



# **FINAL DETERMINATION AND ORDER**

**Issued to: The Bahamas Telecommunications  
Company Limited**

**In the matter of: Breaches of the Retail Pricing  
Rules and Other Measures**

**Issue Date: 28 February 2020**

**ECS 01/2020**

## Table of Contents

1. Introduction .....	3
2. Regulatory Framework .....	5
3. URCA's Assessment of BTC's Submission .....	9
4. Remedies.....	13
5. Final Determination .....	14
6. Order .....	18

# 1. Introduction

The Utilities Regulation and Competition Authority ('URCA') issues this Final Determination and Order to The Bahamas Telecommunications Company Limited ('BTC') in relation to changes made to BTC's Flow TV channel line-up effective 1 December 2018 and 1 January 2019. The changes consisted of the following:

- BTC added two channels to its Flow TV channel line-up effective 1 December 2018. The channels added were Discovery World and Discovery Theater.
- BTC removed six channels from its channel line-up effective 1 January 2019. The channels removed were Big Ten Network, Fox Deportes, Fox Sports Racing, National Geographic, National Geographic Wild, and BBC America.<sup>1</sup>

BTC's Flow TV products are offered on both a standalone basis and as part of a bundle. Because the Flow TV products are bundled with BTC's fixed voice services which are price regulated, the bundles are subject to the *Regulation of Retail Prices for SMP Operators – Rules* (ECS 06/2014),<sup>2</sup> (also referred to as the Retail Pricing Rules or the Rules). The modifications listed above constitute changes to the non-price terms and conditions of a Price Regulated Bundle therefore BTC must obtain URCA's written approval before introducing such changes. Additionally, the Consumer Protection Regulations<sup>3</sup> require BTC to give customers not less than one month's notice of any proposed modification, amendment or variation to a contract which is likely to be of material detriment to the customer. BTC's Individual Operating Licence (IOL) mandates BTC to adhere to specific regulatory obligations and any determination made by URCA.

Despite these obligations, BTC advertised the changes to the public and implemented them without receiving URCA's prior written approval. As a result of BTC's actions, URCA commenced an investigation to determine whether or not BTC breached its obligations. URCA issued a Preliminary Determination to BTC in the matter of: *Breaches of the Retail Pricing Rules and Other Measures* (ECS 70/2019) on 6 November 2019. BTC responded on 10 December 2019.

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<sup>1</sup> Initially, nine channels were slated for removal from the line-up but only six channels were ultimately removed.

<sup>2</sup> ECS 06/2014 is available at <https://www.urcabahamas.bs/wp-content/uploads/2017/02/ECS-06-2014-Regulation-of-Retail-Prices-for-SMP-Operators-Rules-3.pdf>.

<sup>3</sup> ECS 19/2013 is available at <https://www.urcabahamas.bs/wp-content/uploads/2017/02/ECS-19-2013-Consumer-Protection-Regulations-VERSION-1.0.1-2.pdf>.

Having regard to the regulatory framework and in accordance with section 100(2) of the Communications Act, 2009 ('Comms Act' or 'the Act'), URCA issues this Final Determination and Order whereby URCA has delineated measures that BTC must take to remedy the contravention and to prevent a contravention of the same or a similar kind from being repeated.

The remainder of the document is set out as follows:

- Section 2 summarises the regulatory framework relevant to this Final Determination and Order;
- Section 3 summarises and responds to BTC's submission to the Preliminary Determination;
- Section 4 discusses the remedies that URCA will impose;
- Section 5 outlines URCA's Final Determination; and
- Section 5 consists of URCA's Order.

## 2. Regulatory Framework

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

To recap, URCA is the regulator and competition authority for the electronic communications and electricity sectors in The Bahamas. The Comms Act provides a modern framework for regulation and competition in electronic communications markets. URCA is tasked under the 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 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 Act, and where the 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.<sup>4</sup>

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 electronic communications sector (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 other regulatory measures that URCA may issue from time to time. Indeed, URCA expects licensees to comply with their obligations at all times with particular emphasis placed on operators with significant market power (SMP). As such, URCA's position is that whenever an SMP licensee operates in contravention of its obligations, the appropriate regulatory action or measure should be taken, where necessary.

