing the possibility of deploying an alternative infrastructure, URCA states in the Preliminary Determination that:

> "*Deploying alternative infrastructure to provide pay TV services to end users requires substantial capital investment. Given the existing end-to-end networks and the overall size of the Bahamian market, URCA considers the need to deploy alternative infrastructure to constitute a high barrier to entry in the market for pay TV services*"

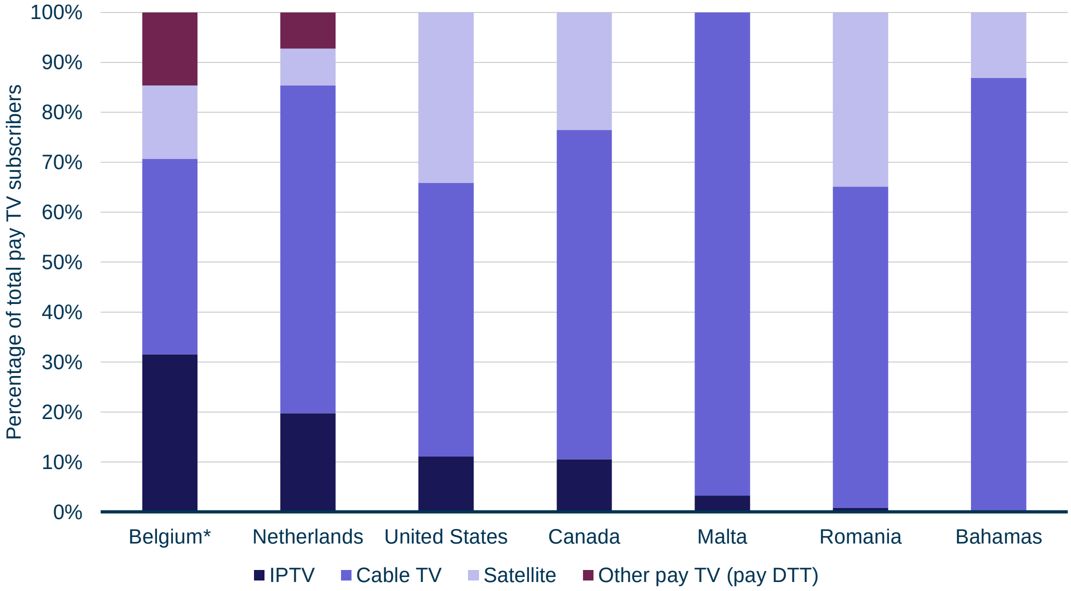
CBL strongly believes that URCA's assessment of the barriers to entry in respect of the pay TV market is wrong or incomplete for two main reasons.

Firstly, the offering of local content does not constitute a high barrier to entry. In terms of local content, the two existing channels (ZNS-TV and the Parliamentary Channel) are both public. These channels are broadcast by CBL based on a must-carry obligation. Their availability is not, therefore, likely to constitute a high barrier to entry as BTC can negotiate to broadcast them under equivalent conditions as CBL. It should also be recognised that ZNS is now streaming LiveTV to tablet devices. Hence it is entirely plausible that IPTV providers could access local content when the existing Public Service Broadcaster is delivering content via OTTP.

Secondly, the provision of legitimate pay TV services via satellite remains possible. URCA has taken great care to point out that some of the existing satellite providers are unlicensed, and has noted that Satellite Bahamas is engaged in a commercial dispute with DirecTV. However, URCA has not indicated that any regulatory barriers to entry exist that would impede or prevent the offering of satellite pay TV services in The Bahamas. As far as CBL is aware, neither the Bahamian Government nor URCA have imposed any licensing or spectrum restrictions that would prevent or inhibit an interested party from procuring the relevant satellite licence.

Satellite TV plays an important role in the pay TV market in most of the global countries with markets relatively close to The Bahamas—this is shown in Figure 9.

Figure 9 – Split of pay TV by technology



** For Belgium, the split between satellite and DTT is an estimate*
Source: Analysys Mason Research, Globalcomms, MCA, Analysys Mason

In conclusion, the first criterion of the three-criteria test is not satisfied in respect of the retail pay TV market. As this test is cumulative, a failure to satisfy one criterion will mean that the entire test is nullified. CBL therefore submits that the correct application of the three-criteria test confirms that the retail pay TV market in The Bahamas is not susceptible to *ex-ante* regulation.

Market trending towards competition

The existence of strong infrastructure-based competition in the fixed sector also means that the pay TV market is, at the very least, trending towards effective competition with the prospect of being fully competitive within a 12-18 month timeframe.

CBL strongly believes that URCA's assessment of the competitive outlook in respect of the pay TV market is wrong or incomplete for a number of reasons.

1. Near term entry of BTC into the pay TV market

URCA states in the Preliminary Determination that "*it is not aware of any concrete plans for BTC* […] *to launch these* [IPTV] *services in the near future.*"[22]

We believe that URCA should take into account that, while BTC has not yet deployed IPTV, it appears to be currently in the process of doing so. In fact, BTC has recently made a number of public statements (both prior to and following URCA's publication of its

[22] Preliminary Determination, p. 100.

Preliminary Determination) indicating that the deployment of pay TV services is imminent:

- BTC staff stated last year that the company is seeking to launch IPTV services in the financial year 2014 (beginning April 2014) and that the service will be more interactive than existing cable TV services and include local content.[23]
- As the upgrade of the fixed line network to NGN is nearly complete, the former chief executive officer ("CEO") of BTC has stated that BTC would ultimately invest "*multiple millions of dollars*" in the deployment of its proposed TV product across The Bahamas. The former CEO also expressed confidence that the company would get it to market within the next 12 months:

> *"I'm very confident that in the next 12 months we will get a TV product to the market...BTC has made progress on its next generation network (NGN) for fixed line broadband since a TV service was first tabled: 'We are almost finished that, and that will give us more of a focused mind-set when we look at TV."*[24]

In addition, BTC is planning almost $200 million of further investment over the next three years. It is high likely that some of this investment will be allocated for IPTV services. In particular, the CEO of Cable & Wireless Communications ("CWC") recently disclosed that BTC networks include: "*LTE, fibre to the home*".[25] Both of these networks are suitable for the provision of IPTV services on fixed and mobile devices.

Moreover, reinforcing its TV offering is a key strategy for BTC's parent, CWC. This was clearly articulated in CWC's announcement covering its financial results for the year 2013/14:

> *"The choice of TV provider is a key "moment of truth" where customers express a clear preference for their entertainment platform.* ***We aim to provide relevant TV services*** *to our customers to primarily grow our broadband and protect our fixed line businesses. Today, TV contributes c.2% to Group revenue. However, we expect to grow this business by 50% over the next two years as we invest in a variety of technology delivery platforms. ...****We will invest in delivery technologies*** *appropriate to each of our markets. In Panama we will expand our fibre coaxial network in urban areas and target rural areas through deployment of direct-to-*

[23] http://www.thebahamasinvestor.com/2013/btc-upgrades-telecommunications-systems-video/

[24] http://www.employbahamians.com/btc-eyes-tv-launch-within-next-12-months/ an http://www.employbahamians.com/btc-eyes-tv-launch-within-next-12-months/d also covered in http://www.telegeography.com/products/commsupdate/articles/2014/03/25/btc-to-offer-tv-service-within-next-twelve-months/

[25] http://www.thebahamasinvestor.com/2014/cw-to-invest-200-million-in-btc-video/

> *home satellite services. Across the Caribbean* ***we will deploy IPTV service capabilities focusing initially on*** *Cayman, Barbados and* ***The Bahamas****. As our TV subscriber base grows this should also enable greater leverage with content providers.*" [26]

These are very public signs of what TV subscribers can expect from BTC in the pay TV market. This development is highly likely to happen within the next 12-18 months, the relevant timeframe for URCA's forward-looking market analysis. It is, therefore, difficult to understand how URCA could form the opinion that barriers to entry in the pay TV market are high. These barriers are obviously not as high as URCA has assumed, at least not for BTC.

Finally, there is evidence from The Bahamas of customer appetite for IPTV services provided locally, [✂]. CBL carried out a survey of 680 persons (of which 480 also had broadband access) in order to understand whether and how these persons consume video content (TV programs, movies, sports and so on) over the Internet. The detailed results of the survey are provided in Appendix 3. When asked specifically about whether they would switch to IPTV services:

- [✂] of broadband subscribers surveyed said that they were willing to switch to a TV service provided over the Internet similar to CBL's cable TV service; and

- [✂] of broadband subscribers surveyed felt that they were either "*likely*" or "*very likely*" to switch to a BTC TV service provided over the Internet, while a further [✂] of broadband subscribers were undecided. Thus, up to [✂] of broadband subscribers are at least susceptible to switching away from CBL's pay TV services, if not already decided on doing so.

2. Impact of IPTV in the region shows that IPTV can eat into cable TV market share quickly

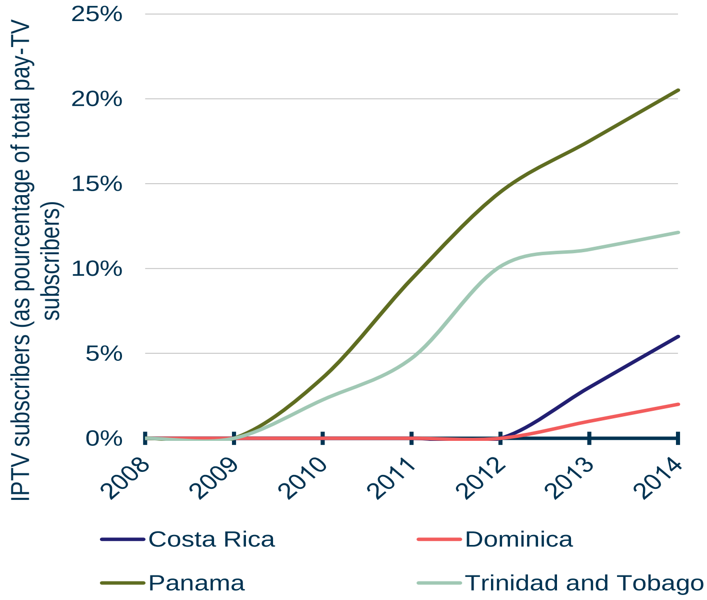
Research reveals that, within the countries selected for their geographical positions and economies relatively close to The Bahamas', four have recently launched IPTV in a context where pay TV was well established (this research also demonstrates that Free in France is an example of a local-loop un-bundler who has successfully deployed an IPTV solution (see pages 20 and 41 of the Analysys Mason report at Appendix 1)).

In all of these countries, IPTV has quickly gained market shares within the global pay TV market. In these countries IPTV based pay TV services are sold as standalone offers, as well as components of multiple-play bundles including broadband, fixed telephony and mobile services. In particular, IPTV has gained 21% market share in Panama.

Figure 10 illustrates the impact IPTV has had on these four markets: Costa Rica, Panama, Dominica and Trinidad and Tobago.

[26] http://www.cwc.com/assets/uploads/files/PressRelease%20Financial/2014/Press%20release%20FY1314%20May%202014.pdf

Figure 10 – Share of IPTV among PV TV Subscribers



CWC, which also owns 49% of Cable & Wireless Panama, is likely to try to leverage its Group experience in the launch and commercial provision of IPTV services in Panama to the benefit of BTC in The Bahamas. Therefore, IPTV could quickly play an important role in the Bahamian pay TV market, and BTC has the potential to gain rapid market share, especially as it will benefit of product launch from its corporate parent, CWC.

