



**NOTICES TO
Cable and Wireless (Cayman Islands) Limited
(T/A 'Flow')**

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**NOTICE IN RESPECT OF CONTRAVENTIONS OF LICENCE CONDITIONS
PURSUANT TO SECTION 91 (9) OF THE UTILITY REGULATION AND
COMPETITION ACT (2021 REVISION) (the ‘Enforcement Notice’)**

A. Introduction

1. The Enforcement Notice is issued by the Utility Regulation and Competition Office (**‘OfReg’** or the **‘Office’**) pursuant to *section 91 (9)* of the *Utility Regulation and Competition Act (2021 Revision)* (**‘URCA’**) to Cable and Wireless (Cayman Islands) Limited (T/A *‘Flow’*) (**‘Flow’**) in respect of contraventions by Flow relating to (a) an unauthorised Licence Category 1 Service rate increase, and (b) non-compliance with Quarterly Monitoring Data reporting requirements.

B. Background

2. On **29th April 2021**, the Office received from Flow a letter “*Notification to introduce new small and medium business bundles*”¹ – notifying the Office of “...our [Flow’s] intention to introduce a new set of bundled services to small and medium sized business (“SMB”) consumers in the Cayman Islands on 29th April 2021.” Further, Flow advised that each bundle would come with “...a fixed access line, a minimum of one postpaid plan (up to a maximum of 10 postpaid plans), and a fixed broadband connection with download/upload speeds that vary based on the bundle” and presented details on each SMB bundle.
3. On **30th April 2021**, the Office responded to that letter, highlighting that Flow’s letter confirmed that the SMB Bundles include a Category 1 Price Cap Service, business fixed line access service (**‘Business Fixed Line’** access service), and Category 3 services (Fixed broadband and Mobile telephony services).² Noting this, the Office reminded Flow that “[w]here bundles include a Category 1 Price Cap Service, such bundles are treated as a Category 4 Service (a bundle of a Category 1 Service, with Category 2 or 3 Services) as per the Annex 5 Tariff Regulation of Flow’s ICT

¹ Exhibit OF-1-2021_04_29_Flow letter to Ofreg - new SMB bundles

² Exhibit OF-2-2021_04_30_OfReg_to_Flow_New_SMB_Triple-Play_Bundle_Offering_Signed



Licence. Each Category sets out certain restrictions, notice requirements, ex ante/ ex post imputation testing requirements and in certain cases approval from the Office.”

4. The Office advised in the same letter that it was *“unclear from Flow’s letter how the bundles are being established, whether any price decreases are being applied, and thus, whether the various Annex 5 conditions are being met, and in particular, whether Flow is in fact seeking the Office’s approval.”*
5. Noting the requirement for Flow to first obtain written approval, the Office stated that it considered it reasonable to accept Flow’s email and letter as a *“proposal seeking the Office’s approval prior to any launch”* of the bundled services, and invited Flow to clarify its position, in addition to responding to the Office’s Request for Information (**‘RFI’**) to:
 - i. *Please confirm whether Flow has offered and/or contracted to provide any of the referenced SMB Bundles.*
 - ii. *For each of the five proposed “triple-play” bundles, please provide the individual pricing of each service component within each bundle.*
 - iii. *Please provide reasons for why Flow did not submit a service filing for the bundled services which includes a Category 1 Service, in accordance with the retail price regulation set out in Part 2 of Annex 5 to Flow’s ICT Licence.*
6. In an email received by the Office on **30th April 2021**³, Flow confirmed that it had *“not begun offering these bundles”*, stated that it *“will not do so unless and until approval is provided”*, and stated that it would provide the implied component prices for each service in the bundles. Additionally, Flow sought to clarify what was missing from its submission to *“satisfy a service filing.”*

³ Exhibit OF-3-2021_04_30_Flow_Ofreg_email_Fwd EXT Re New Flow SMB bundle



7. On **7th May 2021**⁴, Flow submitted a revised letter to the Office seeking the Office's approval to introduce the new SMB bundles, amended the proposed implementation date to 25th May 2021, and submitted the individual pricing for each service component within each bundle for the Business Fixed Line access, Fixed broadband access, and Mobile telephony.
8. In reviewing the individual pricing for each service component within each bundle, the Office noted that the monthly rate for the Business Fixed Line access service was listed as \$35.00.
9. On **18th May 2021**⁵, the Office, requested that Flow "*confirm the current price of the business line rental.*" On **19th May 2021**, Flow confirmed that it was indeed currently charging \$35.00 per month and not the \$30.00 per month previously approved by the Office. In its response, Flow stated that "*[w]e are also aware that business fixed access is a Category 1 regulated service and the price previously approved by the Office is CI\$30. We appreciate the significance of this issue and are deeply concerned. We are therefore investigating when this price was implemented, the circumstances surrounding its implementation, and we plan to report back to you as soon as we have a full understanding of the issue.*"
10. On the same day, the Office requested that Flow "*[p]lease produce the service filing that would have had to been filed with the Office (or then-Authority) for a rate increase of a Category 1 Service as per para. 7 of Annex 5*" as the Office had not been able to locate a service filing relating to a rate increase of the Business Fixed Line rental in its records.⁶
11. On **21st May 2021**⁷, Flow wrote to the Office and confirmed that Flow "*implemented the increase to the Business Direct Exchange line's [Business DEL] monthly rental fee from CI\$30 to CI\$34.99*" and that, "*on 25 September 2018, Business DEL*