URCA assessed BTC as having SMP in the provision of fixed voice services in the document titled *Assessment of Significant Market Power in the Electronic Communications Sector in The Bahamas under section 39(1) of the Communications Act, 2009* (ECS 14/2014).<sup>5</sup>

The Retail Pricing Rules establish an ex-ante notification and approval framework to which BTC's fixed voice services are subjected. Under the Rules, any change in the price or terms and conditions for fixed voice services is governed by the procedures described in ECS 06/2014. In particular, the framework provides details on the application, notification, and review and approval procedures, alongside details on the information to be submitted and the timeframes within which URCA will judge an application or notification. Consistent with URCA's central objectives, the Rules aim to promote transparency in the marketing (advertising) of communications services and ensure that customers make informed choices.

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<sup>4</sup> Section 109(1) of the Comms Act.

<sup>5</sup> ECS 14/2014 can be found at <https://www.urbahamas.bs/wp-content/uploads/2017/02/ECS-14-2014-Assessment-of-Significant-Market-Power-in-the-Electronic-Communications-Sector-in-The-Bahamas.pdf>.

Additionally, the Rules prescribe the types of price or service changes that SMP operators may implement on their networks, alongside obligations relating to the communication of tariff offers, as follows:

The SMP operator must first obtain URCA’s written approval before introducing any changes to non-price terms and conditions for Price Regulated Services that could be expected to affect either the effective price paid by consumers or the costs incurred by the SMP operator (Paragraph 11.2)<sup>6</sup>

In all cases, the SMP operator must not advertise or announce publicly in any way its proposed price for a Price Regulated Service until it has received URCA’s approval for that price (Paragraph 12)

In the event of a price increase, (for either a Single Price Regulated Service, or a Price Regulated Bundle, or the change in the non-price terms and conditions of a Price Regulated Service which could lead to an increase in the effective price paid by the SMP operator’s consumers), the SMP operator must, within **thirty (30) calendar days** of the date of URCA’s written (or deemed) approval, advertise a notice in at least one newspaper with national circulation of the operator’s decision to implement the price increase, giving subscribers at least **fourteen (14) calendar days’** notice of the price change (and/or change in the non-price terms and conditions for the service, if applicable). (Paragraph 15.1)

Any bundle, tied product or package that includes at least one Price Regulated Service shall be subject to price regulation by URCA (“Price Regulated Bundle” or “Bundle”). This means that the SMP operator must not, without the prior written consent or approval of URCA, either change the price and/or terms and conditions of an existing Price Regulated Bundle, or introduce a new Price Regulated Bundle. (Paragraph 32)

Because BTC does not have SMP in the pay television market, its Flow TV service as a standalone product is not subject to the Retail Pricing Rules. Once Flow TV is offered in a

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<sup>6</sup> This should be read in conjunction with Part I of the Rules.

bundle that includes BTC's fixed voice services, which are price regulated, the bundle becomes a Price Regulated Bundle subject to the Retail Pricing Rules.

The Consumer Protection Regulations supplement the Retail Pricing Rules by ensuring that consumers are well-informed as set out below:

A Service Provider shall give a Customer not less than one (1) month notice of any proposed modification, amendment or variation to a contract (which term includes a change in the price of any Service or Product, whether approved by URCA or not) which is likely to be of material detriment to the Customer. The giving of such notice shall be grounds for termination of the contract by the Customer from the effective date of the notice, without penalty or charge other than in respect of any Services already provided to the Customer under the contract (but not in respect of Products purchased by the Customer in connection with the Services). The Service Provider shall, at the same time as giving the notice, inform the Customer of the ability to terminate the contract without penalty if the proposed modification is not acceptable to the Customer by the Customer giving written or other notice to that effect to the Service Provider at any time during the notice period. (Section 2.5.7)

Condition 3.3 of BTC's IOL states that "Subject to all other applicable laws and regulations of The Bahamas at the time being in force, the Licensee undertakes to comply with the Conditions of this Licence, Regulatory and Other Measures and the provisions of the Communications Act." Pursuant to Condition 32(a)(ii) of Part G of BTC's IOL, BTC must adhere to "any such obligations as URCA may set out in any determination, including, when relevant, the obligations listed in Conditions 37, 38, 39, 40 and 41 . . . which are listed for the purposes of exemplification only".



