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

CONTENTS

NOTICE IN RESPECT OF ADMINISTRATIVE FINES AND WARNING PURSUANT TO SECTION 91 (9) OF THE UTILITY REGULATION AND COMPETITION ACT (2021 REVISION) (the 'Fine and Warning Notice')

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A. Introduction

1. This Fine and Warning 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**' services), 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 Licence. Each*

[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

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 to first obtain 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.*"

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

[3] **Exhibit OF-3**-2021_04_30_Flow_Ofreg_email_Fwd EXT Re New Flow SMB bundle
[4] **Exhibit OF-4** 2021_05_07_Flow letter to OfReg - new SMB bundles

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 Business Fixed Line access 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 a "*monthly-recurring price [of] $35.00 [the actual figure being $34.99]*" and not the $30.00 "*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 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

[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

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** [emphasis in bold added].*"

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.

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:

    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.

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[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

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**,[10] 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.*

[10] **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*"[11] to all its ICT Licensees in regard to certain matters including in relation to 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], and "*[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 an 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?*

[11] https://www.ofreg.ky/news/notice-of-non-compliance-quarterly-and-annual-financial-reporting-licence-fee-payment-and-quarterly-monitoring-data

[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 relevant 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 line rental "*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**').

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 will consider any representations and documentation submitted by Flow in accordance with the procedure set out. Flow provided its response on **10th October 2022**.

27. On **28th April 2023**, the Office issued Notices to Flow:

    a) determining that Flow failed to comply with the Licence obligations (the '**Enforcement Notice**'); and,

    b) setting out its minded to position to issue a fine in relation to the non-compliance identified in the Enforcement Notice (the '**Proposed Fining Notice'**), and providing Flow with the opportunity to submit written responses to the matters contained in the Proposed Fining Notice.

28. On **16 May 2023**, Flow submitted its response to the Proposed Fining Notice (considered below at paragraphs [70] to [89]).

C. <u>Contraventions of Cable and Wireless (Cayman Islands) Limited's (T/A '*Flow*') ICT Licences</u>

29. The Office, in the Enforcement Notice, set out the basis upon which it determined that Flow had contravened the Licence conditions:

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

30. 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.

31. Noting that the Business Fixed Line access service has been a Category 1 Price Cap Service, and a service in the frozen basket for which rate increases are not permitted 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, before implementing the unauthorised rate increase of the Business Fixed Line access to $35 since 1st January 2019 – which it had failed to do.

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

32. 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 has also required.[14]

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

34. 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
- Business accounts - end of quarter.

D. <u>The Fine Amount and Warning</u>

35. Where the Office determines that the application of a fine is appropriate, it is guided as to the setting of its fine amount by its ICT Sector Fining Guidelines (the '**Fining Guidelines**'), though noting that OfReg cannot legally fetter its discretion in advance and therefore retains the ability to depart from the Guidelines where the circumstances warrant it.[15]

36. In relation to Flow's non-compliance with its Annex 5 Licence condition to seek approval and receive prior written consent of the Office before making a price change to a Category 1 Price Cap Service, the Office issues Flow with a fine of **CI$400,000**. In issuing such a fine, the Office notes, in particular, what the Office considers to be a serious lack of oversight by Flow's senior management as to

[14] **Exhibit OF-12** 20 March 2009 Letter from ICTA to Licensees
[15] https://www.ofreg.ky/viewPDF/documents/ict/2021-12-21-00-59-59-146178172220160427ICTAFiningGuidelinesFINAL.pdf

compliance with Flow's regulatory obligations and that such a fine will act as a sufficient incentive to Flow and the other ICT Licensees to comply with their Licence obligations. The Office considers such a fine to be proportionate to the significance of the failure in the context of the obligation and the impact on Flow and the general ICT Industry.

37. In relation to Flow's non-compliance with its Licence obligation to report its QMD, the Office does not issue a fine. Noting that Flow has subsequent to the giving of the Proposed Fining Notice provided the missing information, the Office considers that a fine in this case would not be proportionate to the significance of the failure in the context of the obligation. However, the Office reiterates the requirement to provide the QMD data and issues a warning to Flow in this matter, reserving its position to consider issuing a fine should a non-reporting matter be before the Office again.

