NewCo2015 Limited

Response to Preliminary Determination on

Assessment of Significant Market Power in Mobile Call and Short Messaging Termination Services on NewCo2015 Limited's Cellular Mobile Network in The Bahamas under Section 39(1) of the Communications Act, 2009

ECS 17/2016

Submitted to

The Utilities Regulation & Competition Authority

August 15, 2016

Introduction

NewCo was incorporated under The Companies Act, 1992 (as amended) on the 25th day of February 2016 and has been awarded the second mobile licence as per Section 114 of The Communications Act, 2009 (as amended) on 30 June 2016.

In general, NewCo accepts URCA's conclusions about the need for ex ante regulation of call termination markets and the need for cost-oriented price controls to prevent excessive pricing.

In parallel with this consultation, URCA has concluded its consultations and produced its Final Determinations on related matters, in particular the Retail Price Rules, National Roaming, and the Review of BTC's RAIO. NewCo considers that URCA's decisions have made the regulatory framework much clearer, and thanks URCA for its speedy decision making.

In its review of BTC's RAIO, URCA has set the interim mobile termination rate (MTR) in BTC's RAIO at 2.48 cents per minute, and stated its intention to carry out a comprehensive review of termination rates[1]. NewCo urges URCA to start this review as soon as possible, and suggests that URCA should forthwith initiate a long run incremental cost model based on pure LRIC as the basis for setting termination rates in The Bahamas.

In the meantime NewCo supports the principle of asymmetric termination rates while NewCo's market position is being established. A benchmark of asymmetric termination rates shows that the new entrant's termination rates were on average 25% more than the incumbent operator's termination rates. If this asymmetry is applied to The Bahamas, termination rates in NewCo's network would be 3.1 cents/minute for calls from domestic fixed and mobile networks, 5.76 cents/minute for calls from international numbers, and 1.75 cents/message for domestic SMS.

However NewCo is concerned that BTC should not be allowed to use asymmetric rates to charge more that the difference between BTC's and NewCo's termination rates (0.62 cents for calls and 0.35 cents for texts) in any on-net/off-net retail pricing, and urges URCA to use its powers under the Retail Pricing Rules to prevent any such discriminatory pricing.

[1] URCA. Consultation On Proposed Changes To The Reference Access And Interconnection Offer Published By The Bahamas Telecommunications Company Ltd. Response To Public Consultation And Final Determination. ECS 19/2016. Pages 17 – 18.

Responses to URCA's questions

Question 1: Please provide comments on URCA's preliminary view on the relevant product market definition for mobile termination services on NewCo's cellular mobile network.

URCA's has identified the following two product markets for mobile termination services:

1. Mobile call termination on NewCo's cellular mobile network; and
2. Mobile message termination on NewCo's cellular mobile network.

NewCo accepts that these market definitions are fairly standard by international norms and consistent with definitions previously used by URCA for termination markets in The Bahamas.

NewCo has two comments on the analysis presented:

- **Differential MTRs:** URCA states that "consistent with its previous reviews of call termination markets, URCA considers that the product definition for call termination should not distinguish where the call originates" (page 15). NewCo agrees with this approach but wishes to point out that, at the remedy level, the above approach does not apply in The Bahamas. Following its review of BTC's RAIO[2], URCA has decided that three termination rates will apply to calls terminating in BTC's mobile network, depending on whether the calls of whether the call originates on a BTC fixed network,NewCo's mobile network. or an international network. In many other countries the MTR is the same irrespective of whether a call originates on a fixed, mobile or an international network, and NewCo assumes that the practice of differential charging endorsed by URCA for The Bahamas does not count as discrimination between different types of customers. NewCo supports URCA's decision to permit a higher termination rate for incoming international calls terminating on a mobile network than for domestically originating calls.
- **Over the top (OTT) services:** URCA's analysis does not mention the emergence of over-the-top (OTT) alternatives to voice and messaging services. As NewCo has pointed out previously, URCA should conduct a market review of the mobile retail market as an input to the process of determining retail remedies (the retail pricing rules) and as a starting point for the analysis of upstream call termination markets. This would ensure that remedies like the retail pricing rules are proportionate to the problems identified and in the context of this consultation on call termination markets, it would allow for the analysis of indirect constraints stemming from over-the-top providers like Skype and WhatsApp. These services provide an alternative to smartphone users for both making and receiving calls and messages and they provide a much stronger indirect constraint than the services presented by URCA.