⁴ Exhibit OF-4 2021_05_07_Flow letter to OfReg - new SMB bundles

⁵ Exhibit OF-5 2021_05_18 and 19_Ofreg_Flow_emails_Re EXT New Flow SMB bundle

⁶ Exhibit OF-5 2021_05_18 and 19_Ofreg_Flow_emails_Re EXT New Flow SMB bundle

⁷ Exhibit OF-6 2021_05_21_Flow letter to OfReg on Bus DEL

customers were notified of the price increase that would appear in their 25 November 2018 bill, and take effect on 1 January 2019.” Flow also confirmed that it had “*no record*” of applying for approval by the Office to enact a rate increase of the Business Fixed Line access charge or indeed receiving such approval. It was later confirmed that the price increase applied to customers did take effect on the 1st January 2019.⁸

12. Flow stated that “*this oversight was caused by a misunderstanding or miscommunication between the Interim Country Manager at the time and the Company’s Regulatory team. I want to apologize for this error and tell you I am very concerned and disappointed it happened. [...]. I can however confirm there have been no further non-sanctioned price increases or new service introductions since, and this will not happen again. I want to assure you that we have taken steps to improve our processes in order to prevent this error from reoccurring.*”
13. On **25th May 2021**⁹, the Office responded to Flow’s email received on 30th April 2021 and revised letter received on 7th May 2021, as well as Flow’s letter dated 21st May 2021. In summary, the Office outlined the relevant process for rate increases as set out in Annex 3B of Flow’s 2021 ICT Licence (in effect, the equivalent of Annex 5 of Flow’s 2003 Licence) as the proposed new bundle was comprised of Category 1 Price Cap Service – Business Fixed Line access, Category 3A Other Service – Fixed Broadband and Category 3B Other Service - Mobile telephony.¹⁰
14. The Office stated that it remained “*unable to approve the proposed bundles*” due to the issues surrounding the unapproved rate increase and sought to obtain further clarity on the matter by issuing another RFI, requesting that Flow provide the following:

⁸ **Exhibit OF-8** 2021_06_04_Flow response to OfReg on Bus DEL.

⁹ **Exhibit OF-7** 2021_05_25_OfReg_to_Flow_Proposed_Triple-Play_Bundle_BFL_Rate_Increase_RFI Signed

¹⁰ For a discussion of the 2003 Licence, and the 2021 Licence, please refer to the **Annex** to this Notice.



1. *Please [provide] confirmation of the exact date when Flow implemented the rate increase on its Business fixed line access rate from \$30 to \$35.*
 2. *Please provide copies of all notifications sent to Business Customers informing them of an increase in the Business fixed line access rate from \$30 to \$35.*
 3. *Please provide the number and list of Business accounts impacted by the rate increase, on a monthly basis from the date of implementation to the present date – 25th May 2021.*
 4. *Please provide the number of Business fixed telephone lines impacted by the rate increase on a monthly basis from the date of implementation to the present date – 25th May 2021.*
 5. *Following from questions 3 and 4 above, please confirm if there are any Business customers that have been charged any other amount above \$30 but below \$35, or any amount exceeding \$35 for the Business fixed line access.*
 6. *Please supply any other information or record which sets out Flow’s reasoning for implementing the rate increase.*
15. On **4th June 2021**,¹¹ Flow responded to the Office’s 25th May 2021 RFI letter, confirming in summary that:
- *the rate increase to Flow’s Business DEL [Business Fixed Line access] was implemented 1st January 2019”;*
 - *no customers are being charged any other amount above \$30 but below \$35, or any other amount exceeding \$35 [for the Business Fixed Line access]; and,*
 - *[Flow had] no further information or records on the price increase.*

¹¹ **Exhibit OF-8** 2021_06_04_Flow response to Ofreg on Bus DEL and **OF-9-2021**_06_04_Flow response to Ofreg on Bus DEL



16. In its response, Flow stated that it had attached documents in support of responding to RFI questions 3 and 4, however, the Office notes that Flow's referenced attachments were not attached to the submission.
17. On **9th July 2021**, the Office issued a "*Notice of Non-Compliance*" to all its ICT Licensees in regard to certain matters including in relation to ICT Licence Condition 4 "*Provision of Information.*" In that notice, the Office stated that it had "*confirmed that some licensees are failing to meet their annual and quarterly reporting obligations [...]*" and required "*delinquent Licensees to comply with the conditions set out in [...] **Condition 4** (with respect to the required Quarterly Monitoring Data) of their Licences, forthwith.*" The Office emphasised that it would "*continue formal compliance action directly with each delinquent and non-compliant Licensee.*"
18. On **28th June 2022**¹², in further correspondence with Flow, "*[n]otwithstanding the missing attachments, the Office [noted] that Flow described the attached tables as coming from the quarterly monitoring data [**QMD**] submissions made to the Office and that it [represented] the number of business accounts (in response to Question 3) and number of business lines (in response to Question 4) impacted by the price change. Accordingly, the Office accepted that Flow had confirmed that all business accounts and all business lines reported in Flow's quarterly submissions were impacted by the rate increase and were charged a rate of \$35.00 as from 1st January 2019.*"
19. The Office issued Flow with a RFI to confirm:
 1. *What actions has Flow taken to date to compensate its customers for the unapproved rate increase that was applied to its customers?*
 2. *Has Flow continued to apply the unapproved rates to its business customers?*

