



FINAL DETERMINATION AND ORDER

**Issued to: Bahamas Telecommunications
Company Limited**

**In the matter of: Breach of Ex-Ante Retail
Pricing Rules and other Measures**

Issue Date: 22 March 2018

ECS 02/2018

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1. Introduction

The Utilities Regulation and Competition Authority (“URCA”) issues this Final Determination to the Bahamas Telecommunications Company Ltd. (“BTC”) under the terms of section 100(2) of the Communications Act, 2009 (“Comms Act”) further to its Preliminary Determination *“In the matter of: Breach of Ex-Ante Retail Pricing Rules and Other Measures”* (ECS 14/2017). URCA has also attached an Order in accordance with section 100(2)(d) of the Comms Act. Consequential to its findings in Section 3 below, URCA has delineated a number of measures in the Final Determination and Order that BTC must take to remedy or rectify the contravention, or to prevent a contravention of the same, or a similar kind from being repeated.

This Final Determination and Order conclude URCA’s investigation into the Alleged Breaches of the Ex-Ante Retail Pricing Rules and Other Measures by BTC.

1.1 Background

On 19 October 2017 URCA issued a Preliminary Determination and Draft Order to BTC entitled *“In the matter of: Breach of Ex-ante Retail Pricing Rules and Other Measures”* (ECS 14/2017). The Preliminary Determination was in furtherance to a complaint by Be Aliv Limited (“Aliv”) submitted to URCA on 28 March 2017 (“the Complaint”) against BTC. [REDACTED]

- that BTC’s tariff offers for mobile services do not comply with a number of the procedural aspects of the Ex-Ante Retail Pricing Rules (“the Rules”) (“Second Allegation”).

[REDACTED] Therefore, the primary focus of the Preliminary Determination and Draft Order was Aliv [REDACTED] alleging that BTC breached the Rules in relation to the communication of mobile tariff offers and the availability of promotions after their expected expiry date. During URCA’s investigation [REDACTED] URCA identified a series of breaches apparently committed by BTC during the period of November 2016 through June 2017.

Both BTC and Aliv were invited to submit responses by 18 November 2017. URCA received a submission from BTC. Aliv requested an extension until 22 November to make its submission however, on that date, Aliv informed URCA that it did not intend to make any representations.

In issuing this Final Determination, URCA states for the record that while URCA has sought in this document to provide its response to all relevant comments and representations made in response to the Preliminary Determination and Draft Order, URCA's failure to respond to any specific comment or representation does not signify agreement whether in whole or in part with said comment or representation, not that URCA has not considered the comment or that the comment is without merit.

1.2 Structure of this Document

The remainder of the document is structured the following way:

Section 2 reviews the Regulatory Framework under which URCA has exercised its power to issue this Final Determination and Order;

Section 3 presents URCA's assessment of BTC's submission to the Preliminary Determination and Draft Order;

Section 4 outlines URCA's Final Determination consequential to its investigation into Aliv's Second Allegation against BTC; and

Section 5 outlines URCA's Order consequential to its investigation into Aliv's Second Allegation against BTC.

2. Regulatory Framework

This Section sets out the regulatory framework under which URCA has exercised its powers to issue this Final Determination and Order.

URCA is the regulator and competition authority for the electronic communications and electricity sectors in The Bahamas. The Comms Act provides the legal framework for regulation and competition in electronic communications markets in The Bahamas. URCA is tasked under the Comms Act to carry out various duties and functions in fulfilment of its statutory mandate, including issuing regulatory and other measures to further its principal objectives.

Sections 99(1)(a) and (b) of the Comms Act collectively prescribe that if, on its own motion, URCA has reason to believe that a determination is necessary, it may make determinations relating to (amongst other things):

- any obligations on a licensee regarding the terms or conditions of any licence, including obligations in licence conditions and regulations, and
- any activity set out in the Comms Act, and where the Comms Act provides for URCA to “determine” or “to make determinations” as is the case under section 39(1).

Pursuant to section 99(2) of the Comms Act, in making any determination, URCA must comply with section 11 which requires URCA to afford persons with sufficient interest a reasonable opportunity to comment on its proposals.

Section 8(1)(j) of the Comms Act confers on URCA the power to, “conduct inquiries, investigations and oral hearings.”

Under section 9 of the Comms Act, URCA may investigate one or more of the following:

“(a) any contravention;

(b) any alleged contravention; and

(c) any circumstances where it has grounds to suspect a contravention,

of any provision of this Act and any regulatory or other measure issued under this Act, including any licence issued under this Act.”

URCA is empowered to “impose conditions and penalties by order as specified in sections 95 to 98” by virtue of section 9 of the Comms Act. If URCA finds that a breach has occurred or is

occurring, it may direct the licensee to comply with relevant licence conditions and/or other obligations, including imposing financial penalties of up to 10% of the licensee's relevant turnover.¹

A cornerstone of URCA's mandate is to foster effective and sustainable competition between licensees. A further objective of regulation is to promote the interests of existing and future consumers in The Bahamas in relation to the ECS. Integral to the foregoing, is URCA's ability to ensure that licensees abide by their licence Conditions and obligations, including other provisions of the Comms Act and regulatory and other measures that URCA may issue from time to time. Indeed, URCA expects licensees to comply with their obligations at all times. This is especially as it relates to SMP (Significant Market Power) operators. As such, URCA's position is that whenever an SMP licensee operates in contravention of its obligations, the appropriate regulatory action or other measures should be taken, where necessary.

URCA considers that Part XI ("Competition Provisions") of the Comms Act would not apply in respect of Aliv's Second Allegation, since the alleged breaches do not give rise to major competition concerns. Rather, URCA deems it appropriate and reasonable to investigate BTC's conduct in the context of alleged breaches of:

- **Condition 35** of the Individual Operating Licence ("IOL") issued to BTC on 23 November 2009;
- the obligations established in "**Regulation of Retail Prices for SMP Operators of Non Price-Capped Services – Rules**" (Version 1.01 issued 23 January 2017) document reference ECS 35/2016;² and
- the "**Consumer Protection Regulations**" (Version 1.0.1 issued 7 February 2014) document reference ECS 19/2013.³

The above obligations/measures were designed to support URCA's central objectives, as specified at section 4 of the Comms Act include furthering "... *the interests of consumers by promoting competition*" and furthering "...*the interests of ...*" existing and future consumers.