This regional data is supported by broader evidence of the success of IPTV offerings by traditional telecoms companies. In a recent report, Jeff Heynen, principal analyst for broadband access and pay TV at Infonetics Research, noted that:

> "*Telco IPTV operators AT&T, China Telecom, and Deutsche Telekom continue to enjoy strong growth in new subscribers and ARPU, demonstrating that competitive providers with differentiated services can successfully steal share away from incumbent cable operators.* [...] *Whether it's an improved user interface, multi-screen video, or even DVR services, there are marked differences that have allowed telcos to grow their subscriber bases at a time when others aren't.*"[27]

3. Streaming-based services and growth of devices that can deliver TV and video services over broadband are starting to provide an additional alternative to cable TV in the Bahamas

URCA's analysis of the product features of Internet streaming in the Preliminary Determination is five years old, essentially the same as it's analysis 2009/10.

[27] http://www.businesswire.com/news/home/20140128006630/en/Infonetics-Cable's-Share-Pay-TV-Market-Continues-Shrink#.U9IepVYxElK

Unfortunately, this analysis is limited to setting out the basic product features of streaming, and is not informed by any local or international studies or surveys. Moreover, URCA does not seem to recognise that the Public Service Broadcaster, ZNS, is already delivering live services over the Internet.

Since URCA undertook its 2009/2010, there has been an explosion in the number of devices that are broadband enabled and that allow consumers to watch video content over the Internet (e.g.; smartphones, tablets). In addition, there has been tremendous growth in the take-up of over-the-top ("OTT") content services, and in the availability of free video content (such as YouTube or file sharing sites).[28] For example, in 2014 alone, firms such as Sony and Intel are expected to launch OTT services which will deliver television programmes over the Internet. Apple's long-awaited television offering may come to fruition.

CBL urges URCA to take notice of global research and current customer trends that confirm the existence of significant competitive constraints in the pay TV sector. Bahamian consumers are not immune to these global trends, a fact that is demonstrated by our consumer survey of pay TV and broadband subscribers.

We set out below a summary of international research, which highlights a number of global trends relating to how viewer habits of TV and video consumption over the Internet or online are evolving (hereafter referred to as video content):

- In November 2013, *The Economist* published an article on these shifts to online viewing and other TV consumption habits:[29]

> "[O]*nline video will become a more influential cultural force, changing conversations, communities and what people watch."*
>
> *"The internet has made people expect that they can access entertainment on their terms: if someone were to make a reality-television show about media consumers today, it would be called, "Instant Gratification". Binge viewing, in which square-eyed audiences (no longer at the mercy of programmers' line-ups) watch multiple episodes or entire seasons in single sittings, is becoming common. Netflix actively indulges consumers' gluttony by putting whole seasons of its new shows online all at once. More people will spend weekends without leaving the house, mesmerised by their monitors* [...]"

[28] OTT in particular refers to content that arrives from a third party, such as DramaFever, Crackle, Hulu, myTV, NetD, Netflix, NowTV, RPI TV, WhereverTV, or WWE Network, and is delivered to an end user device, leaving the ISP responsible only for transporting IP packets (Source: Wikipeadia).

[29] http://www.economist.com/news/21589085-internet-changing-television-habits-yourtube#sthash.6RP1zbqX.dpbs

> *"With the exception of live sports and a few big television programmes, the era of nations tuning in to a weekly show at the same time, and talking about it the next day, will wane—if not in 2014 then soon after. Colleagues will still discuss "Homeland" or "Downton Abbey", but they are unlikely to have just seen the same episode."*
>
> *"In 2014 more "cord-nevers" (youngsters forgoing cable) will start 2 their own homes and opt for a cheaper online-video service and broadband instead of pay-television. These are not perfect replacements—with no live sports, for example—but many cash-strapped younger folk, who do not care about tuning in at prime time, will choose them. Beyond 2014, even more people will cut the cord. This drama of changing television-viewing habits will play out over many seasons".*

- Consumers are watching video content on multiple devices, rather than only on television screens. Research by Ipsos[30] covering a sample of about 15,000 consumers across 20 countries shows that over one quarter (27%) accessed video content via a computer, while 16% streamed content from the Internet to their TV set. The use of a DVR or other recording devices was cited by 16% of those surveyed, while 11% were accessing content on their mobile devices. The increasingly prolific use of multiple devices to watch video content was also noted in the article we previously cited from *The Economist:*

  > *"Families may still gather in the living room but they will be absorbed by different screens, with adolescents watching programmes on their mobile devices while parents gaze at the television."*

- Streaming-based TV services have developed quickly, together with the increase in available download speeds of broadband services. An example of this is the download speed increase of the entry level broadband service provided by CBL from 3Mbit/s to 20Mbit/s. The development of streaming-based TV has also been facilitated by the availability of devices that can deliver TV services over a broadband connection (e.g. Apple TV). Increasing broadband speeds and the take-up of devices that can deliver video over broadband services has meant that streaming-based services are becoming an additional alternative to cable TV. Faster broadband will make it easier to watch videos delivered online, without firstly having to wait for these videos to load. People will buy more

30 http://www.warc.com/Content/News/Global_TV_viewing_habits_change.content?ID=6b94c5bb-0089-4672-8dae-09fced0a133b

Internet-enabled "*smart*" television sets, bringing websites once accessible mainly from laptops and tablets to bigger screens.

- A recent survey of Video over the Internet by Accenture demonstrates that:[31]
    - Overall, 90 per cent of consumers globally now watch video content over the Internet, including movies, TV programs, videos on demand and more on some device.
    - The frequency with which consumers are watching video content over the Internet is also increasing. The most significant growth is evident in high frequency categories: those watching videos daily or three to five times per week. More than one-quarter of consumers watch video content over the Internet on a PC every day and another 22 per cent do so at least three times per week.
    - More people are watching full-length movies and TV series on personal computers ("PCs")/laptops than in 2012 as this percentage grew from 41 to 47.
    - Online consumption is maturing, and consumers are getting more sophisticated. While consumers want to pay less for content overall, they are prepared to pay more for getting specifically what they want. In other words, if providers demonstrate value in premium content, consumers are willing to pay.
    - Otherwise, customers will opt for consuming content for free. In the survey undertaken by Accenture, two-thirds of consumers said they mainly watch free video content.
- Mobile devices account for 2 per cent of all TV viewing, according to a new study by the Council for Research Excellence. However, that figure is 7 per cent among a group that the study calls "*early adopters*" and "*opinion leaders*". Members of this group use mobile devices for about 25 per cent of their broadcast/cable site viewing. Perhaps the most interesting finding in CRE's study, which involved about 6,000 participants, is that most mobile viewing occurs at home. 82 per cent of tablet views and 64 per cent of smartphone views take place in locations known for immobile devices like TVs, desktop computers and couches. [32]

URCA therefore cannot ignore the relevance of these global trends, or simply assume that they do not apply to The Bahamas and Bahamian consumers. In an effort to inform

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[31] The 2013 Accenture Video-Over-Internet Consumer Survey focuses on understanding consumers' online video behaviors, perceptions and aspirations in this dynamic and fast-developing world. The survey seeks both to monitor trends in the evolution of consumer behavior and aspirations, and also to identify and test hypotheses of new behavior and aspirations each year. Research was conducted in February and March of 2013 with 3501 consumers in Brazil, France, Italy, Spain, the United Kingdom and the United States. (http://www.accenture.com/SiteCollectionDocuments/PDF/Accenture-Video-Over-Internet-Consumer-Survey-2013.pdf)

[32] http://www.poynter.org/latest-news/mediawire/219043/new-mobile-tv-study-shows-changes-in-viewing-habits/

the debate and provide local market data, CBL randomly surveyed its pay TV customers through its call centre via an auto-dialer, but using the independent external agents to conduct the telephone questionnaire.[33] The focus of the survey was to understand whether, and how, broadband subscribers are viewing different types of video content online. The availability of broadband subjects CBL's pay TV service to potential competition from streaming and OTTP services (as well as from the IPTV services covered above). In total, 82% of Bahamian households have broadband service (with a speed of at least 8Mbit/s from BTC or 18-20Mbit/s from CBL).

The key highlights of the Bahamian consumer survey are summarised below (all findings are expressed as a percentage of total broadband subscription in The Bahamas):

<u>Device availability and use:</u>

- [✂] have a smartphone;
- [✂] have a tablet;
- [✂] use a laptop as main form of Internet access; and
- [✂] use a smartphone or tablet as the main form of Internet access.

<u>Awareness and willingness to pay for video content over the Internet:</u>

- [✂] are aware that they are able to watch TV or video content over the Internet;
- Bahamian broadband consumers are actually watching movies, sports and other TV programs on multiple devices;
- [✂] have watched video content at some point on a device (free or paid for);
- [✂] only willing to watch free video content online;
- [✂] have paid for content at some time using local credit cards, US credit cards, iTunes card and other payment methods;
- Most Bahamian broadband consumers watch free content, while some are paying through subscription and one-time purchases, with [✂] of broadband subscribers watching movies online <u>daily</u> and [✂] of broadband subscribers watching other TV programmes <u>daily</u>; and
- Netflix is used widely to view movies and other TV programmes.

The specific consumption habits of Bahamian broadband subscribers for movies, sports and other TV programs are set out below in Table 1.

[33] A total of 779 customers were called and 681 agreed to participate in the survey. A total of 580 customers completed the survey, i.e.; 101 terminated at various points during the telephone interview as they could not reasonably answer the questions. This is a statistically significant sample. Detailed results on a question by question basis are provided in Appendix 3.

Table 1 – Online Video Consumption and Habits of Bahamian Broadband Subscribers

Movies		**Sports**		**Other TV programs**	
% of broadband subscribers	*Survey result*	*% of broadband subscribers*	*Survey result*	*% of broadband subscribers*	*Survey result*
[✂]	Streamed or download movies over the Internet	[✂]	Watch sports over the Internet	[✂]	Watch other TV programs over the Internet
[✂]	Watch movies online daily	[✂]	Watch live sports over the Internet	[✂]	Watch TV series over the Internet
[✂]	Subscribe to an online movie service	[✂]	Watch sports online by making a one-time purchase	[✂]	Watch online TV programs daily
[✂]	Have paid for online movies via one-time purchase	[✂]	Watch sports online at least once a week	[✂]	Watch other TV programs online using Netflix
[✂]	Watch free movies online	[✂]	Watch sports online on a PC or laptop	[✂]	Watch free TV programs over the Internet
[✂]	Watch movies online using Netflix			[✂]	Watch other TV programs online via a PC or laptop

Furthermore, network management statistics used to manage the CBL broadband network demonstrate that:

- anywhere between [✂] of CBL's broadband customers are viewing video content on a daily basis;
- subscription based TV and movie OTTP services account for a significant portion of overall consumption; and
- there are emerging signs of broadband enabled devices being used to access video content.

Further information on these network management statistics is provided in Appendix 2.

As noted above, URCA's competitive assessment of the relevant retail markets is exclusively backward-looking, and fails to determine whether these markets trend towards effective competition within the time frame of the proposed market review. This is in spite of the fact that the application of the second criterion of the three-criteria test is exclusively forward-looking in nature, and requires an analysis of whether or not the retail pay TV market is likely to trend towards effective competition over the market review period. Moreover, Section 3.2 of the Methodology explicitly prohibits URCA from confining its competitive analysis to "*static market share*", and requires that it "*consider trends in market share*", provided that such information is available to it.