*Issuance of the **CI$400,000** fine – Relevant Factors*

38. In relation to the issuance of the **CI$400,000** fine, when deciding whether an administrative fine is appropriate, and as set out in the Fining Guidance, in general the Office is likely first to consider the following factors in determining the starting figure of any fine: (i) the seriousness of the contravention; (ii) any precedents set by previous cases; and, (iii) the need to ensure that the threat of fines will act as a sufficient incentive to comply.

39. As set out in the Fining Guidelines, specific criteria may be relevant to then adjust the starting figure of any fine depending on the type of contravention. This may include, but would not necessarily be limited to:

    a. any gain (financial or otherwise) made by the Licensee (or any connected body);

    b. the degree of harm caused, or increased cost incurred by consumers or other market participants;

c. size and turnover of the Licensee;

d. the extent to which any contravention was caused by a third party, or any relevant

e. circumstances beyond the control of the Licensee;

f. the duration of the contravention; and,

g. whether a fine in respect of the same conduct has already been imposed by the Office.

40. The Fining Guidance then states that the Office may take into account, among other things, the following factors:

Factors leading to a decrease in the fine level	Factors leading to an increase in the fine level
• the extent to which the Licensee has taken steps in advance to identify and mitigate external factors that might result in a contravention;	• repeated contraventions by the Licensee;
• the extent and timeliness of any steps taken to end the contravention in question, and any steps taken for remedying the consequences of the contravention; and,	• continuation of the contravention after either becoming aware of the contravention or being notified of a contravention by the Office;

• co-operation with the Office's investigation.	• the extent to which senior management knew, or ought to have known, that a contravention was occurring or would occur; and,
	• the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the Licensee concerned.

Setting of Fine Amount

General Criteria

41. The Office considers it appropriate to apply a fine for Flow's non-compliance with its failure to seek approval from and receive prior written consent of the Office before making a price change to a Category 1 Price Cap Service, as set out in the Enforcement Notice.

42. In this regard, the Office notes its statutory functions as set out in the URCA[16] and ICTA[17], which include in particular protecting the interests of consumers in relation to utility services and applying the obligations set out in the licences it issues.

[16] See for example the functions set out at section 6.
[17] See for example the functions set out at section 9.

43. The customers of the Office's ICT Licensees, including business customers, should have confidence that those that they contract with follow what they are obliged to do in their Licences.

44. The issuance of a fine will be dissuasive of future failures by ICT Licensees to comply with their Licence obligations, whether it is Flow or, on publication of the final Enforcement and Fine and Warning Notice, other such licensees in similar circumstances.

45. The Office considers that the fine is proportionate to Flow, noting in particular that the level of the fine represents a small percentage **[CONFIDENTIAL]** of Flow's annual turnover (2021 - 2022).

Specific Criteria

i) Any gain made by the Licensee

46. While the Office notes Flow's arguments that it was reasonable to increase its Business Line Rental by the additional amount, the fact remains that Flow did not comply with its clear Licence obligation to seek first the consent of the Office before doing so.

ii) The degree of harm caused, or increased cost incurred by consumers or other market participants

47. Flow raised the Business Line Rental price to its business customers without the prior approval of the Office, which impacted detrimentally its business customers as they were paying an unauthorised price.

iii) Size and turnover of the Licensee

48. The turnover of Flow for 2021 - 2022 was **[CONFIDENTIAL]** (as reported in Flow's Licence Fee Report submissions over this period).

iv) The extent to which any contravention was caused by a third party

49. Not relevant.

v) Duration of the contravention

50. The duration of the contravention is not ongoing insofar as the failure to comply relates to the unauthorised rise in the Category 1 Price Cap Service which happened on a certain day, 1st January 2019.

vi) Whether a fine in respect of the same conduct has already been imposed by the Office

51. No fine has been imposed by the Office in respect of the same conduct.

Factors tending to lead to an increase in the fine level

52. Flow wrote two letters to the Office on **22 March 2019**, with each letter separately raising non-compliance matters related to Flow's admitted failures to seek the Office's consent under its 2003 Licence before raising its regulated prices.[18]

53. In the letter sent relating to Flow's ISDN Primary Rate Interface ("**PRI**"), Flow noted that it had, effective as from **26 August 2017,** implemented an increase to its ISDN PRI service's monthly rental fee from CI$200 to CI$250. Similar to the case of the Business Fixed Line, the ISDN PRI is a service that is a Category 1 Price Cap Service and, under the terms of Annex 5 of the 2003 Licence, any rate increase required *ex ante* approval from the Office which Flow acknowledged in that letter it had not sought or received.