¹² Exhibit OF-10 2022_06_28_OfReg to Flow BFL Rate Increase RFI SM



3. *What plans has Flow established to date to remedy the unauthorised rate increase?*
20. In addition to the above requests, the Office also noted at that time that, as from the second quarter of 2021 onwards (Q2 2021), Flow had not reported its required QMD submissions data relating to:
- *Business fixed telephone lines - end of quarter*
 - *Business fixed telephone numbers - end of quarter*
 - *Business account - end of quarter*
21. Consequently, the Office also requested “*that Flow provide the missing information*” from Flow’s QMD reports.
22. The Office required that Flow provide its response to the Office’s 28th June 2022 RFI, by **5th July 2022**.
23. On **5th July 2022**¹³, Flow, via email, among other things “*acknowledge[d]*” the application to make the increase in the Business Fixed Line access service “*was not submitted to Ofreg for approval before it was implemented*”, stated that it had tried to “*make amends for this error by meeting with Ofreg*” and that “[*h*]aving heard no further from the Office on the matter since meetings a few years ago,[...] *believed the matter was settled.*” Flow requested an extension of the deadline to provide its response by 22nd July 2022.
24. By return email on the same day, the Office declined Flow’s request for an extension, noting that “*Flow has already made certain admissions in this matter, which are re-confirmed in your email below*” and informed Flow that the Office “*is considering issuing Flow with an administrative fine notice in this matter*” and that “[...] *once initiated, [the Office] will provide Flow with an opportunity to provide a*

¹³ **Exhibit OF-11** 2022_07_05_Flow_Ofreg_email_Re Cayman Business Fixed Line Access Rate Increase Request to Extension



response as it sees fit. Penalties resulting from the conclusion of the admin fine process may result in the Office either issuing Flow with a warning or issuing Flow with a fine.”

25. On **20th September 2022**, the Office issued a Notice to Flow pursuant to *section 91 URCA* in respect of possible contraventions by Flow relating to (a) an unauthorised Category 1 Service rate increase, and (b) unreported QMD reporting requirements (the '**Initial Enforcement Notice**') (copy enclosed).
26. The Office provided Flow with the opportunity to make representations on the Initial Enforcement Notice, including providing any documentation, in relation to the suspected contraventions set out therein within 21 days of the date of that Notice and stated that it would consider any representations and documentation submitted by Flow in accordance with the procedure set out. Flow provided its response on **10th October 2022**.

C. Contraventions of Cable and Wireless (Cayman Islands) Limited's (T/A 'Flow') ICT Licence

27. The Office, in the Initial Enforcement Notice, set out the basis upon which it was satisfied that there were reasonable grounds for believing that Flow had contravened the following Licence conditions:
 - a. **Paragraph 7 of Annex 5 of Flow's 2003 Licence – Failure to seek approval of the Office to increase the rate of a Category 1 Price Cap Service.**
28. The Business Fixed Line access service is a Category 1 Price Cap Service as per paragraph 4.a.(i) in Part 2 of Annex 5 of Flow's 2003 Licence. The maximum rate which Flow was allowed to charge retail consumers for the service since 1st December 2003 was \$30.00, as per paragraph 1.(ii) in Part 1 of Annex 5. Further, the Business Fixed Line access service is in the "*frozen basket*" of services in which no rate increase is permitted, as per paragraph 35, Stage 2 a. (i) and Stage 3 a. in Part 2 of Annex 5.



29. Noting that the Business Fixed Line access service has been a Category 1 Price Cap Service, and a service in the frozen basket, since 1st December 2003, Flow should have sought and received the Office's written consent as per paragraph 4.a.(i) in Part 2 of Annex 5 when read with paragraph 7 in Part 2 of Annex 5, and under general licensing principles, before implementing the monthly rate increase of the Business Fixed Line access service to \$35 since 1st January 2019.

b. Condition 4 of Flow's 2021 Licence - Failure to provide Quarterly Monitoring Data

30. Flow is required under Condition 4.2 of its 2021 Licence to provide to "*the Office in the manner and at the times required by the Office, on reasonable notice, any documents, accounts, returns, estimates, reports or other information so required [...].*" The then Cayman Islands' Information & Communications Technology Authority ('ICTA') (which was the body regulating the ICT Industry in the Cayman Islands prior to the formation of the Office pursuant to URCA in 2017) had set out in 2009 to all its Licensees a reporting requirement that such Licensees provide on a quarterly basis certain stated information, which the Office continued to require when it took over the regulatory responsibility for the ICT Sector.¹⁴

31. Flow did not report as part of its QMD returns the required information for Q3, Q4 2021 and Q1, Q2 2022 relating to its business customers.