Notwithstanding this, URCA has failed to undertake a forward-looking analysis of the pay TV market. Instead, it has chosen to limit its competitive analysis to an assessment of the market share and competitive conditions that exist at the time of the proposed market review. Had URCA undertaken a forward-looking competitive analysis as it is required to do, it would have had to take account of the very high probability that BTC will be providing IPTV services in the near future, and the associated effect on competition. This would have confirmed that the pay TV market is, at the very least, trending towards effective competition, and does not, therefore, satisfy the second part of the three-criteria test.

In conclusion, the second criterion of the three-criteria test is not satisfied in respect of the retail pay TV market. As this test is cumulative, a failure to satisfy one criterion will mean that the entire test is nullified. CBL therefore submits that the correct application of the three-criteria test confirms that the retail pay TV market in The Bahamas is not susceptible to *ex-ante* regulation.

2.3 The correct application of the three-criteria test confirms that wholesale broadband access regulation is no longer required in The Bahamas

As demonstrated above, the correct application of the three-criteria test by URCA would confirm the existence of strong competitive constraints on the retail broadband market in The Bahamas.

The existence and impact of competitive constraints at the retail level is a critical factor when determining the need for regulation in the associated upstream wholesale broadband market. The Commission's draft revised Recommendation on Relevant

Product and Service Markets (the "Draft Revised Recommendation"),[34] and specifically Recitals 7, 8 and 10, now explicitly acknowledge this point, and clarify how the existence of retail competition is relevant when determining the appropriateness of upstream wholesale regulation:

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

The methodology adopted by the Finnish Communications Regulatory Authority (FICORA) in its Market 2 review (April 2013) reflects the approach advocated by the Commission in Recitals 7, 8 and 10 of the Draft Revised Recommendation. Market 2 is the market for wholesale fixed call origination. Market 2 is immediately upstream of a retail market that is also identified in the Recommendation as susceptible to *ex-ante* regulation (the market for retail fixed voice access service, or Market 1). We therefore consider Market 2 to be analogous to the wholesale broadband market in The Bahamas, which also sits directly upstream of a regulated retail market (the retail broadband market).

In its market review, FICORA firstly assessed whether the retail market met the three-criteria test. FICORA considered that the satisfaction of the three-criteria test at retail level was a "*prerequisite*" for any further *ex-ante* regulation of the wholesale market for call origination services.[35] FICORA concluded that criteria one and two of the three-criteria test were not met in the downstream fixed voice access service market. On this basis, it concluded that:

> "*there were no market failures which would justify the continued ex-ante regulation of the wholesale market for call origination in Finland*".[36]

Ficora therefore decided to withdraw *ex-ante* regulation from that market. The Commission had no comments on FICORA's approach, or on the conclusions of its

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[34] Commission Recommendation of 2013 on relevant product and service markets within the electronic communications sector susceptible to *ex-ante* regulation in accordance with Directive 2001/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services; http://ec.europa.eu/digital-agenda/en/news/draft-revised-recommendation-relevant-markets

[35] Commission Decision concerning Case FI/2013/1444: Wholesale call origination on the public telephone networks provided at a fixed location in Finland, Brussels, 8/05/2013 C(2013) 2862 final, p. 3.

[36] *Ibid*.

Market 2 review.

CBL argues that URCA should now review the appropriateness of continuing to regulate the wholesale broadband market in light of the existence of strong competition at the retail level. It is argued that the existence of robust competition at the retail broadband level in The Bahamas removes the need for continued wholesale regulation. CBL therefore contends that the "*prerequisite*" for any further *ex-ante* regulation of the wholesale broadband market has been removed, and that such regulation should now be withdrawn by URCA.

In any case, CBL argues that the existence of strong infrastructure based competition in The Bahamian fixed telecommunications sector between BTC and CBL is sufficient, and that new market entry is not required to facilitate/ensure effective competition. The significant benefits that can be delivered by strong infrastructure-based competition between two operators are widely accepted. A market of only two vertically integrated operators can, in fact, demonstrate a stronger competitive dynamic at retail level than a market made up of multiple providers competing at the service level only.

As noted in Section 2.2.1 above, this fact has already been acknowledged by the Commission when assessing a draft review of the national wholesale broadband access market that was undertaken by the MCA in 2007. Similar to the current situation in The Bahamas, the Maltese broadband market is dominated by the fixed telecommunications incumbent (GO), and the cable TV incumbent (Melita), which have a collective market share of 96.86%).[37] The Commission concluded in this case that, in spite of the existence of only two infrastructure based operators, the following factors confirmed the presence of strong retail broadband competition in Malta:

- the fact that the penetration rate of broadband services in Malta was "*not low*", and the evidence of an upward trend in this respect;
- the existence of price competition at retail level (and related price decrease); and
- the existence of a "*variety*" of retail broadband offers, and evidence of service and technology innovation.[38]

Importantly, and as explained in Section 2.2.1 above, the Bahamian retail broadband market displays the same or similar competitive indicators to those relied on by the Commission. This leads to the conclusion that the existence of two infrastructure operators in The Bahamas is also sufficient to deliver downstream broadband competition.

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[37] Commission Staff Working Document, Implementation of the EU regulatory framework for electronic communications – 2014, Brussels, 14.7.2014 SWD(2014) 249 final, pp. 205 – 206. The Commission explicitly acknowledges the following at p. 205:

> "*In the fixed broadband market, consumer choice is effectively limited to offers by those two operators sharing the market.*"

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

It is also important to note that, in its proposal for a Regulation on an integrated telecommunications market in the EU (2013) (the "Connected Continent Regulation"), the Commission explicitly acknowledged that, in the context of next generation access network ("NGA"), the presence of two infrastructure based competitors may be sufficient to guarantee adequate retail competition:

> "[…] *in the conduct of their case-by-case assessment pursuant to Article 16 of Directive 2002/21/EC* [the *ex-ante* market review by national regulatory authorities in the EU] *and without prejudice to the assessment of significant market power and the application of EU competition rules, national regulatory authorities may consider that in the presence of two fixed NGA networks, market conditions are competitive enough to be able to drive network upgrades and to evolve towards the provision of ultra-fast services, which is one important parameter of retail competition.*"[39]

CBL therefore believes that there is no longer any justification for the continued regulation of wholesale broadband access services in The Bahamas.

If, however, URCA is of the view that the existence of strong infrastructure competition between two end-to-end NGNs is insufficient in The Bahamas, and that continued *ex-ante* regulation is therefore required, it should not impose retail based broadband regulation. In such a case, URCA should limit *ex-ante* regulatory intervention in the Bahamian broadband market to the requirement to provide a wholesale broadband offer for the resale of broadband products on a white-label basis.

2.4 URCA's assessment and selection of remedies for retail broadband lacks evidence, contains gaps and is inconsistent

We have already highlighted in Section 2.2 that the proper application of the three-criteria test confirms that the retail broadband market is not actually susceptible to *ex-ante* regulation.

However, even if the broadband retail market in question satisfied the three-criteria test (and could, therefore, be considered to be susceptible to *ex-ante* regulation), CBL urges URCA to reconsider its assessment of the remedies to be imposed on this market for the following reasons:

- URCA has not presented any evidence of actual or potential excessive pricing in the retail broadband market, the anti-competitive trigger that it relies on to justify the expansion of retail price regulation on this market. The Analysys Mason report demonstrates that the prices for CBL's broadband services do not

[39] Recital 38 of the Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012, published on 11.9.2013 (2013/0309 (COD))

appear to be excessive, have decreased over recent times, and are in line with markets covered as part of the Ofcom Report, as well as other global and regional benchmarks (Section 2.4.1).

- URCA's is inconsistent in its assessment of whether *ex-ante* regulation is required to prevent excessive pricing or predatory pricing in the retail broadband market (Section 2.4.2).
- URCA reaches different conclusions on the remedies to be applied to retail broadband and business connectivity services, despite the existence of similar competitive conditions and price performance on both markets (Section 2.4.3).
- URCA's imposition of the replicability remedy is inconsistent with the retail price cap remedy (section 2.4.4).

These reasons are addressed in greater detail below.

2.4.1 URCA has not presented credible evidence of excessive pricing to substantiate its justification for the retail price regulation of broadband

URCA justifies the introduction of retail price regulation on the retail broadband market on the basis that such regulation is needed to safeguard against excessive pricing. It states at page 118 of the Preliminary Determination that:

> *"Whilst aiming to prevent CBL from further manifesting its market power in the retail broadband market, the untying obligation imposed on CBL does not prevent it from potentially engaging in any excessive pricing going forward.* ***Given the limited price reductions****, observed for retail broadband services.* […] *URCA considers that this light touch approach is inadequate going forward*."

URCA contends in its assessment that the monthly subscription charges for CBL's stand-alone residential offers have remained unchanged in recent times, while at the same time acknowledging that download speeds have increased during the same time frame. Similarly URCA recognises that, while BTC's download speeds have increased, headline prices have remained unchanged. We understand that these perceived pricing trends underpin URCA's conclusion that the retail broadband market has been characterised by what it terms as "*limited price reductions*" in recent times. URCA supports this conclusion by reference to the findings of the Ofcom Report, which points to declines in average retail prices in many other jurisdictions.

CBL believes that URCA's conclusions on the risk of excessive pricing on the retail broadband market are seriously flawed. While we have already provided a detailed response to URCA's conclusion on broadband prices in Section 2.2.1, we revisit our rationale here for the sake of completeness.

<u>Increased content of broadband offers has enhanced consumer value and price per Mbit/s has fallen sharply</u>

URCA's assessment fails to take into account how the content of offers increases their value to a customer. While CBL's headline prices have remained largely unchanged, the content of these offers—both upload and download speeds—have been enhanced significantly for the benefit of the customer. For example, CBL's minimum entry package download bitrates increased from 3Mbit/s to 20Mbit/s between 2010 and 2014. In addition, upload bitrates have increased by four fold over the same period. Additional information is provided in Figure 1 and further details are contained in the Analysys Mason report at Appendix 1. Similarly, BTC's downloads speeds have doubled between 2011- and 2014.

As a result of this important change in the content of offers, the price per Mbit/s paid by CBL customers has fallen sharply from between $8-14 per Mbit/s to between $2-3 per Mbit/s. This is shown above in Figure 2, and further details are provided in the Analysys Mason report at Appendix 1.

This consumer centric approach of enhancing the value of offers, rather than prices, is common practice. As an example of this, the Analysys Mason report (pages 19 and 20) provides an overview of how the content of offers by Verizon in the USA and Free in France adopted similar tactics:

- for Verizon we observe a general trend for Verizon's market entry offer to <u>increase</u> both prices and speed; and

- Free, a former start-up that now has over 20 per cent market share in the broadband market in France, has never decreased the price of its broadband offer (and actually <u>increased</u> it in 2011) but has continued to simultaneously increase its content.

URCA is misguided, therefore, if it seeks to justify it's conclusion that there have been "*limited price reductions*" by analysing pricing trends in abstract terms, and by failing to take adequate account of how the content of broadband offers has evolved over time to meet customers' need for speed.

<u>The correct application of Ofcom's broadband basket methodology to CBL leads to the conclusion that prices have decreased and are within an acceptable range</u>

It appears that URCA has not fully understood the methodology applied by Ofcom when preparing the Ofcom Report. Instead, URCA has simply relied on the conclusions of the Ofcom Report that indicate price declines in five OECD markets, and has then simply compared this observation to the absence of any apparent headline changes in The Bahamas.