### 3. URCA's Assessment of BTC's Submission

In this section, URCA summarises and responds to BTC's submission to the Preliminary Determination and Draft Order.

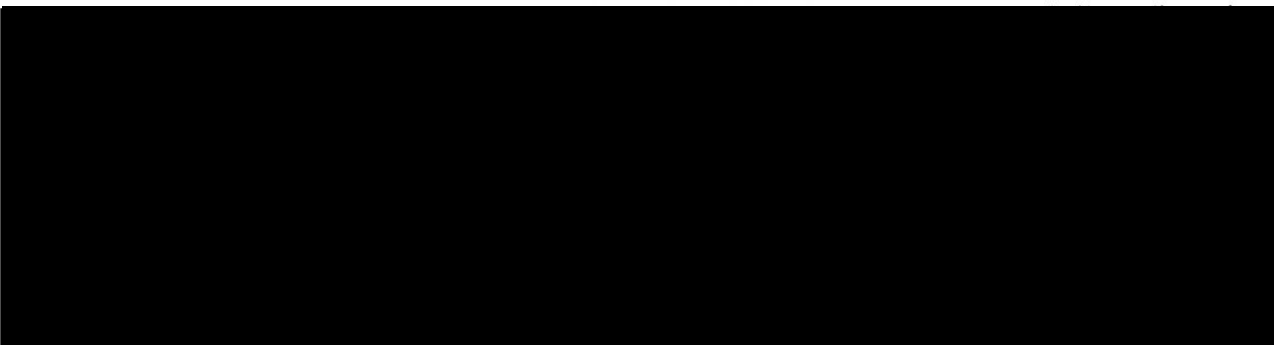
#### BTC's Comments

BTC noted URCA's reference to double play bundles in the Preliminary Determination. BTC clarified that it does not offer a double play bundle which includes Flow TV and only offers triple play bundles consisting of Flow TV, broadband, and fixed voice services.

According to BTC, it is required to provide URCA with a minimum of 30 business days for non-price changes to the terms and conditions for a Price Regulated Bundle as per the Retail Pricing Rules and its IOL requires BTC to provide an additional 30 days to notify its retail customers of changes that are likely to be of a material detriment.

Overall, BTC did not dispute whether it was in breach but instead explained the circumstances leading up to the alleged breach which BTC claimed were beyond its control. BTC then provided the following timeline of important events relating to the matter:

- Date of expiration of content provider's contract – [REDACTED]
- Approximate date on which the contract negotiations started – [REDACTED]
- Contract negotiations continued and ultimately broke down – [REDACTED]
- Local markets advised and communications plan distributed - [REDACTED]



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<sup>7</sup> CWC is the part owner of BTC.

BTC referred to its letter of 29 November 2018 informing URCA of the changes and URCA’s response dated 3 December 2018 advising BTC that the changes impacted a Price Regulated Bundle and were therefore subject to the Rules. BTC explained that it intended to be totally transparent with both URCA and its own customers in respect to the changes to the Flow TV channel line-up. According to BTC, it made the required application as soon as it was able to notify the public. BTC continued that it adhered to URCA’s guidance by making the suggested submission to URCA and it was never BTC’s intention to trivialize or disregard URCA’s authority under the Retail Pricing Rules.

While BTC recognized there should be strict adherence to the Rules and its IOL, BTC believed that the circumstances in this case should be treated an exception as BTC took all appropriate steps to inform URCA and its customers of the changes. BTC is in dialogue with CWC to ensure that, going forward, BTC avoids having to respond to any potential breaches relating to its compliance under the Rules and other measures.