32. Those reports, when submitted to the Office by Flow (Q3 2021 - 15 October 2021; Q4 2021 - 17 January 2022; Q1 2022 - 14 April 2022; and, Q2 2022 - 15 July 2022) did not include the required information relating to:

- Business fixed telephone lines - end of quarter
- Business fixed telephone numbers - end of quarter

¹⁴ Exhibit OF-12 20 March 2009 Letter from ICTA to Licensees



- Business accounts - end of quarter.

D. Flow's 10th October 2022 Response to the Initial Enforcement Notification and the Office's Reply

a. Paragraph 7 of Annex 5 of Flow's 2003 Licence - Failure to seek approval of the Office to increase the rate of a Category 1 Price Cap Service.

i) The Office did not act in a timely manner

Flow's Response

33. Flow disputes that the issuing of the Initial Enforcement Notice by the Office was the appropriate next step in this matter because of, in its view, the Office's failure to itself comply with *section 6(4)a URCA* when performing its functions, namely to act in a timely manner, which "*impaired Flow's ability to respond to competitors and to be responsive to the needs of customers and the Business.*"
34. In support of its submission, Flow referenced that, by letter dated **8th March 2017**,¹⁵ it had submitted to the Office a request to have various Category 1 Services, which included Business Fixed Line access services, reclassified as Category 3b Services and to apply forbearance to the regulation of Category 4 bundles. Included with this request, Flow submitted, was a report that "*drew upon numerous sources and presented extensive analyses of competition and trends in the telecommunications market.*"
35. Flow stated that OfReg did not respond to that request within the ten business days provided for in Flow's Licence, and that it had received on **21st July 2017** a notice from OfReg that OfReg planned to commence a set of market reviews on competition in the telecommunications sector but that, some five (5) years on, "*OfReg has still not completed the market review.*"¹⁶

¹⁵ **Exhibit OF-13** – 8 March 2017 Letter from Flow to the Office

¹⁶ **Exhibit OF-14** – 21 July 2017 Notice from the Office to Telecom Licensees



36. Flow noted that its initial 15-year Licence expired in July 2018, which was extended twice by OfReg after expiry, and was renewed effective **1st April 2021** with the regulatory restrictions on Flow's products and services, including Business Fixed Line access, being lifted in April 2022 (for further background, see the **Annex** to this Notice). Flow contended that the said regulatory restrictions should have been lifted as from when Flow applied in March 2017 (as referenced in paragraph [34] above).
37. Therefore, Flow submitted that OfReg's failure to undertake and finalise the market review in a timely manner "*has been a contributing factor to [the contravention, for if OfReg had performed its functions and exercised its powers in a timely manner, the issuance of the [Initial Enforcement Notice] would not have been necessary.*"

Office's Reply

38. The event this enforcement matter relates to, as indeed identified by Flow itself in its response, in effect took place on **1st January 2019** when Flow implemented the increase of CI\$4.99 (as referenced in correspondence, from CI\$30 to CI\$35 per month) to its Business Fixed Line access service without the required prior written approval of the Office. Flow was in full knowledge before and at that time, noting that Flow was first granted its licence in 2003 (the 2003 Licence) and had previously made such requests to the ICTA and then the Office,¹⁷ that the Office's written consent was required under Flow's 2003 Licence *prior to* that increase taking effect.
39. Indeed, Flow on various occasions as identified in the summary of the correspondence on this matter above (see paragraphs [2] *et seq.* of this Notice) acknowledged this "*oversight.*"
40. Further, the Office only became aware of the stated increase in May 2021 as a consequence of the Office considering Flow's request for the Office to approve its proposed new SMB bundles (see paragraphs [2] *et seq.* of this Notice), which was

¹⁷ **Exhibit OF-15** – E.g. Letter of 3 February 2017 from Flow to the Office



a separate matter. Flow did not of its own accord approach the Office with this information.

41. On becoming so aware, and as summarised above, the Office entered into correspondence with Flow in May to June of 2021, seeking to acquire information on the circumstances surrounding the implementation of the unauthorised price increase that had been discovered. The Office informed Flow on **5th July 2022** that the Office was considering issuing Flow with an administrative fine notice and the Initial Enforcement Notice was issued to Flow on **22nd September 2022**.
42. Therefore, and noting the above, the Office disagrees with Flow's submission that there has been significant delay by the Office in bringing this enforcement matter to Flow's attention and then issuing the Initial Enforcement Notice.
43. Further, the Office disagrees with Flow's submission that, as the Office's market review process was ongoing as on the 1st January 2019, this was a valid reason for Flow not to comply with its Licence obligations in place prior to and at that time. Flow's references to the Office's undertaking and finalisation of its market reviews is a separate matter to that under consideration in the Initial Enforcement Notice which relates to non-compliance with an extant Licence condition.
44. Flow's attempt to conflate the market review process with compliance with its Licence obligations in 2019 (under its 2003 Licence) is unfounded and there were at the time, and are, other regulatory avenues open to Flow to challenge the Office's market review process if it considered it was not timely.
45. Indeed, the Office notes that Flow agreed with the Office to the renewal of its Licence in 2021, which included Annex 3B (which was the same wording as that in Annex 5 of the 2003 Licence), and in Annex 3B there remained the licence obligation to seek the prior written approval from the Office for price increases of such regulated services. Flow accepted the continuation of that obligation at that time.