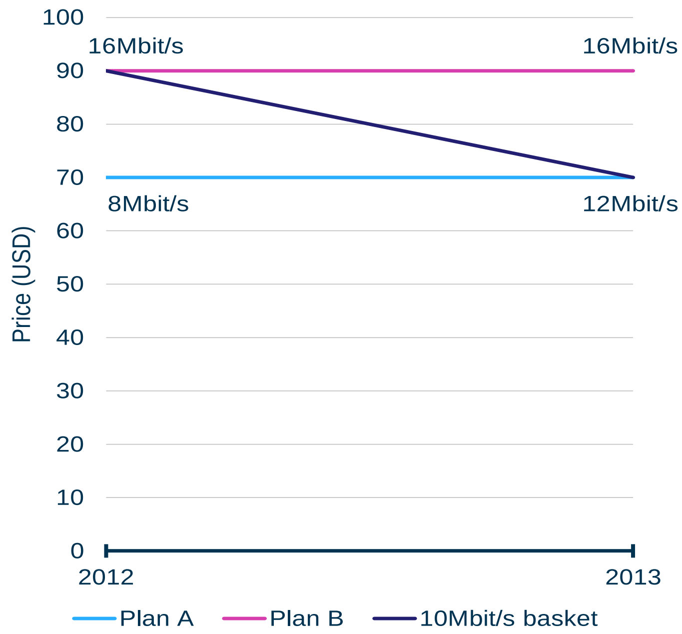
This approach is seriously flawed for a number of important reasons.

Ofcom's methodology is based on a basket of usage. We agree that the use of baskets is a more representative way to understand the evolution of the broadband market. Importantly, however, URCA has failed to analyse or appreciate this evolution. In Appendix 1, Analysys Mason demonstrates how the price of baskets can decrease in the absence of headline price change. We explain this using hypothetical basket and prices.

For example, we can assume that there were two broadband plans in 2012: (a) Plan A with speed of 16 Mbit/s for $90 per month; and (b) Plan B with a speed of 8Mbit/s for

$70 per month. Suppose that the basket under consideration for benchmarking is a 10Mbit/s service. In 2012, the only service that will deliver 10Mbit/s is Plan A at $90. However, if download speeds are increased in 2013, such that Plan B now offers 12Mbit/s, Plan B can now meet the requirements of a 10Mbit/s service. Hence, the price of the basket has fallen from $90 per month to $70 per month. This is illustrated in Figure 11.

Figure 11 – Evolution of a 10Mbit/s basket



Source: Analysys Mason (page 17 of Appendix 1)

Appendix 1 provides details of how Analysis Mason have applied the methodology adopted by Ofcom in its report to CBL's broadband offers. Since Ofcom takes into account the best stand-alone offer, even if it has to be purchased together with another service, Analysys Mason's assessment takes into the account the price of CBL's broadband access as part of a bundle.

CBL has previously discussed the results of this assessment (in Section 2.2.1). These results are summarised below:

- The use of Ofcom's methodology and results leads to the conclusion that CBL's broadband prices for Ofcom's Basket 2 (4Mbit/s) have actually decreased by over 30 per cent between 2012 and 2014. Additionally, CBL's broadband prices for such a basket are within the range of the countries benchmarked by Ofcom. As regulators in these markets have not deemed these prices to be excessive, it is difficult to understand exactly why URCA has determined that CBL's prices are excessive. Further evidence of this is presented in the Analysys Mason report at Appendix 1, while benchmarking results are also covered in Section 2.2.1 above.

- The use of Ofcom's methodology and results leads to the conclusion that CBL's broadband prices for Ofcom's Basket 4 (10Mbit/s) have actually decreased by over 45 per cent between 2012 and 2014. Additionally, CBL's broadband prices for the same basket are within the range of countries benchmarked by Ofcom. As regulators in these markets have not determined these prices to be excessive, it is difficult to understand exactly why URCA has deemed that CBL's prices are excessive. Further evidence of this is presented in the Analysys Mason report at Appendix 1, while benchmarking results are also covered in Section 2.2.1.

- The use of Ofcom's methodology and results leads to the conclusion that CBL's broadband prices for Ofcom's Basket 5 (30Mbit/s) have not decreased, owing to the fact that this is a new broadband service that was only launched last year. Additionally, CBL's broadband prices for this basket are within the range of countries benchmarked by Ofcom. As regulators in these markets have not deemed these prices to be excessive, it is difficult to understand exactly why URCA has determined that CBL's prices are excessive. Further evidence of this is presented in the Analysys Mason report at Appendix 1, while benchmarking results are also covered in Section 2.2.1.

The application of Ofcom's basket based price benchmarking methodology to The Bahamas therefore confirms that CBL's prices are in line with the markets benchmarked. It also confirms that, contrary to URCA's assumptions, CBL's prices have actually decreased in recent times. The reasoning used by URCA to justify the introduction of the retail price regulation of broadband services is, therefore, invalid.

Benchmarking of broadband prices with global and regional comparators shows that CBL's retail broadband prices are not excessive

While URCA has expressed concerns about the potential for excessive pricing on the retail broadband market in The Bahamas, it did not present any evidence of such practice (other than relying on the Ofcom Report in the manner as discussed above). CBL has asked Anaysys Mason to provide additional information on how CBL's broadband prices compare with relevant benchmark markets.

In its report (pages 4 and 5), Analysys Mason set out their approach in selecting both global and regional benchmarks in order to determine how CBL's broadband prices compare with those in similar markets. This approach ensures that there is adequate consideration of market dynamics and economic indicators when selecting benchmark countries. This avoids the situation whereby comparisons are made between The Bahamas and broadband markets characterised by low broadband penetration or low GDP per capita.

For consistency, the price benchmarking of broadband services uses the same speeds that we have considered for the purposes of analysing the findings of the Ofcom Report: 4Mbit/s, 10Mbit/s and 30Mbit/s.

CBL has previously addressed the results of this assessment (in Section 2.2.1), and our conclusions are summarised once again below. These results demonstrate that CBL's prices are typically below average for the different benchmarks, and are, in fact, among the lowest in the Caribbean-Latin American region. These results also confirm the competitiveness of CBL's prices with large neighboring markets, such as the US and Canada:

- For comparable 4Mbit/s broadband services, CBL's prices are 5 per cent below the average for global comparators[40] and priced lower than those in the USA and Canada. Additionally CBL's prices are 35 per cent lower than the average for regional comparators,[41] and priced lower than similar services in Panama and Barbados. This is shown on page 26 of the Analysys Mason report at Appendix 1, and presented earlier in Section 2.2.1.
- For comparable 10Mbit/s broadband services, CBL's prices are 11 per cent below the average for global comparators and priced lower than those in the USA and Canada. They are also 23 per cent lower than the average for regional comparators, and cheaper than Panama and Barbados. This is shown on page 27 of the Analysys Mason report at Appendix 1, and presented earlier in Section 2.2.1.
- For comparable 30Mbit/s broadband services, CBL's prices are 12 per cent above global comparators. While this is explained by the fact that this is a new service, CBL's prices nonetheless offer better value than that offered for similar services in the USA and Canada. CBL's prices are 44 per cent lower than average for regional comparators, and amongst the lowest in the region. This is shown on page 28 of the Analysys Mason report at Appendix 1, and presented earlier in Section 2.2.1.

The benchmarking evidence presented above confirms that, contrary to URCA's assumptions, the presence of strong competition between BTC and CBL is sufficient to deliver competitively priced broadband services (when compared to comparable international peers). It is therefore difficult to understand why URCA has determined that the lower prices charged by CBL in The Bahamas are excessive, particularly considering how the higher prices charged in the benchmark markets have not been deemed to be excessive.

2.4.2 URCA's assessment of whether *ex-ante* regulation is required to protect against excessive pricing or predatory pricing in retail broadband is inconsistent

In Section 7.4.2 of the Preliminary Determination, URCA assesses the appropriateness of various *ex-ante* remedies to address the competitive risk that URCA perceives to exist on the retail broadband market. In doing so, URCA considers a number of potential anti-competitive practices, including excessive pricing and predatory pricing, and the appropriateness of certain regulatory remedies as a means of addressing such practices.

URCA states that the risk of predatory pricing in the retail broadband market is countered by the existence of a second network infrastructure (BTC) and the ability or strength of BTC to compete with CBL on price:

> "*emerging competition would provide an SMP operator with the incentive to engage in predatory pricing. However,* ***in the context of CBL's retail broadband services, the prospect of emerging competition comes primarily from BTC, which is also well***

[40] Malta, USA, Netherlands, Canada, Belgium, Romania.
[41] St Lucia, Dominica, Panama, Barbados, Costa Rica, Trinidad and Tobago.

> ***placed to engage in significant price competition****, thus suggesting that predatory pricing may not be profitable in either the short or long term. As such, URCA is of the preliminary view that no further SMP obligations is required to specifically prevent CBL from potentially engaging in predatory pricing behaviour for broadband services. Instead, URCA is minded to rely on ex post competition powers to address such potential behaviour by CBL*"[42]

CBL agrees with URCA's conclusion in this regard. However, CBL cannot understand why URCA does not apply the same logic when considering the risk of excessive pricing on the retail broadband market. Analysys Mason has also raised this clear inconsistency in URCA's assessment of these two pricing abuses on the relevant market.

Accordingly, at page 31 of its report, Analysys Mason states that:

> *"When assessing the risk of excessive pricing, URCA does not take into account that BTC is also well placed to respond and take advantage from potential excessive pricing by CBL. We believe that, should CBL try to apply excessive prices, BTC would be in a very good position to develop its market share. It would actually be significantly easier for BTC to react to CBL's excessive prices than to CBL's predatory prices.*"

2.4.3 URCA reaches inconsistent conclusions on the remedies to be applied to retail broadband and business connectivity services

In Section 7.4.3 of the Preliminary Determination, URCA assesses the appropriateness of applying various *ex-ante* remedies in respect of the provision of business connectivity services by BTC in markets where CBL has not deployed a network.

In doing so, URCA considers a number of potential anti-competitive practices, including excessive pricing. In this context, URCA states that:

> "*BTC's prices have remained unchanged since 2010.* […] *Whilst URCA would expect competition to lead to price reductions* […] *.given the limited information it holds on business connectivity services, it has not seen any evidence of the operators engaging in excessive pricing* […] *concludes that the prospect of emerging competition for these services remains a sufficient deterrent for excessive pricing to occur.*"[43]

URCA's conclusion on the absence of any risk of excessive pricing on the business connectivity market is inconsistent with its conclusions concerning the retail broadband market for the following reasons:

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[42] Preliminary Determination, pp. 118-119.
[43] Preliminary Determination, p. 120.

- Both the broadband and the business connectivity markets are characterised by the presence of two competing infrastructure operators; CBL and BTC.
- The geographic scope of both product markets is also similar.
- URCA has relied on the absence of any headline price reductions in broadband market services in order to justify the need to extend *ex-ante* price regulation to this market to address the risk of excessive pricing. Similarly, URCA has noted that the operator designated with SMP on the business connectivity market (BTC) has not reduced prices for the provision of this service.

  However, and in contrast to its conclusions in respect of the retail broadband market, URCA states that there is no evidence of excessive pricing on the business connectivity market. For this reason, it considers that competition remains a sufficient deterrent for excessive pricing on that market.