¹ Section 109(1) of the Comms Act.

² Available at <http://www.urbahamas.bs/download/000322300.pdf>

³ Available at <http://www.urbahamas.bs/download/019062100.pdf>

Condition 35 (Part G) of BTC's IOL requires BTC to:

- “35.1 ... publish charges, terms and conditions, ... for all Carriage Services related to the markets in which it is determined or presumed to have SMP.*
- 35.2 ... publish any amendments to the charges, terms and conditions published under Condition 35.1, including charges, terms and conditions for any new services,*
- 35.3 Publication referred to in Condition 35.1 shall be effected by placing a copy of the information on any relevant website operated or controlled by the SMP Licensee.*
- ...
- 35.5 ... provide Carriage Services at the charges, terms and conditions published under this Condition, and shall not depart from those charges, terms and conditions either directly or indirectly.”*

ECS 35/2016 establishes an ex-ante notification and approval framework to which BTC must adhere. For the purposes of the Rules, Non Price-Capped Services are Price Regulated Services⁴ that fall outside the scope of a price cap regime.⁵ At present, the only Non Price-Capped Services are BTC's mobile voice and mobile data services. Under the Rules, any change in the prices or terms and conditions for such services are governed by the procedures described in ECS 35/2016. In particular, the framework provides details on the application, notification, and review and approval procedures, alongside details on the information and the timeframes within which URCA will judge an application or notification. Consistent with URCA's central objectives, the Rules in part, aim to promote transparency in the marketing (advertising) of communications services and ensure customers make informed choices.

Additionally, the Rules prescribe the types of price or service changes SMP operators of Non Price-Capped Services may implement on their networks, alongside obligations relating to the communication of tariff offers and the duration period for Full Length Promotions, as follows:

“When advertising a Price Regulated Service or Bundle that requires notification, including Promotions, the SMP operator shall ensure, consistent with Paragraph 22.3, that such

⁴ These are services that are subject to a price cap regime and/or pricing rules.

⁵ URCA is in the process of developing price caps for BTC's fixed telephony services, and CBL's pay TV and broadband services.

advertising (in whatever form it takes) sets out the terms and conditions for the service, including any eligibility criteria for subscribing to the service.” (Paragraph 23.3)

“When advertising a Price Regulated Service or Bundle that requires approval, the SMP operator shall ensure that such advertising (in whatever form it takes) sets out the terms and conditions for the service, including any eligibility criteria for subscribing to a service.” (Paragraph 22.3)

“Full Length Promotion: *A special offer or discount applied to a Price Regulated Service or Price Regulated Bundle which is in place for a duration of more than one calendar week or more than seven (7) non-consecutive calendar days within a period of fourteen (14) calendar days, but for no more than 90 calendar days.” (Paragraph 59.2)*

“As part of the notification, the SMP operator must also submit a declaration, signed by an authorised officer, confirming that its notification complies with these Rules, the Comms Act, its operating licence, the Sector Policy, and any other documents relevant to the notification, including a declaration that the Full Length Promotion is not similar to any other Full Length Promotion on a Price Regulated Service or Bundle that was available from the SMP operator at any time within the previous Sixty (60) calendar days.” (Paragraph 67)

The Consumer Protection Regulations (“the Regulations”) supplement the obligations noted above. URCA is satisfied that the following requirements of the Regulations are material to its review and consideration of Aliv’s Second Allegation:

“A Service Provider shall provide Consumers with information on Services and Products that is accurate, true, up-to-date, in simple, clear language and adequate to ensure that the Consumer is aware of all material aspects of the Service and any matters which might reasonably be expected to impact upon the Consumer’s decision to enter into a contract for the Service, or the Consumer’s enjoyment of the Service.” (Section 2.1.2)

“A Service Provider shall ensure that the current service arrangements, including rates and terms and conditions for all Services and Products offered to the public are readily available and prominently displayed on any website through which the Service Provider does business with or provides information to the public, and at all retail outlets where the Service Provider’s Services and Products are sold.” (Section 2.1.3)

Section 4.6.1(c) of the Regulations then obliges a service provider to disclose the terms and conditions of the service or product advertised in all advertisements, while Section 8.3.1(a) provides that a service provider must comply in a timely manner with all directions given by URCA in furtherance of these Regulations.

In addition, Section 10.8.4 of the Regulations provides that:

“Continuing or repeated breaches of these Regulations by a Service Provider shall be reviewed by URCA to determine if such breaches constitute a breach of the Service Provider’s applicable Licence Conditions warranting regulatory action to be taken by URCA against the Service Provider.”

3. URCA's Assessment of BTC's Submission

URCA now summarises and responds to BTC's submission to the Preliminary Determination and Draft Order. For ease of reference, URCA has formatted the layout of this assessment to be similar to BTC's submission.

3.1 Relevant Regulatory Rules and Obligations

BTC summarised the obligations under which URCA considered it appropriate and reasonable to investigate the alleged breaches. These include Condition 35 of BTC's IOL, the Retail Pricing Rules and the Consumer Protection Regulations which BTC collectively referred to throughout the submission as the "Relevant Obligations". In BTC's view, the Relevant Obligations provide general guidance on the marketing of electronic communication services but they were not designed to be prescriptive in terms of how products and services are communicated to consumers by BTC or other service providers. BTC continued that this was done to avoid inhibiting the creative ingenuity of each operator's marketing team.

BTC also referenced URCA's letter dated 10 April 2017 which served to remind BTC to adhere to its obligations for the purposes of transparency and accuracy of advertising. BTC claimed the letter provided further interpretive aspects of the Relevant Obligations. It was unclear to BTC whether URCA intended to reiterate or expand in some specific manner the Relevant Obligations.