46. The Office also notes that Flow and the Office *did* address the timing of the market reviews in Flow’s 2021 Licence – whereby Annex 3B contains a provision that, if the aforementioned market reviews were not completed within 12 months from the issuance of that 2021 Licence, the previous Annex 5 restrictions would be lifted. This lifting of the obligation took effect on **1st April 2022** (see the attached Legal Background **ANNEX** for the exact wording).
47. Finally, the Office disagrees with Flow’s representation as stated in paragraph [35] above that OfReg did not respond to its request within the ten business days provided for in Flow’s Licence. In fact, the Office wrote to Flow on **28 July 2017** explaining that “[Flow] has misinterpreted the scope of paragraph 31. Paragraphs 29 through 31 of Annex 5 set out the terms, including service classification, applicable to such Category 6 services, i.e. “New ICT Services””.¹⁸
48. The Office stated in that letter that “New ICT Services” are defined to mean ICT services “that the Authority determines to be materially different in one or more of its fundamental features from any ICT Service previously offered by C&W.” The Office noted that Flow did not propose to offer a “New ICT Service” in either its **8 March 2017** or its **25 July 2017** letters and therefore the referenced requirement to respond within ten business days was “*not applicable in this instance.*”

ii) The Office has not signalled its intent to impose a fine

Flow’s Response

49. Flow stated that “OfReg has been aware of Flow’s failure to seek approval of the Office to increase the rate of a Category 1 Price Cap Service” at least since **May 2021**, OfReg and Flow have been in constant communication since that time, and at no point has OfReg signaled its intention to impose any fine in respect of this breach.

¹⁸ Exhibit OF-16 – 28 July 2017 Letter from OfReg to Flow



50. Further, Flow stated that it understood that this was not OfReg's intention due to the ongoing discussions relating to the market review. Flow submitted that OfReg's inaction during this period also supported its position that to impose a fine at this point is not compliant with the obligation to act in a timely manner under *section 6(4)(a) URCA*.

Office's Reply

51. In disagreement with Flow's submission, and as referenced at paragraph [24] of this Enforcement Notice, the Office made clear to Flow in its 5th July 2022 email of its intention to consider whether or not to issue Flow with an administrative fine notice. Indeed, contrary to Flow's submission, the Office had not at any point stated or indicated to Flow that, due to the ongoing discussions relating to the market review, the Office would not consider imposing a fine in respect of the identified breach. In addition, and prior to the above as summarised at paragraph [17] of this Notice, the Office wrote to all its ICT Licensees on **9th July 2021** including in relation to compliance with licence condition 4 "*Provision of Information*" and, among other things, emphasised that it would "*continue formal compliance action directly with each delinquent and non-compliant Licensee.*"

iii) The issuance of the Enforcement Notice is premature

Flow's Response

52. Flow stated that it was in dialogue with the Office on the Business Fixed Line access service price increase and, as no agreement or settlement had been reached between the Office and Flow, the matter was still open and such dialogue not concluded. Flow stated that it "*has no record of any agreement, settlement or directive from Ofreg in the matter and as such the Notice is not warranted.*" Flow submitted that this "*is a crucial point for the Office's consideration, for then almost any matter that Flow and Ofreg is in discussion on could be the subject of an Enforcement Notice.*"



Office's Reply

53. The Office draws Flow's attention to the correspondence on this matter between May and June of 2021, as summarised at paragraphs [2] *et seq.* of this Notice, whereby the Office set out its position clearly and provided Flow with various opportunities to respond. As stated previously, the Office also made clear in its 5th July 2022 correspondence that it would consider issuing Flow with an administrative fine notice.
54. As an observation, any matter that the Office discusses with a licensee could potentially become the subject-matter of an investigation by the Office for non-compliance with that licensee's regulatory obligations – namely non-compliance with a term, condition, specification or requirement of any licence, order, directive, rule or regulation.¹⁹ There should be no expectation that the Office would not do so and the Office did not say otherwise to Flow.

iv) The Increase of \$4.99 is not unreasonable.

Flow's Response

55. Flow submitted that *section 6(4)(c) URCA* states that, in performing its functions and exercising its powers under this or any other Law, the Office shall "*act in a reasonable, proportionate, impartial and consistent manner.*"
56. Flow referenced that its "*Business [Fixed] Line Rental*" was increased by CI\$4.99, effective 1st January 2019, for the first time in sixteen (16) years and that, between "*the period 2003 and 2019, the accumulated inflation rate in Cayman was approximately 32%.*"

¹⁹ Per s91 (1) URCA.