  CBL contends that, if URCA can reach the conclusion that there is no evidence of excessive pricing in the business connectivity market, notwithstanding the fact that prices on this market have not fallen, it cannot simultaneously rely on the absence of any price reduction on the retail broadband market as evidence of excessive pricing on that market. CBL therefore urges URCA to correct this obvious inconsistency in its analysis, and to revise its dubious conclusions regarding the risk of excessive pricing on the retail broadband market.

2.4.4 Imposition of the replicability remedy is inconsistent with a price cap obligation

In its Preliminary Determination, URCA proposes to impose a replicability remedy:

> *"BTC or CBL shall not introduce any new retail product bundled offerings including broadband services, unless these bundles can be replicated by other providers."*[44]

At page 30 of its report, Analysys Mason have clearly indicated that this proposed obligation is very broad, and risks resulting in the unnecessary extension of *ex-ante* pricing obligations into markets where CBL has no SMP (for example on the fixed voice market).

It is therefore imperative that URCA clarifies the objective of imposing this proposed obligation. CBL believes, and is supported by the expert assessment of Analysys Mason, that this replicability obligation is only intended to ensure that the broadband component of a CBL bundle can be replicated by an efficient operator as part of an equivalent bundle.

CBL is convinced that there is no basis or logic for imposing retail price regulation on retail broadband services. Moreover, CBL contends that the undertaking of a replicability test is inconsistent with the simultaneous imposition of a retail price cap remedy. The reasons for this are set out below.

[44] *Ibid*.

- The objective of the economic part of a replicability test is to ensure that there is no squeeze between retail prices and the costs of an efficient operator (wholesale costs and own costs) trying to replicate this retail offer. A replicability test therefore aims at ensuring that retail prices are high enough (to ensure replicability from other operators).

- In contrast, the goal of a retail price cap is typically to ensure that operators are incentivised to reduce costs and pass on some of the gain to consumers. Hence, prices are subject to a RPI-X approach, and remain within this overall cap (or any sub-caps). It is possible that the maximum price resulting from a price cap leads to a squeeze between retail prices and the costs of an efficient operator, which would be incompatible with the replicability remedy referred to above.

For these reasons, URCA's proposal to simultaneously impose both *ex-ante* remedies is contradictory. URCA should either address predatory pricing or excessive pricing concerns, but not both at the same time.

2.4.5 Conclusions and impact on other regulatory obligations

CBL has demonstrated in this Section 2.4 that the reasoning relied upon by URCA for imposing price regulation onto retail broadband service markets is without foundation and ultimately flawed.

It would not be proportionate, targeted and efficient to impose broadband retail price regulation in Geographic market 1

URCA has not presented any evidence of the actual or potential for excessive pricing in the retail broadband market, the anti-competitive trigger that it has relied on to justify the extension of retail price regulation into the relevant retail markets. The Analysys Mason report shows that the prices of CBL's broadband services do not appear to be excessive, have decreased in recent times, and are in line with markets addressed by the Ofcom Report cited by URCA, as well as other global and regional benchmarks.

The rationale relied upon by URCA for imposing *ex-ante* price regulation in the retail broadband market is inconsistent in the following of ways:

- There are serious inconsistencies in URCA's assessment of whether *ex-ante* regulation is required to protect against excessive pricing or predatory pricing in the retail broadband market.

- There are serious inconsistencies in URCA's conclusions on the specific remedies to be applied to retail broadband and business connectivity services, despite the existence of similar competitive conditions and price performance.

- There are serious inconsistencies in URCA's proposed imposition of a replicability remedy together with a price cap obligation.

Retail price regulation is a very intrusive remedy that significantly impacts on the commercial strategy of an operator and on its ability to innovate in both price and quality. For this reason, it is generally considered to be a last option when there is an existing or potential market failure that cannot be resolved by the imposition of any wholesale remedies. This is confirmed under Article 17 of the EU Universal Service

Directive, which limits the imposition of retail price regulation only to cases where *ex-ante* wholesale remedies are insufficient.[45]

Moreover, and as Analysys Mason's research demonstrates (pages 12 and 13 of the report at Appendix 1), retail price regulation on broadband service markets is:

- not imposed in any of the market covered by the Ofcom Report;
- not imposed on any of the global benchmark countries with similar TV and broadband market to that of The Bahamas; and
- not imposed on similar regional countries close to The Bahamas.

The imposition of such intrusive regulation ignores the impact on market entry and investment incentives

Firms enter markets where profit opportunities can be identified. New competitors will be dissuaded from entering a market if there is a risk that their potential retail profits could be diminished by excessive regulation. The imposition of retail price regulation can, therefore, have a serious impact on the incentive of an operator to enter that market. Reluctance to enter a market can, in turn, limit the potential for competition to develop on that market.

There is also a possibility that the investment risks borne by a broadband infrastructure provider can be ignored or underestimated by a regulatory authority when choosing to impose retail price regulation. This raises the risk that the regulatory authority in question may apply inappropriate regulatory tools in an effort to share economic welfare gains with end-users before those gains have actually materialised.

Regulatory intervention at the retail level may therefore dampen competition, the perceived absence of which led to such intervention in the first instance. The continuing lack of competition thus reinforces the apparent need for the regulator to regulate retail prices, thereby perpetuating the problem and undermining the regulator's efforts to establish efficient price levels that might encourage investment and even competition.

URCA should therefore refrain from regulating prices in broadband markets, particularly while those markets are still developing, while further investment is still required, and while demand remains uncertain. Instead, reliance should be placed on the price clearance mechanism of competition (as was demonstrated in this Section, there is strong price and quality competition in The Bahamas that is comparable with international benchmark markets) and on *ex post* intervention in the unlikely case of anti-competitive behaviour occurring.

2.5 URCA's assessment and selection of remedies for the pay TV market lacks evidence, contains gaps and is inconsistent

In this Section we present CBL's comments on the assessment of the remedies proposed by URCA for the retail pay TV market and explain how:

[45] Directive 2002/22/EC of the European Council and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) as amended by Directive 2009/136/EC.

- URCA has not presented credible evidence of excessive pricing in the pay TV market, the anti-competitive trigger relied upon by URCA to justify the expansion of retail price regulation onto this market (Section 2.5.1).
- URCA has failed to explain what has changed since 2010 to warrant the price regulation of pay TV services other than PRIME/Superbasic (Section 2.5.2).
- URCA is inconsistent in its assessment as to whether *ex-ante* regulation is required to protect against excessive pricing or predatory pricing in the retail pay TV market (Section 2.5.3).
- URCA's imposition of the replicability remedy is inconsistent with the price cap obligation (Section 2.5.4).

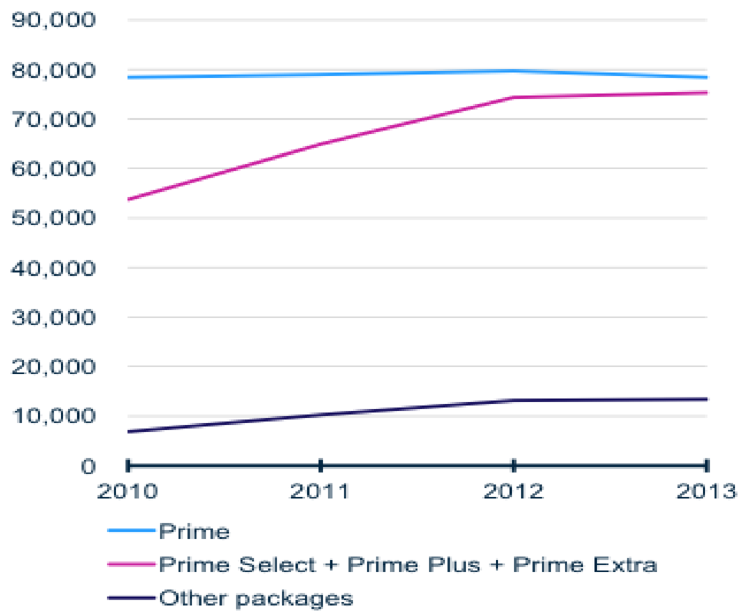
For these reasons, CBL submits that *ex-ante* regulation should be limited to the Superbasic (PRIME) service only, and should not be extended to premium TV packages. CBL urges that URCA defer from taking any final decision on the extension of *ex-ante* regulation into the pay TV market at this point. Instead, URCA should monitor the development of this market over the forthcoming 12-18 months, and undertake a market assessment and review at the end of this period. This approach will ensure that URCA's *ex-ante* review of this market takes adequate account of the strong competitive dynamic at play. It will also allow for the relaxation of existing retail regulation on PRIME/SuperBasic, and the sun-setting of current *ex-ante* obligations as soon as BTC acquires a 15% share of the TV market.

2.5.1 URCA has not presented credible evidence of excessive pricing to justify the increased scope of retail price regulation in the pay TV market

URCA justifies its proposed extension of the retail price regulation of pay TV services (beyond PRIME to three other packages—Prime Select, Prime Plus and Prime Extra) on the basis of the potential risk of excessive pricing. URCA has not, however, properly assessed the likelihood of this risk, and has failed to present any evidence that either suggests or confirms that current pay TV prices in The Bahamas are excessive. CBL therefore contends that the extension of regulation to other TV packages is, in fact, unwarranted.

The existing retail price regulation applied to the Prime package ensures that consumers have access to a basic package that is subject to price regulation. The existence of price regulation in respect of a basic package in this manner has the effect of preventing CBL from pricing the other packages at an excessive level. In its report at Appendix 1 (page 45), Analysys Mason highlight that the evolution of sales (Figure 12) confirms an increase in the sales of Prime Select, Prime Plus and Prime Extra packages "*which is a sign that their prices are not excessive*."

Figure 12 – CBL pay-TV subscribers



As CBL has explained above, URCA should have analysed the pay TV market on a forward-looking basis. Had it done so, it would have taken account of the fact that BTC will be providing IPTV services in the very near future. The imminent launch of such IPTV services by BTC is already acting as a strong competitive constraint to CBL on the pay TV market, and effectively inhibits its ability to engage in excessive pricing practices. Moreover, the competitive constraint that is currently being applied by OTT services is already restricting CBL's scope to price its pay TV service excessively.

Similar to its strategy of providing greater download speeds at the same price for broadband services, CBL has continuously improved the content of various pay TV packages. A summary of this is provided in Figure 13, and is also included in the Analysys Mason report at Appendix 1.

Figure 13 – Evolution of CBL's TV offers since 2011

The risk of excessive pricing by CBL on the pay TV market is therefore extremely limited.

Finally, URCA is fully aware, as is the Bahamian public, that CBL applied for an $8 increase in the price of Prime service in 2011 and that this application was rejected on grounds unrelated to the cost of the service. In fact, in its Final Decision rejecting the price increase, URCA recognised that CBL is providing the Prime service below cost. In this context, it is therefore highly unreasonable for URCA to impose stringent price regulation on a particular service on the basis of the perceived risk of excessive pricing, when at the same time acknowledging that the regulated price of providing that very service is below the fully allocated cost level.