54. In the letter relating to Flow's new Quad Play bundle, Flow noted that the Quad Play bundle was introduced on a commercial basis on **13 November 2018** which, again,

[18] **Exhibit OF-13** 2019_03_22 Flow letters to OfReg re ISDN PRI and Quad Play

Flow was obliged under Annex 5 of its 2003 Licence to seek prior written consent from the Office before effecting such an increase but it did not do so.

55. In both letters referenced above, the then Country Manager of Flow apologised to the Office for the errors and stated in each letter that "*[they were] very disappointed it happened*" and that they "*want[ed] to assure [the Office] that* ***[Flow has] taken steps to improve our processes in order to prevent this error from reoccurring*** *[emphasis in bold added].*" The Office has not taken enforcement action in each of the aforementioned matters.

56. However, the substantive matter of this Fine Notice occurred effective on **1 January 2019**, around the same time as the Quad Play matter discussed above, and the relevant price increase itself was in the planning months before then, noting that Flow had written to its business customers informing them of the intended price increase for provision of the service prior to the effective date (see e.g. the reference in paragraph [67] below); all of which is over two years before the Office became aware of the non-compliance. The Office was not informed by Flow of this oversight prior to the Office becoming aware of the matter due to the Office's own information interrogation.

57. On **21 May 2021**, Flow in response to the Office pointing out that it had not, as it was required to do, sought the written approval of the Office before raising its Business Line Rental rates, responded 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 that I am very concerned and disappointed it happened. […]. I want to assure you that we have taken steps to improve our processes in order to prevent this error from reoccurring*** *[emphasis in bold added].*"

58. The Office notes the similarity in this apology wording as that expressed by Flow in the previous correspondence with the Office of **22 March 2019,** as emphasised in bold in the quotes at paragraphs [55] and [57] above.

59. In this regard, the Office highlights the factors leading to an increase in the fine level as set out in its Fining Guidance, namely – (i) repeated contraventions by the Licensee; (ii) the extent to which senior management knew, or ought to have know, that a contravention was occurring or would occur; and, (iii) the absence, ineffectiveness or repeated failure of internal mechanisms or procedures intended to prevent contravention by the Licensee concerned.

60. It is telling that Flow did not, at the time of noting both the non-compliance matters referenced above at paragraphs [52] to [54], also refer to its increase to its Business Fixed Line prices in that correspondence. While the Office notes that the Business Fixed Line prices were raised before the 22 March 2019 letters were sent, the Office would have expected Flow's senior management to either (i) have known about that price increase and thus have reported the omission shortly after the rise; or, at the very least (ii) have reviewed at the time the ISDN PRI service and Quad Play bundle rises were identified whether there were any other unconsented to price increases, to check that there was compliance with its Licence obligations in other reporting areas under Annex 5. Neither of the aforementioned were the case.

61. By this failure of senior management to undertake a thorough review of its processes, and improve its processes as Flow said it would in its 2019 correspondence referenced at paragraph [57] above, there were obvious ineffectiveness and repeated failure of internal mechanisms intended to prevent contravention by Flow of its 2003 Licence obligations.

62. While this is the first fine to be made by the Office under *section 91 (9) URCA*, and that there is little precedent for Flow to guide its behaviours on this matter, the Office considers that this lack of senior management oversight, and obvious ineffectiveness and repeated failure of internal mechanisms, is a very serious omission which has put the fine at the higher end of the scale available to the Office.[19]

[19] Under section 91 (9) URCA, the Office may issue a warning or impose a fine not exceeding five hundred thousand dollars

<u>Factors tending to decrease the fine level</u>

63. In its response of **10 October 2022** to the Initial Enforcement Notice, Flow submitted that it had been engaged in continuous dialogue with Office on both the price increase of CI$4.99 for Business Line Rental and the interrogation of the QMD. Flow also submitted that it had demonstrated that proper notice was served to its customers regarding the price increase and that its business customers were aware of the price increase, and that it acted in a manner that is fair and reasonable to its customers.

64. Further, Flow stated that it had admitted its failure to obtain prior approval in relation to the Business Fixed Line price increase and had been completely open and transparent with the Office in this regard and that its failure to obtain that prior approval was not intentional.