57. Flow submitted that, as a consequence of inflation, Flow's operating input prices in 2019 were *"at least 30% higher than they were in 2003 when a reasonable rate of return was determined and the rate for Business [Fixed] Line Rental was established at CI\$30."*
58. Further, Flow submitted that it continues to *"absorb significant economic cost in the provision of its [Business Fixed Line] service"* as it is not recovering the *"true economic cost for the provision of fixed line service to business customers and is in effect providing a subsidy to its business customers."*
59. Flow, therefore, submitted that if there had *"not been a procedural error on Flow's part, Ofreg too would have found the rate increase of CI\$4.99 reasonable and would have approved the increase"* and that it had provided the proper notice of variation of the rates as required under its customer contract²⁰ with business customers.

Office's Reply

60. The Office considers that the amount by which Flow increased its price for the Business Fixed Line access service, and whether it is to be consented to, is a separate matter from that being considered as part of the Initial Enforcement Notice and this Enforcement Notice: both of which address Flow's procedural failure to seek written approval from the Office before increasing the rate of a Category 1 Price Cap Service.
61. Flow has not made any application to the Office and therefore the Office has not made its decision on whether or not to consent to the increase to Flow's Business Fixed Line service to CI\$35 between **1 January 2019** to **31 March 2022** (being the date when Flow's Annex 5 conditions that were rolled-over into Annex 3B of Flow's 2021 Licence were lifted) and the Office will contact Flow separately in respect of commencing this process.

²⁰ <https://discoverflow.ky/item-101-conditions-governing-provision-telecommunications-service>



v) **Press Release**

Flow's Response

62. In relation to *section 6(4)(c) URCA*, Flow referenced the Office's press release on **21 September 2022** which it stated (amongst other things) that "*OfReg investigation finds FLOW overcharged business customers.*"²¹ In Flow's view, that having issued that press statement, the Office is "*no longer conducting this administrative fine process in an impartial manner, as required by that statute.*" In this regard, Flow submitted that the Office had already "*stated that customers have been overcharged by Flow without (A) having allowed Flow the opportunity to respond to the Notice [...] or (B) considered Flow's position on this issue.*"

Office's Reply

63. The Office disagrees that its publication of the aforementioned press release has prejudged, or in any way foreclosed its mind to, the outcome of the representation stage in this enforcement process.
64. The press release wording makes it clear that the Office would be considering the matter with an open mind. In particular, the Office draws Flow's attention in this regard to the statement in the Press Notice that "*OfReg has issued FLOW with an Administrative Fine Notice in relation to the contraventions, a process **which affords Flow an opportunity to provide a formal response to the allegations. After a review of FLOW's response, the Office will issue a decision of its ultimate findings.***" (The Office's emphasis added.)

b. **Condition 4 of Flow's 2021 Licence - Failure to provide QMD as prescribed by the Office**

²¹ <https://www.ofreg.ky/viewPDF/documents/2022-09-21-12-56-27-OfReg-Press-Release-Flow-Overcharging-21-September-2022.pdf>



Flow's Response

65. Flow referenced *section 6(4)(e) URCA*, which states that, in performing its functions and exercising its powers under this or any other Law, the Office shall “*engage in reasoned decision making based on the administrative record.*”
66. Flow rejected the Office’s statement at paragraph 41 of the Initial Enforcement Notice that “*Flow failed to comply with the requirement to provide information to the Office. The requirement to provide information in the form of Quarterly Reporting Data reports is a longstanding obligation.*” Flow stated that it “*continues to and at no time ceased to comply with its longstanding obligation to submit [QMD]. Flow’s investigation identify[ed] no cessation of submission of*” the QMD to OfReg.
67. Flow also rejected the Office’s statement at paragraph 43 of the Initial Enforcement Notice that “*Flow stopped reporting information relating to business customers shortly after the unauthorised increase in the business fixed line access rate was discovered by the Office*” and, in Flow’s language, “*the damaging innuendo that Flow is engaged in some form of misconduct.*”
68. Flow further stated that there was nothing in the exchange of emails provided that would suggest that the regular, “*operational cut and thrust of interrogating the Quarterly Monitoring Data*” was occasion for an enforcement notice for there was nothing in the exchange of information between OfReg and Flow to suggest this.

Office's Reply

69. The Office refers to the relevant Licence condition of Flow’s 2021 Licence, condition 4.2, which obliges Flow to “*provide to the Office in the manner and at the times required by the Office, on reasonable notice, any documents, accounts, returns, estimates, reports or other information so required [...].*” (As background, this wording was also in Flow’s 2003 Licence (at Licence condition 4.1).)