2.5.2 URCA's has failed to explain why a change in the scope of retail price regulation is actually required

In the 2010 SMP Decision, URCA included Superbasic (now called Prime) and digital packages (PRIME SELECT, PRIME Plus and PRIME Extra) within the scope of the SMP market. Following from this, URCA decided to only regulate the price of Superbasic (PRIME), and provided the following rationale for its choice to forbear from regulating digital packages:

> "*URCA considers that the proposed price regulation of the SuperBasic package may provide disincentive for CBL to engage in predatory pricing as it would effectively be acting predatorily against its own product, which would not be a profit-maximising strategy.* […] *URCA also considers that the proposed* ***price regulation of the SuperBasic package may also provide a disincentive against CBL engaging in excessive pricing****. This is because it may not be in CBL's interest to increase the prices for digital packages materially above the regulated price of the*

> *SuperBasic package, assuming that CBL would prefer to migrate as many of its customers from SuperBasic over to digital packages* […].*"*[46]

In particular, URCA correctly understood that any commercial strategy by CBL to migrate customers would be inhibited by an increase in the price of digital packages (this is because the price differential between Superbasic and the next digital service would be greater, making it more difficult for customers to upgrade). However, the Preliminary Determination goes further than URCA's decision in 2010, and URCA now proposes to also price regulate the digital packages (PRIME SELECT, PRIME Plus and PRIME Extra).

Notwithstanding this, URCA has not provided any rationale for extending *ex-ante* price regulation to these services under the proposed market review. Instead, URCA states as follows:

> "*URCA has found CBL to have SMP in the provisioning of all pay TV services, including, amongst others, CBL's access and content pay TV packages, its 'add on' TV channel packages (such as, PRIME Sport, PRIME Movies, etc.) and its 'on demand' services (i.e., pay-per-view and 500 REVTV on demand). Whilst CBL has SMP in all of these sub-groups, URCA is of the view that the focus of any ex- ante regulatory obligation should focus on the access and content pay TV packages (i.e., PRIME and PRIME Ultimate) only, as these represent the essential means to gain access to pay TV services in The Bahamas. In URCA's view the remaining product offerings represent by products, in the sense that they offer existing pay TV customers additional channels or features.*"[47]

We attempt below to break down the limited rationale provided by URCA—which is confined to a single paragraph in the Preliminary Determination—for its proposal to extend *ex-ante* price regulation beyond.

Firstly URCA appears to conclude that CBL's services are disaggregated into: (i) access and content pay TV packages; and (ii) other add-on TV packages and on demand services. URCA then states that the focus of *ex-ante* regulation should be access and content TV pay TV packages (PRIME, PRIME SELECT, PRIME Plus and PRIME Extra), as these are the "*essential means to gain access to pay TV services.*" URCA then concludes that other services or product offerings by CBL are merely the provision of additional channels or features.

CBL considers that the reasoning provided by URCA in this respect does not constitute a legitimate rationale or basis for the extension of *ex-ante* regulation beyond PRIME. In contrast to URCA's reasoning, CBL contends that only the PRIME service would satisfy

[46] SMP Final Decision, 22 April 2010.
[47] Preliminary Determination, p. 122.

the conditions of "*essential means to gain access to pay TV services*", because it is the minimum entry package available. There is therefore no reason why URCA would conclude that the other Prime TV packages are "*essential*". If these packages are, in fact, "*essential*", as URCA has claimed, then URCA should have provided sufficient explanation as to why it believes this to be the case. Failure to do so means that URCA has not provided any legitimate rationale for extending *ex-ante* price regulation beyond PRIME. It also means that URCA has neglected to satisfy a number of important regulatory requirements/principles, including transparency and reasoned decision-making.

CBL contends that, if nothing has changed in the pay TV market since 2010 to warrant additional regulation, then no additional regulation should be imposed under the proposed market review. This is especially relevant in the context of the imminent entry of BTC into that market, as is discussed in detail earlier. Such entry will mean that the pay TV market is very likely to be subject to strong competition within the 12-18 month timeframe relevant to URCA's proposed market review.

Alternatively, if URCA considers that its own rationale from 2010 is no longer valid in today's market context, it should clearly explain why it believes this to be the case.

Finally, and when compared to PRIME, other Prime TV packages are also just product offerings with additional channels or features. CBL contends that this analogy, which is used by URCA to exclude regulation of other product offerings, should not be limited to "*add on TV channels and on demand services*."

Our views expressed above are supported by Analysys Mason, which concludes at page 46 of its report that:

- Retail price regulation is a very intrusive remedy that is capable of significantly altering an operator's ability to find relevant compromises between price and quality.
- A significant part of the costs of providing for pay TV come from content rights, the market for which is global.
- If a TV operator is forced to reduce its prices and revenue, a natural strategic response is to reduce the cost of its content, and therefore its quality (e.g. reducing the share of premium sports and movies).
- The current retail price regulation on the PRIME package is sufficient to address the risk of excessive pricing. In the case of the successful launch of IPTV by BTC, such retail regulation on a basic offer would probably no longer be necessary.
- Extending retail price regulation to other packages is therefore unnecessary, and would damage CBL's ability to offer prime content that many customers are willing to buy. Such extension would therefore not be "*targeted and efficient*" (it does not represent the "*least intrusive way of addressing a competitive concern*" as described in Section 3.2.1 of the Preliminary Determination).

2.5.3 URCA's assessment of whether *ex-ante* regulation is required to protect against excessive pricing or predatory pricing in the pay TV market is inconsistent

In Section 7.4.4. of the Preliminary Determination, URCA considers the appropriateness of a number of *ex-ante* regulatory remedies as a means of addressing certain potential anti-competitive practices, including excessive pricing and predatory pricing.

URCA states that predatory pricing concerns in the broadband market are countered by the existence of a second network infrastructure (BTC), and the ability or strength of BTC to compete with CBL on price:

> "[…] *whilst emerging competition would provide an SMP operator with the incentive to engage in predatory pricing, in the context of pay TV services, the prospect of emerging competition comes primarily from BTC (i.e., by BTC launching IPTV services in the future). BTC is also well placed to engage in significant price competition, thus suggesting that predatory pricing may not be profitable in either the short or long term. Further, URCA considers it likely that in case BTC launches IPTV products, these would be offered as part of a product bundle. This would make any predatory pricing from CBL more difficult. As such, URCA is of the preliminary view that no further SMP obligation is required to specifically prevent CBL from potentially engaging in predatory pricing behaviour for pay TV services. Instead, URCA is minded to rely on ex post competition powers to address such potential behaviour by CBL.*"[48]

CBL agrees with the above statement. However, CBL cannot understand why URCA does not apply the same logic in respect of its assessment of the risk of excessive pricing on the retail pay TV market. Analysys Mason has also raised concerns about this clear inconsistency in URCA's analysis. At page 48 of its report at Appendix 1, Analysys Mason states that:

> "*When assessing the risk of excessive pricing, URCA does not take into account that BTC is also well placed to respond and take advantage from potential excessive pricing by CBL. We believe that, should CBL try to apply excessive prices, BTC would be in a very good position to develop its market share. It would actually be significantly easier for BTC to react to CBL's excessive prices than to CBL's predatory prices.*"

[48] Preliminary Determination, p. 123.

2.5.4 Imposition of the replicability remedy is inconsistent with a price cap obligation

In its Preliminary Determination, URCA proposes to impose a replicability remedy:

> *"BTC or CBL shall not introduce any new retail product bundled offerings including broadband services, unless these bundles can be replicated by other providers"*.[49]

For the same reasons as set out in Section 2.4.4 in respect of the retail broadband market, we believe that this obligation is unclear and potentially very broad in scope. Accordingly, it could have the unintended result of imposing *ex-ante* obligations in markets where CBL has no SMP.

CBL sets out its arguments below as to why it is unreasonable for URCA to consider the replication of a broadcasting package in the context of its proposed market review.

First, an operator wishing to replicate a broadcasting package from CBL would have to use a broadcasting platform (BTC's IPTV or CBL's cable platform). Importantly, none of these operators are under an obligation to provide a wholesale broadcasting offer.

Second, content rights cannot be replicated by CBL and rights owners usually forbid reselling these rights and may offer exclusivity for a given period of time.

Finally, we note that this replicability remedy is not consistent with the retail price cap remedy. The reasons for this are set out below:

- The goal of the economic part of a replicability test is to ensure that there is no squeeze between retail prices and the costs of an efficient operator (wholesale costs and own costs) trying to replicate this retail offer. A replicability test therefore aims to ensure that retail prices are high enough.
- The goal of a retail price cap is to ensure that prices are low enough (below a base price – x% per year). It is possible that the maximum price resulting from a price cap lead to a squeeze between retail prices and the costs of an efficient operator, which would be incompatible with the replicability remedy mentioned above

CBL therefore considers that the concurrent imposition of both of the above remedies (replicability requirement and a retail price cap) by URCA is contradictory.

2.5.5 Conclusions

CBL believes that, if URCA chooses to ignore CBL's compelling argument for the de-regulation of the retail pay TC market, it should not extend retail regulation to premium TV packages, other than Superbasic (PRIME).

There is a strong case for URCA to defer from taking any final decision on the extension of *ex-ante* regulation into the pay TV market at this point. Instead, it should monitor the development of this market over the forthcoming 12-18 months, and undertake a market assessment and review at the end of this period. This approach will ensure that

[49] Preliminary Determination, p. 120.

URCA's *ex-ante* review of this market takes adequate account of the strong competitive dynamic at play.

It will also allow for the relaxation of existing retail regulation on PRIME/SuperBasic, and the sun-setting of current *ex-ante* obligations as soon as BTC acquires, for example, a 15% share of the TV market.

2.6 Other concerns with URCA's approach to the Preliminary Determination

In this Section we explain a number of other concerns that CBL has with the Preliminary Determination. These concerns include:

- the clear inconsistency between URCA's application of price caps and its concerns about excessive pricing (Section 2.6.1);
- URCA's failure to consult on the price cap methodology and implementation process – additionally, the proposal to implement price caps means that regulation will become more complex, require up-front investment and could take at least another 12-18 months to implement (Section 2.6.2); and
- how the consultation process adopted by URCA does not reflect the lessons learnt from the 2009/10 market review process and timeframes (Section 2.6.3).

2.6.1 Why the application of price caps is inconsistent with URCA's concerns about excessive pricing

In Section 7 of the Preliminary Determination, URCA sets out its views on expected competition problems and the regulatory options available to address the potential anti-competitive practices identified. URCA then proposes a number of remedies for each retail market.

For CBL's broadband and pay TV services, URCA identifies the following potential anti-competitive practices, and proposes the following remedies:

- Excessive pricing—this is to be prevented by applying price cap regulation;
- Predatory pricing—this is to be prevented through *ex post* competition powers; and
- Undue bundling/tying—URCA proposes to maintain the current SMP obligation to provide stand-alone (unbundled) retail broadband offers.

The remedies proposed by URCA to counter the specific anti-competitive practices identified (i.e.; potential predatory pricing and undue bundling) remain unchanged from the review process and SMP Final Decision of 2010.

We therefore understand that URCA's main concern in this market review of retail broadband and pay TV services is one of excessive pricing:

- Broadband services—URCA states that: "[F]*or broadband retail services there is a potential for both CBL and BTC to extract rent from their customers by pricing excessively in the relevant market where they have SMP*."[50]
- Pay TV services—URCA states that: *"*[F]*or retail pay TV services there is a potential for CBL to extract rent from its customers by pricing excessively*." [51]

Excessive pricing is defined by URCA as: "*charging higher prices than those expected under competitive market conditions*."[52]

We find it difficult, however, to understand how URCA has determined that the imposition of a retail price cap as a regulatory remedy will be capable of countering the competitive risk identified; i.e.; excessive retail pricing.