[2] URCA. Op cit

Question 2: Please provide comments on URCA's preliminary view on the relevant geographic market definition in relation to mobile termination services on NewCo's cellular mobile network.

URCA considers that the geographic market for mobile call termination on NewCo's cellular mobile network and mobile message termination on NewCo's cellular mobile network should not be narrower than the area in which NewCo has facilities to provide the product. NewCo does not object to this geographic market definition.

However the market definitions proposed by URCA – termination services provided by NewCo over its cellular mobile networks in The Bahamas – appears to exclude traffic that will be carried on BTC's mobile network under the proposed National Roaming Agreements. NewCo considers that calls terminating on mobile numbers allocated to NewCo from the national numbering plan of The Bahamas should form part of the call termination market of NewCo, including calls terminated through the national roaming service provided by BTC.

Question 3: Please provide comments on URCA's preliminary views that NewCo has SMP in relation to the wholesale supply of mobile voice call and/or mobile message termination services on its cellular mobile network.

NewCo accepts that it has 100% market share in the prospective markets for termination on its cellular mobile network, and that barriers to entry and expansion on this market are extensive. In addition, a call termination market represents control of infrastructure not easily duplicated and a finding of SMP is therefore highly likely.

In relation to the other factors presented by URCA it is worth remembering the market structure in The Bahamas at the point of commercial launch of NewCo. At this point, BTC holds 100% of the mobile retail market and BTC terminates 100% of all mobile traffic on its network. NewCo, at this stage, holds 0% of the mobile retail market and the markets for termination on NewCo's network do not yet exist.

Bearing this in mind, NewCo disagrees with URCA's analysis of:

- **Countervailing buying power**: NewCo considers that URCA underestimates the countervailing buying power of BTC. BTC will provide most, if not all, of the traffic for termination on NewCo's network, and so has power in negotiating the terms and conditions for call and message termination services on NewCo's network. In the retail market, BTC can limit NewCo's ability to engage in monopolistic pricing behaviour on the markets for call termination on its network through the threat of abusive on-net/off-net pricing in the mobile retail markets where BTC enjoys a position of Significant Market Power or SMP[3]. URCA's proposed changes to the retail pricing rules will allow BTC to engage in such discriminatory pricing with a mere notification obligation to URCA. By imposing price regulation on the market for call termination services on the network of NewCo, URCA removes one of the few tools available to NewCo to counter such abusive on-net/off-net

[3] The fact that BTC has bargaining power is recognised by URCA on page 34 of its document where it is stated that 'BTC may aim to use any bargaining power arising from its overall market position to achieve low termination rates'.

pricing behaviour, for example by raising call termination rates in response to increases by BTC of tariffs for off-net calls. NewCo does not object to price regulation of call termination markets per se, but the necessity of regulating BTC in the upstream mobile retail market to prevent discriminatory pricing practices from being introduced will become even more pressing if URCA regulates NewCo's call termination markets.

- **Licensee's ability to influence market conditions**: URCA notes that "an operator providing termination is in an extremely strong position to influence entry and competition in the market place by denying requests to supply termination (an essential input) to other licensees in a timely manner, thereby inhibiting the competitive structure in retail markets to the detriment of customers and competition" (page 26). NewCo believes that, in the market structure of The Bahamas, this is not a realistic prospect. On the contrary, in order to be commercially successful, NewCo must ensure that all existing subscribers to fixed and mobile services can make and receive calls to and from NewCo's subscribers. The main risk in this market structure is not NewCo's abuse of an essential facility like call termination, but BTC's.

Question 4: Please provide comments on URCA's preliminary view that the wholesale termination markets identified are susceptible to ex-ante regulation.