70. By letter, dated **20 March 2009**, the then ICTA required all its Licensees to complete the QMD spreadsheet “[f]or each quarter thereafter (i.e. beginning 1 April 2009) [...]”, and this is a continuing obligation under the relevant Licence.
71. The Office notes, as a matter of fact, that the QMD figures for Flow’s Business Fixed telephone lines, numbers and accounts were not set out in Flow’s relevant reports for Q3, Q4 2021 and Q1, Q2 2022 at the time they were reported. While Flow will have a copy of its respective QMD reports for the relevant periods, for completeness those reports are provided to Flow to evidence this.²²
72. Therefore, and contrary to Flow’s submission, as a matter of fact Flow did fail to provide the QMD figures for Flow’s Business Fixed telephone lines, numbers and accounts for Q3, Q4 2021 and Q1, Q2 2022 when it submitted those reports and such non-compliance is contrary to Flow’s obligation under Licence Condition 4.2 of its 2021 Licence to provide this information to the Office in the “*manner and at the times required by the Office.*”
73. That said, the Office notes that Flow has subsequently provided the relevant QMD information for Q1 and Q2 2022.
74. As to Flow’s comment that the Office made an “*innuendo that Flow is engaged in some form of misconduct*” by the Office’s reference that Flow had stopped providing the information “*shortly after the unauthorised increase in the business fixed line access rate was discovered by the Office*”: the Office had merely stated when Flow ceased reporting indicators relevant to the business fixed line, as from Q3 2021, which was factually after the correspondence summarised at paragraphs [2] *et seq.* of this Notice. The Office, in so doing, did not intend to or make any comment as to the reason why Flow had stopped its reporting at that time. The Office in the relevant

²² Exhibit OF-17 Flow QMD reports for Q3, Q4 2021 and Q1, Q2 2022



description in this Enforcement Notification at paragraphs [30 to 32] has reflected this.

c. Hearing request

75. Flow requested at the beginning of its **10th October 2022** submission a “*hearing to discuss the Enforcement Notice and this Response*” but did not go into detail as to why it considered it appropriate to hold such a hearing.
76. In this regard, the Office notes that *section 91 (4) URCA* provides that, where the Office notifies a licensee of a suspected failure to comply with an obligation, that licensee “*may request that the Office hear the licensee in person or through a representative [about the matters set out in that notification] and, if so requested, the Office may **in its discretion** allow such request.*” (Emphasis added.)
77. While the Office noted Flow’s request for a hearing in this matter, the Office has not allowed such request. The Office considers that Flow has had the opportunity to provide its representations on the Office’s proposed determination and Flow did make such representations which were detailed and set out its concerns clearly. Further, the Office considers that the facts in this matter are straightforward, and a hearing is not needed in order to clarify what happened.

E. Determination

78. **Therefore, for the reasons set out above, the Office determines that pursuant to s91 URCA, Flow has failed to comply with the Licence obligations set out at paragraph 7 (Part 2) of Annex 5 of Flow’s 2003 Licence, and Licence Condition 4.2 of Flow’s 2021 Licence.**

ANNEX: LEGAL BACKGROUND

Flow ICT Licences

1. Flow was first issued its ICT Licence in July 2003. At that time, the Licence contained “Annex 5 – Tariff Regulation and Other Matters” (the ‘**2003 Licence**’).
2. The conditions contained in Annex 5 of Flow’s 2003 Licence were subsequently agreed by the Office and Flow to be rolled-over as part of the grant of Flow’s Licence renewal in April 2021. The Annex 5 was included in “Annex 3B – Significant Market Power” in that Licence renewal.
3. As per the conditions in Annex 3B, the conditions that were contained in “Annex 5” were rolled-over “*in its entirety*” with the:

[E]xpectation that within 12 (twelve) months of the commencement of this Licence, the Office would have completed an SMP review consultation process and therefrom arrived at a determination on SMP access charging regulation and obligations in relation to the Licensee’s services, if any. Where the SMP review consultation and determination is not completed within the stated 12 month period, the previous Annex 5 restrictions will be lifted at the conclusion of the 12 month period following the commencement of this Licence.

4. As the Office had not completed the SMP review within the stated 12 month period, the previous Annex 5 restrictions were lifted as from 1st April 2022.
5. Relevant licence conditions under Annex 5 (and Annex 3B before they fell away) are as set out in the following paragraphs.
6. Annex 5/3B – Part 1 – C&W’s Retail Prices, paragraph 1:

With effect from the dates specified below, the rates set out below shall be the maximum rates which C&W shall charge retail consumers for the specified services.



Percentage reductions where indicated are from C&W's existing standard rates as at 31st December 2002. [...]

(ii) Monthly Line Rental (Access Charge)

- [...]
- *Business (incl. Government) \$30 (from 1st Dec 2003)*

7. Annex 5/3B – Part 2 – Retail Price Regulation, paragraph 2:

Price Cap Regimes. *The following arrangements apply to the regulation of C&W's retail prices. From the Effective Date until the date that the Initial Price Cap is set, C&W shall comply with the Interim Price Restrictions as set out in paragraph 35. The Authority shall conduct a public proceeding to set the Initial Price Cap consistent with the principles set out in this Agreement. From the date that the Initial Price Cap is set, C&W shall comply with the Initial Price Cap and the Interim Price Restrictions shall no longer apply.*

8. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 3:

ICT Services Categories. *C&W's retail ICT Services are divided into the following six (6) categories:*

Category 1 - Price Cap Services

Category 2 - Special (i.e. Fixed Internet Connectivity, Mobile, and IDD calls)

Category 3 – Other

Category 4 - Bundled services containing services from Categories 1 and 2 or 3

Category 5 - Bundled services containing services from Categories 2 and 3



Category 6 - New ICT Services

9. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 4:

Category 1 – Price Cap Services

The following ICT Services are ‘Category 1 Services’:

a. Line Rental

(i) Business.