URCA's Response

URCA disagrees with BTC's reasoning that adhering to the Relevant Obligations would inhibit the creative ingenuity of the marketing team, or that this means that the Relevant Obligations were not intended to be "prescriptive" in terms of how products and services are communicated to consumers. The Relevant Obligations were designed to further the strategic objectives in section 4 of the Comms Act by, amongst others, promoting market transparency and minimising confusion and inconvenience to customers. URCA considers that full compliance with the Relevant Obligations is essential to ensure that complete and accurate information is provided by service providers to consumers, while allowing for creativity by marketing teams in the way that the accurate and complete information is presented. URCA observes that the obligations did not inhibit the creative ingenuity of BTC's marketing team prior to Aliv's entry to the market, and the 2016 modifications to the Ex-Ante Rules would have provided BTC with greater marketing flexibility in light of Aliv's entry to the market.

URCA also disagrees with BTC's contention that URCA's 10 April 2017 letter provided further "interpretive" aspects to the Relevant Obligations. That letter outlined existing obligations that

BTC was already aware of and it served as a reminder that URCA had observed several instances where, upon Aliv's entry to the market, BTC was not abiding by the Rules/obligations. The letter, like several similar correspondences to BTC over the years since URCA began regulating BTC's services, was intended as a warning of noted breaches in an effort to ensure swift corrective actions by BTC and its full compliance with the various Rules/obligations moving forward.

3.2 The Alleged Breaches

BTC summarised the breaches that were outlined by URCA in Section 4 of the Preliminary Determination and collectively referred to them as "Alleged Breaches". The Alleged Breaches were grouped into four categories:

- (i) missing or incorrect rate information on BTC's website;
- (ii) failure to clearly state that temporary or promotional offerings are promotions on BTC's websites or in other marketing/advertising media;
- (iii) failure to correctly and prominently display the start and end dates of each promotional offer on BTC's websites or in other marketing/advertising media; and
- (iv) the continuation of Full Length Promotions beyond their expected end dates.

3.2.1 Missing/Incorrect Rate Information

In the Preliminary Determination, URCA observed that BTC published the off-net rates for its post-paid plans following the Aliv Complaint however the off-net voice and SMS rates for prepaid services were still not available. BTC acknowledged that specific information on off-net rates was missing from BTC's website earlier in the year. BTC explained that the omission was inadvertent and that BTC in no way intended to mislead or cause harm to BTC's customers or ignore the Relevant Obligations. BTC stated it corrected the error and posted the information on BTC's off-net voice and SMS rates on its website on 5 May 2017, after it was brought to its attention in the Aliv Complaint and URCA's 10 April 2017 letter. BTC considered this to be a timely response to the directive in URCA's letter. BTC continued that the rates for its standalone and out-of-plan on-net voice and SMS services are equal to the off-net rates therefore BTC did not consider it necessary to specify two separate rates when there is no differential between the on-net rate and off-net rate. BTC noted that additional information is available in the Frequently Asked Questions (FAQ) section of its website. BTC explained that this is a common pricing practice in the sector which is also followed by Aliv.

BTC acknowledged that there was a temporary discrepancy between BTC's main website and its mobile website with respect to tariffs and details for post-paid mobile plans. BTC claimed the discrepancy was inadvertent and if a customer, who visited the mobile website at the time, enquired about post-paid options, he/she would have been informed of the new plans. BTC explained that the mobile website was created and maintained by a third-party service provider overseas and that the information displayed on the mobile website was based on redirects from BTC's main website. In early 2017, BTC decided to maintain the mobile website in-house however cancelling the agreement became contentious and time-consuming. During the interim period from January to April, the third-party did not release control of the mobile website and was not updating it. In light of these issues along with the discrepancies noted in URCA's 25th May letter, BTC decommissioned the mobile website in early June 2017 and will rely exclusively on its main website going forward. Therefore, BTC considered that the discrepancies raised by URCA were addressed promptly.

BTC considered that it would not be fair or reasonable to treat the two inadvertent and relatively minor errors, regarding off-net rates and incorrect information on its website, as intentional breaches. In the event that they are treated as such, BTC suggested that the errors should be considered *de minimis* not warranting remedial action. BTC continued that the errors also do not warrant a full review/audit of its websites as proposed in the Preliminary Determination. BTC also rejected the notion that any licensed operator should be fined for website errors of such limited scope and impact.

URCA's Response

URCA confirms that BTC added the off-net rates for its post-paid plans following the Aliv Complaint however, to date, the off-net rates for prepaid services are still not indicated on BTC's website. URCA recognises that there is no differential between on-net and off-net rates for prepaid mobile voice and SMS services but this fact needs to be made clearer for visitors to BTC's website. URCA noticed that BTC's FAQ section features the rates for prepaid services, the on-net and off-net rates for post-paid services and also provides definitions for "out of plan", "on-net" and "off-net". In URCA's view, BTC should clearly state that there is no differential for on-net and off-net prepaid rates on the prepaid plan page. BTC should not assume that visitors to its website (especially senior citizens and visitors to The Bahamas) have full information about BTC's pricing structure. Furthermore, the off-net rates are referred to as "cross net" on the post-paid mobile plan section of BTC's website however, in the FAQ section, there is no definition of "cross net" and it may not be clear to everyone that cross net and off-net have the same meaning. If BTC continues to use the term "cross net" then it should include a definition in the FAQ section.

URCA notes BTC's comments regarding Aliv's published rates not outlining a differential however these are out of scope for this exercise. In fact, if BTC believes that Aliv is in breach of its obligations then BTC is free to make representations (including evidential support) to URCA in respect of same.

BTC's claim that its mobile website was decommissioned in early June is inaccurate. Figure 9 in Section 4.2 of the Preliminary Determination shows a screenshot from BTC's mobile website and the 26 July 2017 date on which the screenshot was taken can be seen in the bottom right corner. This is evidence that BTC's mobile website was not in compliance with the Relevant Obligations for at least two months following URCA's 25 May 2017 letter which notified BTC of the website discrepancies.

In URCA's view, the transgressions noted above are not of a *de minimis* nature as BTC suggests. This is especially in light of mobile competition, BTC's unique position as a Significant Market Power ("SMP") operator and the purposes of the obligations including promoting market transparency and minimising potential confusion and inconvenience to customers and competitors. As stipulated in the Relevant Obligations, service providers have a duty to provide consistent, complete and accurate information to existing and potential customers. URCA emphasises that the repeated and ongoing transgressions by BTC despite warnings by URCA (i.e., URCA 10 April 2017 and 25 May 2017 letters) demonstrate a troubling disregard for URCA's regulatory actions and the Relevant Obligations, and therefore warrant regulatory and enforcement action. URCA addresses the issue of the fine and other remedies in Section 3.3 further below.