65. Flow submitted that there would be no benefit in imposing an administrative fine in order to deter future failures to obtain prior approval, given that the relevant Licence condition has now been removed from Flow's 2021 Licence; and while Flow benefitted financially from the failure to obtain prior approval, the licences of Flow's competitors did not (and do not) contain similar restrictions, leading to one minimal tariff increase in a sixteen year period, in circumstances where customers were provided with notice and were able to find alternative arrangements.

66. In reply to the above, while the Office acknowledges that Flow has been open with the Office regarding its failure to obtain prior approval, such openness in this matter has only been forthcoming *<u>after</u>* the Office itself raised this oversight with Flow.

67. In addition, while the Office notes that Flow had informed its customers of the increase prior to the increase, the Office was not so informed. Further, Flow's business customers would have trusted that Flow was in compliance with its regulatory obligations and would have had no reason to question the increase at the time as being contrary to Flow's Licence obligations.

68. For the reasons set out above, the Office disagrees with Flow that there would be no benefit in imposing an administrative fine in order to deter future failures as the relevant Licence condition is no longer in effect. The matter of this proposed fine is of a wider principle, namely the non-compliance with a Licence condition and such conditions should be taken seriously by Flow.

69. Therefore, the Office has not decreased the proposed level of fine based on the submissions made by Flow as summarised above.

In reply to Flow's response of 16th May 2023:

70. Flow referenced the mitigating factors it had set out in its **10 October 2022** Response both for the Enforcement Notice and for the Proposed Fining Notice. The Office has addressed the referenced mitigating factors in relation to the non-compliance in the Enforcement Notice itself. In relation to the Proposed Fining Notice, response, the Office has replied to this response at paragraphs [63] et seq. above.

71. Further, in its **16th May 2023** response, Flow stated the following mitigating factors should be taken into consideration by the Office when setting the amount of any fine.

    a. *The Office's failure to perform its functions*

72. Flow submitted that it had been engaged in continuous dialogue with the Office on the price increase of CI$4.99 for Business Line Rental and that the Office's own failure to perform its functions and exercise its powers in a timely manner to lift the restrictions on Flow's products and services has implicated the Office itself as a culpable party.

73. The Office strongly resists both assertions and has already addressed these matters as part of this enforcement and fining process. In particular, the Office draws Flow's attention to paragraphs [53] and [54] of the Enforcement Notice (regarding Flow's

continuous dialogue point); and, paragraphs [38] to [48] of the Enforcement Notice (regarding the Office not acting in a timely manner point).

74. In relation to the aforementioned not acting in a timely manner point, Flow in its 16th May 2023 response to the Proposed Fining Notice drew the Office's attention to the 2020 C.I. Government's Public Accounts Committee's report on the "*Office of the Auditor General on the Efficiency and Effectiveness of the Utility Regulation and Competition Office (OfReg) – June 2020*" (the '**PAC Report**').[20]

75. From the Public Accounts Committee ('**PAC'**) Report, Flow drew specific reference to paragraph 9.04 where the PAC expressed "*serious concerns about the delays in OfReg's decision making*." Flow then referenced the Office's "*bold assertions at paragraphs 42, 43 and 44*" of the Enforcement Notice, and stated that OfReg's points set out therein are not supported by the findings of the PAC.

76. For context, the Office at paragraphs [42], [43] and [44] of the Enforcement Notice (a) disagreed with Flow's assertion that there had been significant delay in bringing the enforcement matter to Flow's attention; (b) disagreed 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; and (c) considered that Flow was attempting to conflate the separate market review process with compliance by it of its Licence conditions.

77. Flow also submitted that the Office "*dismisse[d] its duty of care to act timely*" when it stated in the Enforcement Notice that there were other regulatory avenues open to Flow to challenge the Office's market review process.

78. Noting the above, Flow submitted that the Office must "*share some culpability for the identified breach and the Office must consider this is a mitigating factor, for not to do so would suggest that the PAC findings and its recommendations have been dismissed by Ofreg*."

[20] https://cnslibrary.com/wp-content/uploads/PAC-Report-on-OAG-OfReg-Report-June-2020.pdf

79. In response, and as has been stated previously by the Office in the Enforcement Notice, the Office disagrees with Flow's position that by not finalising the market review process has in some way justified Flow's non-compliance with its stated Licence conditions and/or mitigated the level of any fine administered for such non-compliance. Indeed, the relevant obligation was applicable at the time of the failure to comply and its requirements were clearly set out in the Licence and known to Flow.