NewCo agrees that the wholesale termination markets identified are susceptible to ex ante regulation. NewCo notes that such regulation removes one of the main objective sources of discriminatory on-net/off-net retail pricing by BTC in the upstream market for retail mobile calls and NewCo urges URCA to ensure that such discriminatory pricing practices are not introduced by BTC on the basis of non-objective factors.

There is an important parallel between the analysis presented by URCA and BTC's SMP position in the upstream mobile retail market. Given that BTC has been found to have SMP in the retail market for mobile services, the three criteria test primarily requires an assessment on whether ex-post intervention under Part XI of the Comms Act would be sufficient to remedy any abuses. As noted by URCA, the process of identifying potentially abusive behaviour, verifying whether it constitutes an abuse and then remedying the abuse is a time and resource intensive exercise. This may lead to considerable harm to those who have been affected by the abusive behaviour. All of these points are directly relevant to BTC's ability to distort the retail market for mobile services through discriminatory on-net/off-net pricing practices[4]. By regulating NewCo's wholesale termination markets on an ex ante basis, URCA has made it even more important to regulate BTC's retail prices on an ex ante basis to prevent such anti-competitive pricing behaviour from being introduced.

Question 5: Please provide comments on URCA's preliminary views on the main competition problems or market failures that could arise from NewCo having SMP in respect to the provisioning of wholesale call and/or mobile message termination services on its own cellular mobile network.

[4] See NewCo's explanation of the "Club Effect" in responses to ECS 09/2016 on proposed changes to BTC's RAIO and ECS 16/2016 on changes to the retail pricing rules.

See our response to Question 3 on our views of a risk of refusal to supply. NewCo considers that URCA's analysis of the refusal to supply is not applicable to a new mobile operator, which is highly incentivised to ensure interconnection with all existing players in the market. Refusal to supply interconnection to BTC would make NewCo's commercial proposition unmarketable, and a refusal to supply interconnection to CBL, NewCo's parent, is similarly unlikely. NewCo would be happy to offer interconnection terms on a non-discriminatory basis to any other operators.

We note that Question 6 is missing from the URCA document and have assumed this is a numbering issue rather than an omission.

Question 7: Please provide comments on URCA's preliminary view regarding NewCo's publication of tariff and non-price terms and conditions governing supply of wholesale termination services.

NewCo has no objections to the suggested approach on publication of tariff and non-price terms and conditions governing supply of wholesale termination services.

Question 8: Please provide comments on URCA's preliminary view regarding price regulation of termination services on NewCo's cellular mobile network.

NewCo does not object to the introduction of price controls for termination services as long as the retail pricing rules governing BTC's pricing behaviour are kept in place to prevent anti-competitive pricing in the upstream retail markets where BTC has SMP.

NewCo agrees that excessive charging is a risk in call termination markets in general. This is why NewCo proposes call termination rates on the network of BTC should be based on the 'pure LRIC' methodology. This standard would also apply to calls terminating in NewCo's network if symmetrical termination rates are adopted.

We note that URCA has not given separate consideration to rate for the termination of messages, although URCA has addressed the issue for BTC's network in its review of BTC's RAIO. URCA has set a rate for SMS terminating in BTC's network, but the operators may prefer to use a "bill and keep' system in order to save the costs of measuring messages and charging for them. In this scenario the operators would decide to implement a rate that is lower than URCA's mandated charge, at zero cents per minute.

Question 9: Please comment on URCA's preliminary proposal to apply the principle of cost orientation to NewCo's mobile termination rates. If respondents consider that cost oriented mobile termination rates are not appropriate for NewCo, the relevant respondent should describe its preferred alternative approach, with supporting rationale.

Generally speaking, NewCo supports the principle of cost orientation to set mobile termination rates. As set out above, NewCo considers that the appropriate cost standard for termination in BTC's network is Pure LRIC, and if symmetrical termination rates are adopted this standard would also apply to calls terminating in NewCo's network.

Question 10: Please comment on the merits of allowing NewCo to temporarily charge higher mobile termination rates than those contained in BTC's RAIO. As part of your response please provide further comment on the appropriate level and time period of any asymmetry in mobile termination rates.