3.2.2 Use of the Term "Promotion"

BTC argued that it was unclear which, if any, of the Relevant Obligations was breached by its failure to use the term "promotion" in the promotional offers referred to in the Preliminary Determination. In BTC's view, none of the provisions requires specific or prescriptive use of terminology including mandated use of the term "promotion". BTC repeated that URCA's 10 April 2017 letter added further "interpretative" directives to established provisions by instructing BTC to inform the public that any temporary offerings marketed to the public are clearly labelled as promotional offers. BTC was unclear whether that directive was intended to alter or add to the existing obligations.

BTC considered itself to be in full compliance with the Relevant Obligations and URCA's 10 April 2017 letter in respect to its advertisements of promotional offers. BTC explained that its FAQs for such offers clearly indicated that they were promotions or promotional offers along with the limitations and eligibility associated with the offers. In reference to the Facebook advertisements,

which URCA included in the Preliminary Determination as evidence that BTC was not marketing offers as promotions, BTC declared that they were to attract attention. A customer would then have to browse to the terms and conditions which are set out as a series of FAQs to learn more about the offer including that it is a promotion.

According to BTC, its failure to use the term “promotion” did not constitute a breach. BTC repeated its previous comments that if it is determined to be a breach then no remedial action should be undertaken by URCA due to the *de minimis* nature of the offence.

URCA’s Response

URCA disagrees with BTC’s entire justification for its failure to inform customers that specific offers were promotional. URCA rejects BTC’s suggestion that URCA’s 10 April 2017 letter provided “interpretative” directives (see Section 3.1 above). The Rules distinguish between temporary and permanent price changes and specify obligations for the communication and marketing of tariff offers. The Consumer Protection Regulations supplement the requirements of the Rules and BTC’s IOL. It is URCA’s position that all Relevant Obligations were breached by BTC’s failure to clearly identify the offers as promotional as referred to in the Preliminary Determination.

Paragraph 23.3 of the Rules clearly states that “*advertising (in whatever form it takes) sets out the terms and conditions for the service, including any eligibility criteria for subscribing to the service.*” Paragraph 2.1.2 of the Consumer Protection Regulations also states that a service provider shall provide consumers with information to ensure that the consumer is aware of all material aspects of a service and any matters which may impact the consumer’s decision to obtain the service or the consumer’s enjoyment of the service. It is clear that the fact that an offer is temporary is a term and condition and also a material aspect that may impact the consumer’s decision to purchase the service or impact the enjoyment of the service. Also, the promotional nature of the offer must be communicated in a clear and upfront manner to the customer in all advertisements without the customer having to research this information elsewhere. Furthermore, prior to the entrant of a second mobile operator, BTC’s advertisements for temporary offers invariably informed customers that they were indeed promotions. Given this, URCA struggles to understand why BTC should now query the use of the term “promotion” in the promotional offers mentioned above. In conclusion, URCA maintains that BTC’s actions constitute a breach of the Relevant Obligations.

3.2.3 Communication of Promotion Start and End Dates

BTC acknowledged that it did not include the end date for the Prepaid S and XS Bundles (\$4.99 and \$6.99 mobile bundles) on its website. As pointed out by URCA in the Preliminary

Determination, BTC noted that the FAQ for the bundles incorrectly indicated that there was no end date for the promotion at the time. BTC discontinued the bundles in April therefore eliminating the error. BTC continued that it generally includes the start and end dates for promotions in the first FAQ associated with the promotional offers. Since this error was brought to BTC's attention, BTC ensured that the duration period for promotions are clearly and correctly communicated to customers.

URCA's Response

For the same reasons provided in URCA's Response in Section 3.2.2 of this document, URCA does not accept BTC's justification for not indicating in clear and unambiguous language the start and end dates of promotion offers. In conclusion, URCA maintains that the conduct constitutes a breach of the Relevant Obligations, though URCA notes BTC's eventual corrective actions.

3.2.4 Continuation of Promotions beyond Notified End Dates

BTC referenced the four instances outlined in the Preliminary Determination where BTC's Full Length Promotions exceeded the 90-day limit.

- (i) Prepaid Mobile Data \$35/35 day & \$125/45 day Plans scheduled to run from 9 December 2016 until 9 March 2017 – BTC referred to a mobile website screenshot provided on page 16 of the Preliminary Determination which suggested the \$35/35 day plan⁶ was still available in early April 2017 despite its notified end date of 9 March 2017. While a notification to introduce this promotion was filed with URCA, BTC claimed it was never launched and never made available to customers. BTC contended that residual information on the live testing of the promotion was inadvertently retained on BTC's former mobile website. This was one of a number of inadvertent errors on the mobile website which contributed to its ultimate decommission. Consequently, BTC argued that there was no actual instance of a promotion overrun in this case.
- (ii) Prepaid Mobile Data \$25/6GB & \$35/15 GB Plans scheduled to run from 27 March 2017 until 23 June 2017 – BTC calculated that a full 90-day term for this promotion would have

⁶ When URCA commenced its investigation in early April 2017, URCA did not find screenshots or advertisements that featured the \$125 plan therefore URCA is unable to confirm whether the \$125 plan was never launched or if it was launched and subsequently ended on the notified end date.

carried it through beyond the 23rd June end date to 26th June. BTC filed a notification with URCA to make the offers permanent on 23rd June with an effective date of 29th June. If not for the delay associated with URCA's review period, the overrun of the promotion would have been no more than two (2) days. BTC suggested that this overrun could have been treated as a "bridge period" between the promotion and permanent placement to minimise potential customer confusion and inconvenience. In any event, BTC submitted that the overrun is *de minimis* in nature.