CBL contends that this regulatory remedy is not capable of addressing the risk of excessive pricing, a fact that is acknowledged by URCA itself in its assessment of regulatory options. In Table 16 of the Preliminary Determination URCA notes that Retail Price Rules are:

> "*most suitable in areas where the focus is on ensuring that retail prices do not increase (rather than there being a potential for further price reductions)."*

This suggests that URCA's concerns of excessive pricing are best dealt through Retail Price Rules.

In contrast, Table 16 of the Preliminary Determination states that price caps are:

> "*most suitable in markets where SMP licensee should be incentivized to reduce costs and those to be passed on to retail prices* […]*"*

However, at no point in the Preliminary Determination has URCA explained that there is a desire or need to incentivise CBL to reduce costs, which would then be passed through to retail level in the form of reduced broadband or pay TV service prices. In contrast, URCA's concern regarding retail prices is limited to the potential for excessive pricing.

Incentives to reduce costs through price caps have been typically applied to incumbent fixed line operators (particularly those telecommunications operators transitioning from state ownership or operators benefiting from extended monopoly periods for the provision of certain services). Price caps have been applied (and, in certain cases, continue to apply) to utility companies (such as gas and electricity transmission or distribution companies) because they operate as either monopolies or have monopoly characteristics. CBL is not, however, aware of any communications markets where price caps are applied to broadband or pay TV services.

URCA has not presented any arguments or evidence to support a case for applying such an incentive scheme to a cable operator like CBL. In order to ensure proportionality, the *ex-ante* SMP obligation to be imposed must match the concern arising from the nature

[50] Section 7.4.2 of the Preliminary Determination.
[51] Section 7.4.4 of the Preliminary Determination.
[52] Preliminary Determination, p. 106.

of the competitive problem identified on that market. In reality, the accumulation of SMP will give rise to different issues under different market conditions. URCA must not, therefore, follow a "*one size fits all*" approach by applying price caps to a cable operator for regulatory concerns that are best tackled through retail price rules.

In conclusion, URCA has only established a desire to protect consumers from potential excessive pricing which is best dealt with by the continuing application of retail price rules. Furthermore, URCA has **not** established that:

- that current broadband or pay TV prices are excessive (and CBL has presented credible evidence of this in the broadband market – see Section 2.4.1); and
- there is a case for incentivising CBL to reduce costs (which would guide the application of a price cap) and prices.

As noted above, CBL is not the typical fixed line incumbent operator benefiting from a historic monopoly and characterised by inefficiency and an inflated cost base. The application of such a price cap on CBL would inevitably impact on issues such as quality of service and ability to innovate. This would have a wider effect on CBL's commercial activities in The Bahamas, and on the Bahamian economy itself. CBL urges URCA to take these wider issues into consideration in its proposed market review.

In fact, CBL has previously presented evidence that pay TV services are being provided at below cost in The Bahamas, a fact that has been acknowledged by URCA in the Final Universal Service Obligation ("USO") decision. If prices are already subject to below cost regulation under the universal service framework, URCA cannot, at the same, impose regulatory remedies to protect against potential concerns of excessive pricing.

2.6.2 URCA's failure to consult on the price cap methodology and implementation process

In Section 2.6.1 above, we outline the reasons why price caps are not a suitable way of addressing the risk of excessive pricing. However, even if URCA were to introduce price caps to prevent excessive pricing on the relevant retail markets, it should still have consulted on the price cap methodology to be applied in this regard. Such an approach would be consistent with URCA's publication of draft Accounting Separation Guidelines and Retail Price Rules as part of the overall SMP package in 2009/10.

Moreover, the proposed introduction of a price cap as a replacement of the retail price rules is the single biggest change in the *ex-ante* regulation of telecommunications services over the past three years. While a step by step approach to remedy development is not uncommon (i.e.; the imposition of an *ex-ante* obligation at the outset, followed by the development of a methodology and finally implementation), there are particular reasons why the price cap methodology and linkages with other regulatory proceedings are important at this stage.

In addition, CBL notes that there is an important relationship between the application of the universal service framework and the imposition of retail price caps. To the extent that the costs of providing the services included in the USO are not funded,[53] these costs must be recovered at the retail level through the levying of retail service charges. The price cap framework and methodology imposed under the SMP regime must, therefore take account of the important overlap that exists between *ex-ante* retail price regulation and the universal service regime, and the possibility that the cost of universal service may need to be recovered at the retail level. The impact that the imposition of a price cap remedy could have on the application of the universal service framework requires that URCA engage with the market on its draft price cap methodology, and the manner in which it proposes to apply this price cap in practice.

Similarly, several of the parameters of the price cap requirement will need careful consideration and development. This is because this obligation will be applied simultaneously in respect of two different operators. CBL would expect that URCA's price cap methodology will set out and explain exactly how this regulatory requirement will be applied in respect of both BTC and CBL in a manner that takes account of the important differences that exist between both operators. CBL notes that URCA had to publish two different accounting separation guidelines in 2010 because of the inherent differences in applying the cost accounting separation requirement to two different operators with different networks and products.

The simultaneous application of the price cap requirement to both CBL and BTC therefore raises a number of important issues/questions that should be consulted on with the affected stakeholders, including:

- Establishment of the length of the Initial Price Cap Period: In establishing the length of the initial price cap control period, URCA has to weigh the risks of mis-specification against the benefits of maximising the incentives for efficiency. The more frequently that the plan is renegotiated, the more the incentives for efficiency are reduced. Nonetheless, a long price control period could involve excessive risk, particularly as market conditions change. The competitive dynamics facing BTC and CBL, as well as their ability to maximise efficiency, are different. This requires careful consideration by URCA on the price cap period for each company.
- How long does URCA propose to calculate the "*X*" factor separately for CBL and BTC? What methodology would URCA use to estimate the "*X*" factor.
- Will a "*Y*" factor be allowed for price increases of services that are currently provided below cost.
- Given that a significant portion of pay TV costs are programming costs, what will be URCA's approach to cost pass-through? Price caps applied to electricity companies often differentiate between fuel tariffs and non-fuel tariffs, with the former allowing for pass through of fuel costs because regulators recognise that utilities cannot control for the cost of fuel. Other regulators have considered a

[53] This may arise as a result of an estimation of USO benefits that exceed USO costs or the limited availability of funding because of the smaller market share of other operators.

"*Z*" factor for exogenous changes that are beyond the control of the regulated company.

- What will be the data requirements for the implementation of the price cap? In particular, given URCA's refusal to use BTC's Accounting Separation results as a basis to set interconnection charges, what will be the relevant data used that will be used for the purposes of setting the price caps?
- What will be the process for the removal of a service or group of services from the price cap basket? Similarly, what will be the process for new services, and how will this differ from the existing retail price rules?
- How will any "*unused price cap*" be treated, i.e.; where changes in the weighted basket price in any one year is less than that permitted under the price cap?
- What is the burden of compliance requirements and is it actually lower than the retail price rules?

There is little if any reliable international precedent for the application of price caps in respect of either cable TV companies, or in respect of the provision of broadband or pay TV services. URCA will once again be in unchartered regulatory waters if it proceeds with imposing price caps on broadband and pay TV services. This makes it all the more important that every detail of this proposed remedy is consulted on in advance, and that URCA has the possibility to take adequate account of the opinions of affected stakeholders prior to the finalisation of the proposed market review.

2.6.3 The existing consultation process should take account of the experience of the 2009/10 SMP review

While CBL appreciates the additional time granted by URCA for the purposes of responding to the Preliminary Determination, CBL believes that the consultation process should have benefited from the extended and interactive consultation used by URCA when undertaking its market review in 2009/10.

Currently, URCA envisages only one round of consultation, which will be followed by the possibility for respondents to provide comments on the responses of other respondents. Following from this, URCA will release Statement of Results and Final Decision, albeit with an unidentified finish date.

In fact URCA proposed a similar approach in 2009 when it released the Preliminary Determination (ECS 19/2009) on 30 September 2009 (see text below).

- *"All submissions to this consultation should be submitted by 5pm on 16 November 2009.*
- *URCA shall endeavour to publish these responses by 5pm on 17 November 2009.*
- *Interested parties then have an opportunity to comment on submissions made by other respondents by 7 December 2009.*
- *The date of 7 December 2009 marks the end of consultation period.*
- *URCA then has one month from the end of this consultation period to make a Final Determination and Final Order, which shall be issued 6 January 2010. "*

However, the process followed by URCA differed from that which it had initially envisaged, as is summarised below in URCA's Final Decision of 22 April 2010 (ECS 11/2010):

- 30th September 2009 – Publication of Preliminary Determinations and Draft Orders issued for public consultation using a s.100 process in discharge of URCA's duties under s.116 of the Comms Act. In addition, publication of Draft Guidelines for Accounting Separation for BTC, Draft Guidelines for Accounting Separation for CBL, and Draft Guidelines for Access & Interconnection.

- 20th, 21st October 2009 – Meetings with BTC and CBL to present the Preliminary Determinations.

- 18th December 2009 – Submissions received from interested parties discussing the Preliminary Determinations and Draft Orders and the various guidelines.

- 13th, 14th January 2010 – Meetings between BTC and CBL to present their submissions to URCA.

- 22nd January 2010 – Second set of submissions received from operators, proposing alternative obligations and taking account of the 18th December 2009 submissions made by other operators.[5]

- 15th February 2010 – Publication of Final Determination (closure of original s.100 process and timelines) issued.[6]

- 22nd, 24th February 2010 – Meetings with operators to discuss URCA's position based on their submissions and other information received.

- 19th March 2010 – Publication of Position Paper issued on Types of Obligations on BTC and CBL under s.116 (3) of the Comms Act. The purpose of the paper was to set out URCA's current thinking on the types of obligations, and the reasons for possible changes to the Preliminary Determinations issued in September 2009.

The proposed market review is broad ranging and covers all retail services. CBL underlines the significance of the market review process for the sector, and the fact that the regulatory remedies imposed on SMP designated operators are likely to remain in place throughout the whole of the review period.

It is therefore critical that URCA take a measured and proportionate approach before making a final determination, and that it use every opportunity to engage with industry and stakeholders during this process. For this reason, URCA should allow itself sufficient time to undertake this wide-ranging and complex process. In fact, it is not uncommon for regulators in the EU to adopt a more "*piecemeal*" approach, and to focus on the review of a single (retail) market at a time.

For these reasons, CBL encourages URCA to consider a revised schedule for the proposed market review, and to add flexibility into this process (just as it did in

2009/10) that allows for greater engagement with SMP operators and the market in general. More specifically, we request that URCA:

- hold meetings and workshops to allow SMP operators to present and discuss their responses with URCA;
- allow more time to respond to comments of other respondents (at least four weeks);
- prepare a Position Paper to update the market on its thinking on the remedies in light of submissions received by URCA;
- publish a Draft Price Cap Methodology Guideline (similar to Accounting Separation Guidelines published as part of the 2010 SMP decision);
- allow stakeholders to respond to that Position Paper and Price Guidelines (at least four weeks);
- arrange a final set of meetings or workshops with operators; and
- issue a Final Determination once it has undertaken all of the steps outlined above in the order as indicated above.

CBL believes that its proposed approach would still allow URCA the possibility to conclude its retail market review by the end of the year (as set out in the Annual Plan for 2014).