80. In relation to the other regulatory avenues open to Flow to challenge the Office's market review process if it considered it was not being conducted in a timely manner, the Office notes, and as explained at paragraphs [45] to [46] of the Enforcement Notice, Flow and the Office provided for the lifting of the relevant Annex 5 restrictions in its 2021 Licence.

81. Further, the Office takes very seriously the recommendations made in the referenced PAC Report. In this enforcement matter, the Office has acted in a timely manner noting that it issued the Initial Enforcement Notice on **20th September 2022** and the Enforcement and Proposed Fine Notice on **28th April 2023**.

b. *No detriment to its Business Customers*

82. Flow also stated that there was no detrimental impact to its business customers by the unauthorised price increase as it had provided its customers with the proper notice of its variation of its rates "*as required under the Conditions and business customers were aware of the rate increase and were not impacted detrimentally*."

83. In reply, the Office strongly disagrees with Flow's statement noting that Flow's business customers were detrimentally impacted by them paying an unauthorised price increase for Flow's Business Fixed Line access service. As referenced in paragraph [41] above, Flow's business customers, should have confidence that Flow follows what it is obliged to do in its Licence.

c. *Part of the Fine is not specific to Flow*

84. Flow's final point is to state that the ICTA Fining Guidelines[21] do not include "*a provision to make an example of any company to dissuade future non-compliance by other companies.*" In this regard, Flow referenced the Office's statement in the Proposed Fining Notice that *"[…] a fine will act as sufficient incentive to Flow and other ICT Licensees to comply with their Licence obligation*."

85. Flow stated that this "*suggests that Ofreg has imposed a fine on Flow that is not appropriate and disproportionate, by virtue of the fact that the Office has contemplated a fine large enough to dissuade other operators, rather than specific to the issue for Flow*." Flow stated that this is not "*reasoned decision making*" as required by section 4 of URCA.

86. In disagreement with Flow's position, the Office's Fining Guidelines set out that, under "*General Criteria*", when the Office is considering the starting figure of any fine, it will likely consider "*the need to ensure that the threat of fines will act as a sufficient incentive to comply*."

87. Therefore, the Fining Guidelines are aimed at deterring Licensees from failing to comply with their Licence obligations. Indeed, in the Office's view, this is one of the reasons why *section 91 (10) URCA* provides for the publication of the Office's findings and any quantum of any fine imposed, which is to be published "*in any manner and in [the Office's] discretion*."

88. That the impact on the wider industry is considered as part of the incentive effect of the issuance of fines is common in other jurisdictions. For example, Ofcom, the UK Communications Regulator, has set out in its fining guidelines[22] that:

*1.4 All businesses should operate in compliance with the law, taking into account any relevant guidelines where appropriate. As such, **the central objective of***

[21] https://www.ofreg.ky/viewPDF/documents/ict/2021-12-21-00-59-59-146178172220160427ICTAFiningGuidelinesFINAL.pdf
[22] https://www.ofcom.org.uk/__data/assets/pdf_file/0022/106267/Penalty-Guidelines-September-2017.pdf

imposing a penalty is deterrence. The level of the penalty must be sufficient to *deter the business from contravening regulatory requirements, and to* ***deter the wider industry from doing so****. […]*

1.6 A relevant factor in securing this objective of deterrence is the turnover of the regulated body subject to the penalty. ***Penalties should be set at levels which****, having regard to that turnover, will have an impact on the body that deters it from misconduct in future and and which* ***provides signals to other bodies that misconduct by them would result in penalties having a similar impact****. That is, it must be at a level which can also change and correct any non-compliant behaviour, or potential non-compliant behaviour, by other providers.*

89. Therefore, the Office considers that its Fining Guidelines provide for consideration that the fine issued "*will act as a sufficient incentive to comply*" with Licence obligations in general and, in any event, it is appropriate for the Office to consider such a matter when determining the level of any fine.

E. <u>The Determination</u>

90. Therefore, for the reasons set out above, the Office determines that Flow is fined **CI$400,000** for its failure to comply with the Licence obligation set out at paragraph 7 (Part 2) of Annex 5 of Flow's 2003 Licence.

91. In respect of Flow's failure to comply with its QMD reporting obligation, pursuant to Licence Condition 4.2 of Flow's 2021 Licence, the Office determines that no fine is to be issued though a warning be given, with the Office reserving its position to consider issuing a fine should a non-reporting matter be before the Office again.

THE UTILITY REGULATION AND COMPETITION OFFICE

20 July 2023