- (iii) Prepaid S and XS Bundles scheduled to run from 11 November 2016 until 10 February 2017 – As noted in Aliv's Complaint, this promotion was still available in early April 2017. Once URCA's 10 April 2017 letter brought this to their attention, BTC promptly discontinued the promotion. BTC explained that the overrun resulted from internal miscommunications regarding the required timing to end this offer. As a result, the promotion inadvertently overran its expected end date.
- (iv) Free Fixed to Mobile scheduled to run from 4 November 2016 until 11 February 2017 – BTC filed a notification to renew the promotion in June 2017 however BTC claimed that this was when URCA became aware the original promotion was still ongoing since November 2016. As a result, URCA ordered BTC to cease the promotional offer and allow the 60-day cooling off period to occur before resubmitting the promotion. BTC stated that this overrun was also due to internal miscommunications regarding the end date of the offer resulting in it being available in the market unintentionally for a significant extent. BTC stated it promptly terminated the promotion once URCA brought it to its attention.

BTC recognised that the latter two incidents involved material overruns, i.e., two months and four months respectively. BTC maintained that these were inadvertent and do not represent an intention to mislead, cause harm to customers or ignore the Relevant Obligations. These instances were exceptions and not the rule, BTC added, as it had launched numerous promotions since October 2016. In BTC's view, it consistently sought to fully comply with all rules and obligations including adhering to the end dates of promotions. As a result of the overruns, BTC instituted new internal promotion compliance measures to ensure no further overruns occur in the future. BTC repeated its previous comments that a financial penalty is not warranted but if one is imposed then it should be reduced relative to that proposed in the Preliminary Determination.

URCA's Response

With respect to the \$35/35 day & \$125/45 day plans, URCA refers BTC to Figure 1 on page 16 of the Preliminary Determination. The figure illustrates a screenshot from a mobile phone not BTC's mobile website. The screenshot taken on 3 April 2017 shows that the \$35/35 day plan was available to customers for purchase through the mobile phone platform by dialling *200# and following the prompts. As such, BTC's claim that the \$35/35 day plan was never launched or available to customers is inaccurate. Furthermore, it was available for purchase for over one month beyond its 9 March 2017 expected end date. BTC removed the plan from the market following URCA's 10 April 2017 letter.

In regard to the \$25/6 GB & \$35/15 GB plans, using URCA's own calculation, a full 90-day term would have carried the promotion to 24 June 2017. In any event, BTC should have notified URCA at least five (5) business days prior to the end date of the promotion of its intention to make the offer a permanent placement as stipulated in Paragraph 19 of the Rules. This would have allowed URCA the requisite time to review and respond to the notification and ensure that BTC adhered to the Relevant Obligations. As it relates to BTC's suggestion that the technical overrun be treated as a "bridge period" which served to minimise potential customer confusion and inconvenience, URCA emphasises that if BTC had notified customers that the plans were, in fact, promotional offers then there would have been no cause for confusion or inconvenience. URCA also advises that the term "bridge period" is not recognised by the Rules.

In reference to the Prepaid S and XS Bundles (\$4.99 and \$6.99 bundles), URCA agrees and acknowledges that in an effort to rectify the breach, BTC removed the offers from the market following URCA's 10 April 2017 letter.

Regarding the Free Fixed to Mobile promotion, URCA disagrees with BTC's recap of what occurred. BTC's claim that it promptly ended the promotion, after URCA brought the overrun to its attention, is inaccurate. URCA brought the overrun of the Free Fixed to Mobile promotion to BTC's attention in its 10 April 2017 letter. While BTC ended the other promotions mentioned in the letter, i.e., \$35/35 day and the Prepaid S and XS bundles, BTC continued to offer the Free Fixed to Mobile promotion to customers up to June when it notified URCA that it intended to run the promotion again. After URCA directed BTC to end the original promotion which began in November 2016 and to abide by the 60-day cool-off period before it would be able to offer the promotion again, BTC finally ended the Free Fixed to Mobile promotion.

URCA finds it difficult to accept BTC's argument that the four cases represent inadvertent errors on BTC's behalf. In the case of the Free Fixed to Mobile promotion, there is clear evidence that BTC intentionally ignored the directive in URCA's 10 April 2017 letter to cease the offer. For the reasons stated in Section 3.2.1, URCA does not consider the offences to be of a *de minimis* nature

due to the offences occurring repeatedly and the apparent disregard for the Relevant Obligations despite warnings from URCA. URCA is pleased that BTC has taken steps to prevent overruns from occurring in the future, however reiterates that this does not remove URCA's ability to determine that BTC is in breach of the Relevant Obligations regarding the end dates for promotions.

3.3 Proposed Remedies

BTC addressed the two forms of remedies proposed by URCA. The first remedy involved a set of behavioural and structural remedies and the second involved a fine.

3.3.1 Proposed Behavioural/Structural Remedies

BTC indicated that it accepts and *"will adhere to the intent of all of the proposed remedies"* however BTC had concerns with three of them.

The first involves the proposed review/audit of BTC's websites which BTC considered to be motivated by two relatively minor concerns: a temporary uncertainty about BTC's off-net voice and SMS rates and a temporary discrepancy between BTC's main and mobile websites. BTC repeated its previous comments regarding off-net rates and its mobile website which can be found in Section 3.2.1 of this document.

BTC also had concerns with the remedy that requires all promotions to be "clearly stated as promotions" on BTC's website. As outlined in Section 3.2.2 above, BTC considered itself to be in compliance with this stipulation. BTC continued that it would be unfair, unjustified and prejudicial to BTC for URCA to impose unnecessarily restrictive marketing obligations on BTC but not Aliv given the highly competitive nature of the mobile market in The Bahamas.

BTC's third concern was with the remedy requiring BTC to "prominently display" the start and end dates of each promotion. BTC repeated its previous comments that it currently complies with the Relevant Obligations and that the same restrictions should also apply to Aliv.

URCA's Response

URCA repeats its previous comments in Sections 3.2.1 and 3.2.2 regarding off-net rates and the provision of clear information that an offer is a promotion along with the start and end dates of the promotion.

As regards to BTC's websites, URCA notes that BTC has decommissioned its mobile website and other than the issue involving off-net rates set out in Section 3.2.1, URCA did not identify any other current irregularities or inconsistencies of a material nature on the main website. For these

two reasons, it would be disproportionate for URCA to require BTC to conduct an audit of its main website. URCA, however, recommends that BTC undertake frequent and periodic reviews of its website and other advertising media to ensure accuracy and consistency in the information available to the public and that BTC adheres to the Relevant Obligations at all times. In this case, URCA will not require BTC to submit a report of its review to URCA.