3. Response to Consultation Questions

This Section sets out CBL's responses to the specific questions raised in the Preliminary Determination. To avoid duplication, and where relevant and necessary, we refer URCA to points made and arguments raised in Section 2 of this submission.

3.1 Fixed Voice Services

Q1 Do you agree with URCA's approach to and definition of the product market? If not, why?

CBL agrees with URCA's Preliminary Determination that the relevant market for voice service provided at a fixed location includes the following products:

- fixed access and call services delivered via a fixed network; and

- fixed access and call services delivered via a cable network.

However, CBL believes that URCA's product analysis should be adapted to include fixed access and calling services delivered via fixed wireless networks. URCA's approach towards market definition is unduly restrictive in terms of the technology considered, which has a corresponding effect on its analysis of barriers to entry or expansion.

For this reason, URCA has failed to take account of licensed fixed wireless operators (including Last Mile Communications, IPSI, and other Internet service providers) providing wireless services, but with the capability to offer voice services. This failure affects both the substitution analysis (which should be considered on a 12-18 month forward-looking basis) as well as URCA's application of the EU three-criteria test.

Q2 Do you agree with URCA's approach to and definition of the geographic market? If not, why?

CBL agrees with URCA's approach to and definition of the geographic market, and that the market is national in scope.

Q3 Do you agree with URCA's SMP finding in the market for fixed voice services? If not, why?

While CBL agrees with URCA's finding that BTC has SMP in the retail fixed voice services market, it considers that URCA has overlooked the ability of fixed wireless networks to provide fixed access and call services. These fixed wireless networks are more cost effective in terms of initial investment and service deployment, and spectrum is already available in The Bahamas for the provision of such services. Therefore, the potential time and resource requirements to start operations are different for fixed wireless operators, especially as they may not have to overcome lengthy approval processes for the construction of underground ducts associated with fixed wireline networks.

Q16. Do you agree with URCA's proposed SMP remedies for fixed voice services? If not, why?

CBL agrees with URCA's proposed SMP remedies for fixed voice services.

3.2 Retail High-speed data services

Q4. Do you agree with URCA's definition of the product market? If not, why?

CBL agrees with URCA's definition of the product market.

Q5. Do you agree with URCA's definition of the geographic market? If not, why?

CBL agrees with URCA's definition of the geographic market.

Q6. Do you agree with SMP's findings in the markets for broadband services? If not, why?

CBL does not agree with URCA's SMP findings in the retail broadband service market. URCA has failed to correctly apply the three-criteria test in respect of this market. Had it correctly applied the three-criteria test, URCA would have concluded that the retail broadband market is not susceptible to *ex-ante* regulation.

URCA has failed to take account of the existence of strong competition on the retail broadband market and of the absence of high barriers to entry to this market in its competitive assessment. This issue is addressed in detail in Section 2.2.1 above and at pages 11 – 13 of the Analysys Mason report found in Appendix 1 below.

In addition, CBL submits that the existence of strong competition at retail level negates the need for continued *ex-ante* regulation at the wholesale level, and two broadband infrastructure providers in The Bahamas is sufficient. This argument is discussed in more detail in Section 2.3 above, which relies on relevant precedent in the EU whereby *ex-ante* wholesale regulation has been withdrawn where competition is found to exist on the corresponding downstream retail market. The Analysys Mason report found in Appendix 1 below also discusses the appropriateness of continued wholesale broadband regulation in The Bahamas at pages 32 and 33.

Q17. Do you agree with URCA's proposed remedies for broadband services? If not, why?

CBL does not agree with URCA's proposed remedies for broadband services. CBL addresses the inadequacy of URCA's proposed remedies in detail in Section 2.4 above. These submissions are summarised below:

- URCA has failed to present any evidence of excessive pricing on the retail broadband market. In fact, and as confirmed by the Analysys Mason report found in Appendix 1 below, the correct application of the Ofcom methodology and results that are relied upon by URCA in its analysis actually leads to the conclusion that retail broadband prices in The Bahamas are not excessive, have decreased in recent years and are in the range of prices benchmarked as part of the Ofcom Report (see pages 14 – 28 of the Analysys Mason report and Section 2.4.1 above).

- URCA is inconsistent in its assessment as to whether *ex-ante* regulation is required to prevent excessive pricing, or to prevent predatory pricing on the retail broadband market. URCA acknowledges that the risk of predatory pricing in the retail broadband market is countered by the existence of a second network infrastructure (BTC). However, when assessing the risk of excessive pricing, URCA fails to take into account that BTC is also well placed to respond and take advantage from potential excessive pricing by CBL. This glaring inconsistency in URCA's analysis is discussed in more detail in Section 2.4.2 above, and is also acknowledged at page 31 of the Analysys Mason report.

- As discussed in Section 2.4.3 above, URCA has reached different conclusions on the remedies to be applied to retail broadband and business connectivity services, despite the existence of similar competitive conditions and price performance on both of these markets.

- As argued in Section 2.4.4 above, and confirmed on page 30 of the Analysys Mason report, the imposition by URCA of the replicability remedy would be inconsistent with the proposed concurrent imposition of a retail price cap remedy.

- Finally, the imposition by URCA of retail broadband price regulation is contrary to international trends, disproportionate, intrusive and ignores the detrimental impact that this type of stringent regulation can have on further market entry and investment incentives. This issue is discussed in detail in Section 2.4.5 above and at pages 12, 13 and 29 of the Analysys Mason report.

3.3 Business Connectivity services

National

Q7. Do you agree with URCA's definition of the product market? If not, why?

CBL agrees with URCA's definition of the product market.

Q8. Do you agree with URCA's definition of the geographic market? If not, why?

CBL agrees with URCA's definition of the geographic market.

Q9. Do you agree with URCA's SMP findings in the retail national business connectivity services market? If not, why?

CBL agrees with URCA's SMP findings in the retail national business connectivity services market.

International

Q10. Do you agree with URCA's definition of the product market? If not, why?

CBL agrees with URCA's definition of the product market.

Q11. Do you agree with URCA's definition of the geographic market? If not, why?

CBL agrees with URCA's definition of the geographic market.

Q12. Do you agree with URCA's SMP findings in the retail international business connectivity services market? If not, why?

CBL agrees with URCA's SMP findings in the retail international business connectivity services market.

Q18. Do you agree with URCA's proposed SMP remedies for business connectivity services market? If not, why?

CBL agrees with URCA's proposed SMP remedies for business connectivity services market.

3.4 Pay TV services

Q13. Do you agree with URCA's definition of the product market? If not, why?

CBL does not agree with URCA's definition of the pay TV service market.

CBL considers that the market should have been defined in a broader manner to include satellite TV, IPTV and OTTP services and streaming. CBL has presented arguments on the emergence of competition from these services in The Bahamas in Section 2.2.2 above, including results from local consumer surveys that it has undertaken and network management statistics.

Q14. Do you agree with URCA's definition of the geographic market? If not, why?

CBL agrees with URCA's definition of the geographic market.

Q15. Do you agree with SMP's findings in the markets for pay TV services in The Bahamas? If not, why?

CBL does not agree with URCA's SMP findings in the pay TV service markets. URCA has failed to correctly apply the three-criteria test in respect of this market. Had it correctly applied the three-criteria test, URCA would have concluded that the pay TV service market is not susceptible to *ex-ante* regulation.

URCA has failed to take account of the fact that competitive constraints already exist on the pay TV market, and that this market is, at the least, trending towards effective competition. It has also failed to take account of the absence of high barriers to entry to this market in its competitive assessment.

In particular, URCA has failed to take any account of the imminent entry of BTC into the retail pay TV market through the provision of IPTV services, and [✂] (which is supported by trends in other markets concerning the take-up of IPTV services). Likewise, URCA has ignored the possibility of new market entry by competitors using satellite or streaming technologies, and the competitive constraints already posed by streaming-based services and the growth of devices that can deliver TV and video services over broadband. These flaws in URCA's assessment are discussed in detail in Section 2.2.2 above. The Analysys Mason report also acknowledges that barriers to entry into the pay TV market are "*significantly decreasing*", while recognising the important role that BTC could quickly play in the Bahamian pay TV market (see pages 41 – 43 of the Analysys Mason report found in Appendix 1 below).

Q19. Do you agree with URCA's proposed SMP remedies for pay TV services? If not, why?

CBL does not agree with URCA's proposed remedies for retail pay TV services. CBL addresses the inadequacy of URCA's proposed remedies in detail in Section 2.5 above. These submissions are summarised below:

- As explained in Section 2.5.1, URCA has failed to present any credible evidence of excessive pricing on the retail pay TV market, while also failing to acknowledge how the imminent entry of BTC into the retail pay TV market limits the risk of excessive pricing by CBL. The Analysis Mason report also concludes that URCA has failed to properly assess the likeliness of the risk of excessive pricing by CBL in the pay TV market, while recognising the important role that BTC could quickly play in this market (see pages 43 to 45).

- As discussed in detail in Section 2.5.2 above, URCA has failed to adequately justify why an extension of *ex-ante* price regulation beyond the superbasic (PRIME) package is now required. The Analysys Mason report concludes that there is no reason to impose retail price regulation on packages other than PRIME (see page 46).

- URCA is inconsistent in its assessment as to whether *ex-ante* regulation is required to prevent excessive pricing, or to prevent predatory pricing on the retail pay TV market. URCA acknowledges that the risk of predatory pricing in this market is countered by the existence of a second network infrastructure (BTC). However, when assessing the risk of excessive pricing, URCA fails to take into account that BTC is also well placed to respond and take advantage from potential excessive pricing by CBL. This glaring inconsistency in URCA's analysis is discussed in more detail in Section 2.5.3 above, and is also acknowledged at page 48 of the Analysys Mason report.

- As discussed in Section 2.5.4 above, and confirmed on page 47 of the Analysys Mason report, the imposition by URCA of the replicability remedy would be inconsistent with the proposed concurrent imposition of a retail price cap remedy.

For these reasons, CBL submits that *ex-ante* regulation should be limited to the PRIME service only, and should not now be extended to premium TV packages as URCA proposes. CBL believes that there is a strong case for URCA to defer from taking any final decision on the extension of *ex-ante* regulation into the pay TV market at this point. Instead, URCA should monitor the development of this market over the forthcoming 12-18 months, and undertake a market assessment and review at the end of this period. This approach will ensure that URCA's *ex-ante* review of this market takes adequate account of the strong competitive dynamic at play. It will also allow for the relaxation of existing retail regulation on PRIME/SuperBasic, and the removal of current *ex-ante* obligations as soon as BTC acquires, for example, a 15 per cent share of the TV market.

Appendix 1 Expert Report of Analysys Mason on URCA's Analysis and Conclusions for the Retail Broadband and Pay TV markets

This report is appended separately.

Appendix 2 Information on Video Content using the Broadband Network

The following data is from CBL's Network Management System June, 2014.

[✂]

Appendix 3 Survey of Bahamian Online Viewing Trends and Habits

CBL wished to understand the TV viewing habits of RevTV customers, and particularly: (i) whether, and how, movies, sports and TV content are viewed over the internet, and, if so, (ii) with the use of which devices, and how often.

For this reason, CBL has randomly surveyed its pay TV customers through its call centre via an auto-dialler, but using independent external agents to conduct the telephone interview with the individual respondent.

A total of 779 customers were called and 681 agreed to participate in the survey. A total of 580 customers completed the survey and 101 terminated at various points during the telephone interview as they could not reasonably answer the questions.

[✂]