NewCo agrees with URCA that it could be reasonable to allow NewCo to charge mobile termination rates above those of BTC on an interim basis. Many national regulatory authorities in Europe, for example, implemented higher MTRs for new entrants on the grounds on the additional costs due to market entry some years after the entry of the incumbent operator[5]. In The Bahamas, the predecessors to BTC launched the mobile network about 20 years ago, and this has allowed BTC to achieve economies of scale that are not immediately available to NewCo and to recover its investments.

If URCA decides to implement asymmetric termination rates, it will have to decide the differential between BTC's and NewCo's MTR. Today there are not many examples of asymmetric termination rates because most new mobile competitors entered the market in the early 2000s, and the time period for any asymmetric termination rates has expired. The tables below shows in Europe that the average asymmetry between termination rates was 25% and that the period of asymmetry was about 9 years.

[5] European Regulators Group. Common position on symmetry of fixed call termination rates and symmetry of mobile call termination rates. ERG (07) 83 final 080312.

Table 1: Asymmetric termination rates in Europe, 2005 (cost per minute, local currency)

Country	Average termination rate of operators above 20% market share	Average termination rate of operators below or equal to 20% market share	% increase in average termination rates of operators with 20% market share or less
Austria	0.12	0.17	39%
Belgium	0.15	0.19	29%
Denmark	0.88	0.97	11%
Finland	0.10	0.11	16%
Germany	0.14	0.18	25%
Ireland	0.12	0.14	16%
Italy	0.15	0.18	23%
Netherlands	0.16	0.18	13%
Norway	0.76	1.19	57%
Sweden	1.04	1.26	21%
Switzerland	0.34	0.37	10%
UK	0.08	0.11	38%
Average			25%

Table 2: Duration of asymmetry in Europe

Country	New operator	Year asymmetric rates implemented	Year asymmetric rates ended	Duration of asymmetry
Austria	tele.ring	2003	2009	6
Austria	Drei	2003	2009	6
Belgium	Base	2001	2013	12
Denmark	3 (Hutchinson)	2004	2012	8
Finland	Telia (DNA)	2003	2009	6
France	Bouygues	2004	2011	7
Germany	02 Germany	1998	2013	15
Hungary	Vodafone	2002	2009	7
Ireland	Metero	2002	2013	11
Italy	Wind	2005	2012	7
Italy	3 (Hutchinson)	2005	2012	7
Netherlands	02 Netherlands	1999	2011	12
Netherlands	Ben (T-Mobile)	1999	2011	12
Netherlands	Dutchtone (Orange)	1999	2011	12
Switzerland	Orange	2000	2013	13
Switzerland	Sunrise	2000	2013	13
United Kingdom	3 (Hutchinson)	1999	2011	12
Average				**9.8**

This information may provide URCA with useful benchmarks while URCA carries out its comprehensive review of termination rates. Assuming that URCA agrees to the uplift of 25% shown in the Table 1 benchmark, the following termination rates would result:

Table 3: proposed mobile termination rates (cents per minute or per message)

	BTC termination rate	NewCo termination rate
Mobile termination from fixed numbers	0.00	3.10
Mobile termination from mobile numbers	2.48	3.10
Mobile termination from international numbers	4.61	5.76
SMS termination	1.40	1.75

BTC's termination rates are those recently determined by URCA, and NewCo assumes that BTC will follow its current Mobile Party Pays practice for fixed to mobile call termination in the BTC network. NewCo expects that these temporary rates would be superseded when URCA has carried out its review of termination rates, which NewCo assumes will include the development of a pure LRIC cost model.

However URCA should not permit BTC to use any asymmetric termination rates, which are temporary, to implement on-net/off-net retail pricing differentials that are in excess of the actual difference in the MTRs (0.62 cents for calls and 0.35 cents for texts), which reflects the difference in the cost of termination a call or message in NewCo's network compared to BTC's network. Of course, if symmetrical termination rates are applied, no cost based grounds would exist to justify any on-net/off-net retail pricing differentials.

Respectfully submitted
On behalf of NewCo2015 Limited

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