3.3.2 Proposed Financial Penalty

Out of the 12 Alleged Breaches identified in the Preliminary Determination, BTC repeated its previous comments that 10 of the Alleged Breaches are *de minimis* in nature or do not constitute breaches. BTC only considered two breaches, i.e., the overruns of the Prepaid S and XS Bundles and the Free Fixed to Mobile promotion, to be material in nature. BTC urged URCA to take into account that no harm to consumers or competition resulted from the Alleged Breaches. BTC mentioned that neither URCA nor Aliv made reference to consumer harm in the Preliminary Determination or the Aliv Second Allegation respectively. According to BTC, customers benefitted from the promotions being available in the market past their expected end dates despite this occurring inadvertently.

BTC repeated that a financial penalty is unwarranted and unnecessary. To the extent that URCA determines a financial penalty should be imposed, BTC submitted that there are two key factors to warrant a lower fine than what was proposed by URCA:

- Scope of the Alleged Breaches subject to a fine - BTC repeated its previous comments that only two overruns warrant a potential fine. As a result, BTC believes that the scope of infractions and the proposed fine are significantly overstated.
- Impact of the Alleged Breaches – BTC repeated its comments that no harm to consumers or competition was indicated therefore the fine should be proportionately limited in magnitude. In BTC's view, the proposed fine does not fully reflect this fact.

Taking these two factors into account, BTC then provided more specific comments on individual elements of the proposed fine.

- (i) Revenue Base Services - URCA proposed that the revenue base for the fine should involve all cellular mobile network and service. BTC submitted that the revenue base should exclude business and wholesale services and mobile handset revenues since they are unrelated to the Alleged Breaches.

- (ii) Revenue Base Time Period - URCA proposed a time period of October 2016 – June 2017 on which the revenue base calculation should be based. According to BTC, only two of the Alleged Breaches warrant a fine and these occurred during the period February 2017 – June 2017.
- (iii) Base Penalty Rate – URCA considered a base penalty rate of [REDACTED]. BTC argued that due to the limited scope and impact of the breaches, the base penalty rate should be reduced to [REDACTED].
- (iv) Adjustment for Gravity of Breach – BTC agreed with URCA that no further adjustment is necessary.
- (v) Adjustment for Duration of Breach – BTC agreed with URCA that no further adjustment is necessary.
- (vi) Adjustment for Aggravating Circumstances - URCA considered an upward adjustment of 15% due to repeated breaches and disregard for URCA’s authority and the Relevant Obligations. BTC repeated its previous arguments that only two of the offences represent substantive breaches. BTC maintained that it promptly responded to URCA’s directives and that it complied with the Relevant Obligations. BTC disagreed that there was any attempt to disregard URCA’s authority or ignore the Relevant Obligations or URCA’s 10 April 2017 letter. BTC stated that the upward adjustment should be removed.
- (vii) Adjustment for Mitigating Circumstances – URCA stated in the Preliminary Determination that it did not see evidence of mitigating circumstances. BTC submitted that it has been responsive to all of URCA’s directives and sought to adhere to the Relevant Obligations. BTC repeated that there was no harm to consumers or competition. For these reasons, BTC recommended a downward adjustment of 15% to offset the proposed 15% upward adjustment for aggravating circumstances. Alternatively, BTC suggested that there be no adjustment for either aggravating or mitigating circumstances.
- (viii) Adjustment for Policy Objectives – URCA considered an upward adjustment of 10% to deter BTC from committing a future breach of its licence conditions. BTC disagreed that any adjustment is required. BTC pointed to URCA’s reference of the policy objective “*promoting affordable access to high quality networks and carriage services in all regions of The Bahamas.*” It was unclear to BTC how the Alleged Breaches affect the pursuit of this objective or detract from it. BTC repeated that there was no harm to competition or

consumers. BTC submitted that there was no justification for this upward adjustment and that it be removed.

URCA's Response

In reference to the scope of the Alleged Breaches, URCA disagrees with BTC's position that only two of the overruns are relevant and warrant a fine for reasons stated previously. With respect to the impact of the Alleged Breaches, URCA agrees that harm to competition has not been evident. While customers may have benefitted from the promotions being in the marketplace beyond the expected end dates, it is still a non-trivial breach of the Relevant Obligations having regard to BTC's unique position as an SMP operator, amongst other reasons. URCA additionally views the communication of inaccurate, incomplete and potentially misleading information to the public as contrary to the strategic objectives of section 4 of the Comms Act. For these and other reasons, URCA maintains that the Alleged Breaches in the Preliminary Determination do warrant a financial penalty.

URCA now responds to BTC's comments on individual elements of the proposed fine below.

- (i) Revenue Base Services – URCA disagrees with BTC's argument that the revenue base should exclude business and wholesale services and mobile handset revenues. Section 2 of the Comms Act defines "relevant turnover" as:

"the gross receipts in money or money's worth of the licensee ... attributable to: (a) the provision of a network or carriage service or use of any radio spectrum under any licence or exemption determination; and (b) a content service, including associated advertising revenue and other ancillary revenue, but after the deduction of sales rebates in The Bahamas during the relevant financial year".

URCA affirms its preliminary view that the "relevant turnover" for any fine levied under section 109(1) would be BTC's total revenue (or turnover) derived from its cellular mobile network and services.

- (ii) Revenue Base Time Period – For reasons stated previously, URCA disagrees with BTC that only two of the breaches are relevant and that the time period should be reduced to encompass February 2017 – June 2017. In its 18 November 2017 submission BTC provided URCA with a spreadsheet of its mobile service revenues for the period October 2016 to May 2017 and not June 2017. In this circumstance, URCA will use the revenue for May 2017 as a proxy for June 2017 which is missing from the spreadsheet. On the other hand, URCA acknowledges that the Free Fixed to Mobile promotion started 4 November 2016

although URCA was notified in October 2016. As such, URCA will now use the time period from November 2016 to June 2017 (using May 2017 as a proxy for the missing June data).