[...]

10. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 6:

Rate Decreases. *C&W may decrease the price of any Category 1 Service, provided that the rate decrease complies with the ex-ante Imputation Test. The Authority may elect to exempt certain ICT Services from the requirement to have an imputation test. The process for any such decrease shall be as follows:*

- a. C&W files a proposal with the Authority in complete confidence (even its existence is not disclosed on the public record).*
- b. Unless more information is requested by the Authority and provided C&W does not make more than two (2) tariff filings within any ten (10) business day period, the Authority shall issue a ruling within ten (10) business days. Where that proposed price decrease meets the Imputation Test, the Authority will grant interim approval. With interim approval, C&W may implement that price decrease.*



- c. *C&W shall submit, on or before the date the proposed rate decrease becomes effective, each proposal to the Authority in an abridged form, including the imputation test, in a format that permits the Authority to place the abridged form of that proposal on the public record (together with any claim to be made under the Confidentiality Rules in respect of the application).*
- d. *If no significant comments are received from interested parties and the Authority does not raise any concerns, within thirty (30) calendar days of the initial filing, final approval shall be granted.*
- e. *In respect of the time periods set out in sub-sections (b), (c) and (d) above, these periods shall be reviewed jointly by the parties twelve (12) months after the Effective Date. Any changes to these time periods shall be as agreed by the parties.*

11. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 7 and 8:

Rate Increases. *C&W may raise the price of any Category 1 Service only with the prior written consent of the Authority.*

Changes. *C&W may change any term or condition in respect of a Category 1 Service only with the prior written approval of the Authority.*

12. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 10:

Bundling. *Bundles of price cap services will be permitted subject to the Authority's imputation test requirements.*

13. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 20.1 a. and 20.1 b.:



Category 3 – Other

There will be 2 **sub-categories** of Category 3 Services:

- a. **Sub-category A** – are ICT Services for which C&W is required to publish all of its rates, terms and conditions (in a manner that is easily accessible and clearly indicates to users what terms and conditions apply to each ICT Service). C&W is permitted to offer customer specific pricing for these sub-category A ICT Services that differ from the published rates, provided that C&W files those arrangements with the Authority within a reasonable timeframe. The Authority may, on a service by service basis, exempt C&W from this requirement.
- b. **Sub-category B** – will be ICT Services whose rates, terms and conditions C&W will not be required to publish (i.e. those Category 3 Services not in sub-category A, and all Category 3 Services that are not ICT Services).

14. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 21, 22 and 23:

Rate Increases. Rate Increases for Sub-category A do not require the Authority's approval, however, C&W must notify the Authority at least three (3) business days before that rate comes into effect.

Rate Decreases. Rate Decreases for Sub-category A do not require the Authority's approval. However, C&W must notify the Authority at least three (3) business days before that rate comes into effect. The Authority may require C&W to demonstrate that the new rate passes an ex-post imputation test, if the Authority states in writing that it has concern that the new rate fails the imputation test, and provided that it does so within 180 days of the decrease taking effect.



Terms and Conditions. *C&W may change its terms and conditions for Sub-category A services with appropriate notice to customers, in addition to the three (3) business days' notification to the Authority, prior to those changes coming into effect.*

15. Annex 5/3B – Part 2- Retail Price Regulation, paragraph 26:

Category 4 – Bundles of Category 1 Services with Items of Category 2 or 3

Category 4 Services (being bundles comprising Category 1 Services with either Category 2 or Category 3 Services) shall be subject to an ex-ante imputation test. Bundling of these ICT Services shall be allowed. However, if the bundle contains a price cap service, then the rules found in Category 1 shall apply.

16. Annex 5/3B – Part 2 – Retail Price Regulation, paragraph 35:

Interim Price Restrictions

Until such time as the Initial Price Cap plan is finalized and implemented, the following Interim Price Restrictions shall apply:

Stage 1: Rate changes for ICT Services as set out in Part 1 to this schedule take effect.

Stage 2: For the first twenty-four (24) months after the Effective Date, unless the Initial Price Cap comes into effect earlier, there will be two (2) baskets:

a. Frozen Basket, no rate increases permitted:

i. Line Rental (business and residential).



[...]

Stage 3: Commencing two (2) years after the Effective Date, unless the Initial Price Cap regime is in effect:

a. Frozen Basket: no rate increase shall be permitted, except:

i. Monthly rates for residential line rentals shall be permitted to increase by a maximum of \$1, for each year after the first two years after the Effective Date.