- (iii) **Base Penalty Rate** – URCA repeats its disagreement with BTC that only two of the breaches are relevant. URCA reiterates that BTC offering a promotion beyond its expected expiry date and the communication of inaccurate, incomplete and potentially misleading information to the public are non-trivial breaches of the Relevant Obligations having regard to BTC’s unique position as an SMP operator, amongst other factors. Further, BTC’s actions contravene the strategic objectives of the Comms Act and resulted in Aliv asking URCA to investigate BTC’s compliance with a number of the procedural aspects of the Rules. However, URCA did not see evidence that the Alleged Breaches were harmful to competition and customers. Based on the repeated nature of these breaches and the numerous occasions on which URCA has had to seek corrective action, URCA now advises of its intention to move more quickly and frequently to impose penalties where there are breaches of the Relevant Obligations. For these reason, URCA has decided to lower the base penalty rate for this breach from [REDACTED]. A penalty rate of [REDACTED] is proportionate to the breaches identified and sufficient to prevent a contravention of the same, or a similar kind from being repeated. Such a rate is also more consistent with the imposition of financial penalties for future breaches.
- (iv) **Adjustment for Gravity of Breach** – As agreed by BTC, no adjustment for gravity of breach is necessary.
- (v) **Adjustment for Duration of Breach** – As agreed by BTC, no adjustment for duration of breach is necessary.
- (vi) **Adjustment for Aggravating Circumstances** – URCA was not convinced by BTC’s arguments that this adjustment is unwarranted. As demonstrated previously, BTC repeatedly breached its licence conditions after URCA sent warnings to this effect and BTC exhibited disregard for URCA’s regulatory authority and flouted the Rules and other obligations. For these reasons, URCA considers a 15% upward adjustment of the basic amount for aggravating circumstances to be proportionate and necessary.
- (vii) **Adjustment for Mitigating Circumstances** – URCA did not see evidence that BTC mitigated the circumstances and BTC’s statement that it was responsive to all of URCA’s directives is inaccurate. For these reasons, URCA determines that a downward adjustment is disproportionate.

- (viii) Adjustment for Policy Objectives – Taking into account BTC’s argument that the Alleged Breaches did not harm competition or consumers URCA will not apply the upward adjustment for policy objectives.

4. Final Determination

This Final Determination is issued by the Utilities Regulation and Competition Authority (“URCA”) pursuant to section 100 of the Communications Act, 2009 (Comms Act). This Final Determination imposes obligations on BTC and is therefore addressed to BTC.

WHEREAS on 23 November 2009, URCA issued the Bahamas Telecommunications Company Limited (“the Licensee”) an Individual Operating Licence (“the Licence”) to provide electronic communications services within, into, from and through The Bahamas, subject to conditions of the Licence, regulatory and other measures and the provisions of the Comms Act.

WHEREAS Condition 35 of the Licence provides that:

35.1 “The SMP Licensee shall publish charges, terms and conditions, including bundled charges, terms and conditions (whether or not those bundles include charges, terms and conditions for Carriage Services supplied in markets to which this Condition does not 29 apply) for all Carriage Services related to the markets in which it is determined or presumed to have SMP.

35.2 The SMP Licensee shall publish any amendments to the charges, terms and conditions published under Condition 35.1, including charges, terms and conditions for any new services, within ten working days of the time that the amendment comes into effect.

35.3 Publication referred to in Condition 35.1 shall be effected by placing a copy of the information on any relevant website operated or controlled by the SMP Licensee.

...

35.5 The SMP Licensee shall provide Carriage Services at the charges, terms and conditions published under this Condition, and shall not depart from those charges, terms and conditions either directly or indirectly.”

WHEREAS under section 9(1) of the Comms Act URCA may investigate one or more of the following:

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

WHEREAS on 28 March 2017, Be Aliv Limited (“Aliv”) submitted a Complaint to URCA alleging:

- (i) anti-competitive conduct by the Licensee in relation to prepaid and post-paid mobile services (“First Allegation”); and
- (ii) that the Licensee’s pricing for cellular mobile services did not comply with a number of the procedural requirements of the Retail Pricing Rules (“Second Allegation”).

WHEREAS URCA, having considered the evidence gathered during the course of its review and investigation into Aliv’s Second Allegation, confirmed that between November 2016 and June 2017:

(a) The Licensee did not publicise all relevant terms and conditions associated with the following offers and did not indicate that they were promotions:

- “Free Fixed to Mobile”;
- \$4.99, \$6.99, \$34.99 and \$124.99 prepaid mobile bundles;
- \$25 for 6 GB prepaid mobile data plan;
- \$35 for 15 GB prepaid mobile data plan; and
- Discounted calls to Haiti and Jamaica.

(b) The Licensee offered the following Promotions⁷ for more than the ninety (90) calendar days, which is the maximum amount of time allowed for a Full Length Special Promotion to be available to the public:

- “Free Fixed to Mobile”;
- \$4.99, \$6.99, and \$34.99 prepaid mobile bundles;
- \$25 for 6 GB prepaid mobile data plan; and
- \$35 for 15 GB prepaid mobile data plan.

WHEREAS URCA’s investigation showed that the Licensee’s mobile website www.btcmobile.me displayed outdated tariffs and details for its post-paid mobile plans.

WHEREAS in URCA’s letters dated 10 April 2017 and 25 May 2017 respectively to the Licensee, URCA emphasised the need for the Licensee to adhere to the Rules and the Conditions of its Licence, and notified the Licensee that there were discrepancies in its post-paid mobile plans.

⁷ Except discounted calls to Haiti and Jamaica.

Further, URCA advised the Licensee to ensure that any web presence reflect accurate tariffs and other non-price terms and conditions.

WHEREAS on 28 June 2017, URCA wrote a letter to the Licensee and directed the Licensee to discontinue offering the “Free Fixed to Mobile” Promotion and adhere to the cooling-off period of sixty (60) days or make the offer available on a permanent basis.⁸ URCA advised the Licensee that its prepaid data plans (i.e., \$25 for 6GB and \$35 for 15 GB) must not be available in the market after the promotion ended or prior to URCA being notified that the Licensee intended to offer the plans on a permanent basis.⁹

NOW URCA, having considered the representations made by BTC in response to URCA’s Preliminary Determination (ECS 14/2017), HEREBY DETERMINES AS FOLLOWS:

The Licensee breached Condition 35 of its Licence, Paragraphs 23.3, 59.2 and 67 of the Retail Pricing Rules, and Sections 2.1.2, 2.1.3, 4.6.1(c), and 8.3.1(a) of the Consumer Protection Regulations, in that the Licensee:

- (i) failed or refused to publicise all relevant terms and conditions in the advertisements for a service;
- (ii) failed or refused to publish all charges (including off-net charges) and other non-price terms and conditions for a service on its websites;
- (iii) offered Full Length Promotions beyond the maximum time period allowed for such promotions;
- (iv) failed or refused to display on its websites and other advertising mediums accurate, true, up-to-date information on all material aspects for subscribing to a service; and
- (v) failed or refused to comply with directives from URCA pursuant to the foregoing obligations.

AND URCA HEREBY FURTHER DETERMINES, that the Licensee shall:Conduct periodic reviews of its main website and other advertising media in order to identify any discrepancies in the

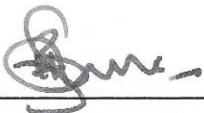
⁸ This letter was in response to BTC’s notification dated 23 June 2017 to run the promotion again effective 29 June 2017 despite it being available from 4 November 2016.

⁹ This letter was in response to BTC’s notification dated 23 June 2017 to offer the plans on a permanent basis.

marketing and advertising of its services. The review should focus on updating of all platforms as necessary in order to ensure accuracy and consistency in the information published across its web platforms and other advertising media. The Licensee should clearly state that there is no differential between its on-net and off-net rates on its prepaid mobile plan webpage. the Licensee should also include the definition of “cross net” in the FAQ section of its website if it continues to use the term;

- (a) At all times abide by the approval and notification procedures specified in the Rules and other similar obligations or regulatory measures;
- (b) Ensure that all promotions marketed to the public are clearly stated as promotions on its website, its mobile platform and all other marketing/advertising media;
- (c) Prominently display (on its website, its mobile platform and all other fora) both the start and end dates of each promotions;
- (d) Discontinue the sale and marketing/advertising of a promotion on the end dates notified to URCA by the Licensee, and approved or acknowledged by URCA;
- (e) Ensure that the terms and conditions for all promotions and other price and service changes are in line with the Rules, the Comms Act, its IOL, the Sector Policy and, its notification or application for approval along with any regulatory measure issued by URCA, as necessary;
- (f) Publish all relevant terms and conditions for all promotions and other price changes that are subject to a notification or approval; and
- (g) Pay a fine under section 109 of the Comms Act in the amount of \$30,868.56 no later than thirty (30) calendar days from the issuance of this Order. Payment of such fine shall be as directed by URCA.

Failure by the Licensee to comply with this Final Determination or any part thereof may result in a further fine not exceeding ten percent of the Licensee’s relevant turnover or other penalty determined by URCA in accordance with section 109 of the Comms Act.



Stephen Bereaux
Chief Executive Officer
22 March 2018

5. Order

This Order is enclosed by the Utilities Regulation and Competition Authority (“URCA”) pursuant to section 100 of the Communications Act, 2009 (Comms Act) that URCA issues in conjunction with the Final Determination and Order pursuant to section 95 of the Comms Act.

WHEREAS by Final Determination made on (22 March 2018), URCA has determined that the Bahamas Telecommunications Company Limited (“the Licensee”) has breached Condition 35 of its Individual Operating Licence, Paragraphs 23.3, 59.2 and 67 of the Retail Pricing Rules, and Sections 2.1.2, 2.1.3, 4.6.1(c), and 8.3.1(a) of the Consumer Protection Regulations, in that the Licensee:

- (i) failed or refused to publicise all relevant terms and conditions in the advertisements for a service;
- (ii) failed or refused to publish all charges (including off-net charges) and other non-price terms and conditions for a service on its websites;
- (iii) offered Full Length Promotions beyond the maximum time period allowed for such promotions;
- (iv) failed or refused to display on its website and other advertising mediums accurate, true, and up-to-date information on all material aspects for subscribing to a service; and
- (v) failed or refused to comply with directives from URCA pursuant to the foregoing obligations.

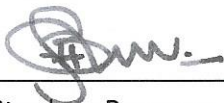
AND URCA HEREBY ORDERED, that the Licensee shall:

- (a) Conduct periodic reviews of its main website and other advertising media in order to identify any discrepancies in the marketing and advertising of its services. The review should focus on updating of all platforms as necessary in order to ensure accuracy and consistency in the information published across its web platforms and other advertising media. The Licensee should clearly state that there is no differential between its on-net and off-net rates on its prepaid mobile plan webpage. The Licensee should also include

the definition of “cross net” in the FAQ section of its website if it continues to use the term.

- (b) At all times abide by the approval and notification procedures specified in the Rules and other similar obligations or regulatory measures;
- (c) Ensure that all promotions marketed to the public are clearly stated as promotions on its website, its mobile platform and all other marketing/advertising media;
- (d) Prominently display (on its website, its mobile platform and all other fora) both the start and end dates of each promotions;
- (e) Discontinue the sale and marketing/advertising of a promotion on the end date notified to URCA by the Licensee, and approved or acknowledged by URCA;
- (f) Ensure that the terms and conditions for all promotions and other price and service changes are in line with the Rules, the Comms Act, its IOL, the Sector Policy and, BTC’s notification or application for approval along with any regulatory measure issued by URCA, as necessary;
- (g) Publish all relevant terms and conditions for all promotions and other price changes that are subject to a notification or approval; and
- (h) Pay a fine under section 109 of the Comms Act in the amount of \$30,868.56 no later than thirty (30) calendar days from the issuance of this Order. Payment of such fine shall be as directed by URCA.

Failure by the Licensee to comply with this Order or any part thereof may result in a further fine not exceeding ten percent of the Licensee’s relevant turnover or other penalty determined by URCA in accordance with section 109 of the Comms Act.



Stephen Bereaux
Chief Executive Officer