BTC stated that URCA’s breach notice applies to BTC’s Triple Play bundles which [REDACTED] of BTC’s pay television customers subscribe to. BTC considers the impacted subscriber base to be quite minimal, noting that customers were informed 30 days before the pending changes took effect and customers had the option to exit their contracts without penalty. Thus, BTC deduced that the adverse impact of the breach was minimal.

BTC acknowledged its good faith efforts to mitigate the impact of the changes with the addition of two channels to the line-up, i.e., Discovery World and Discovery Theater, effective 1 December 2018. This was outlined in BTC’s initial communication dated 29 November 2018.

BTC provided the following table displaying which channels were removed and the corresponding pay television plan and Triple Play bundles impacted by the removal.

**Table 1. Pay TV plan and bundles impacted by the changes**

<b>Channels that were removed</b>	<b>Affected TV Package</b>	<b>Affected Bundle</b>
Big Ten Network	[REDACTED]	[REDACTED]
Fox Deportes		
Fox Sports Racing		
National Geographic		
National Geographic Wild		

BBC America	

BTC also provided a table below showing the number and percentage of subscribers in each Triple Play bundle as at December 2018.

**Table 2. Distribution of Triple Play Bundles by Plans as at December 2018**

	December 2018	% of Customers
Spark - \$99.99		
Flame - \$129.99		
Fire - \$154.99		
<i>Totals</i>		

In BTC’s view, the above tables demonstrate the minimal impact of the changes. BTC explained that the majority of its Triple Play customers were subscribed to the Spark Triple Play bundle as at December 2018 and only three out of the six channels that were removed impacted this bundle.

BTC concluded that notwithstanding the exogenous factors impacting the timelines to submit applications and/or notify URCA and its customers of changes to non-price terms and conditions for Price Regulated Services/Bundles, there is an obligation to adhere to the Rules and other relevant measures. BTC expressed its commitment to ensuring that it is compliant at all times in relation to the Rules and any applicable measures.

URCA’s Comments

URCA thanks BTC for the clarification that it does not offer a double play bundle which includes Flow TV.

In regard to BTC’s statement that a minimum of 30 business days is required to apply to URCA for non-price changes to the terms and conditions of a Price Regulated Bundle and an additional 30 days are required to notify customers, URCA clarifies that these timelines are expected to run concurrently. Also, it is the Consumer Protection Regulations, and not the IOL, that requires BTC to give a customer not less than one month’s notice of any proposed modification, amendment or variation to a contract which is likely to be of material detriment to the customer.

URCA notes that BTC advertised the changes 30 days in advance of the effective date, however, URCA maintains that the advertisements occurred without URCA's prior approval and were therefore in breach of the Rules. As a result, the notice to customers is null and void.

URCA applauds BTC's efforts to work with CWC to avoid future breaches from happening. URCA notes BTC's comments that exogenous factors may not allow for an SMP operator to provide the required lead time, however, in this instance, URCA believes that BTC had sufficient time to apply to URCA and notify the public of the changes. This is compounded by the fact that URCA previously determined BTC to be in breach of the Rules, its IOL, and the Consumer Protection Regulations in the Final Determination and Order in the matter of: *Breaches of Ex-Ante Retail Pricing Rules and other Measures* (ECS 02/2018) issued on 22 March 2018. In that Final Determination, BTC was mandated to "at all times abide by the approval and notification procedures specified in the Rules and other similar obligations and regulatory measures."

## 4. Remedies

In regard to the fine/remedy, BTC did not comment on this section of URCA's Preliminary Determination. Therefore, URCA affirms its preliminary view in Section 4 of the Preliminary Determination that BTC must abide by the approval and notification procedures specified in the Rules and other similar obligations or regulatory measures at all times. In terms of the percentage of the fine, URCA used a starting point of 5%. URCA made upward adjustments of 10% each to the starting point of the fine for the gravity of breach, aggravating circumstances, and policy objectives. This led to a final percentage of 5.15%. URCA did not see any evidence of mitigating circumstances and therefore did not make any downward adjustments.

In conclusion, URCA upholds that BTC breached Paragraphs 11.2, 12, 15.1 and 32 of the Retail Pricing Rules, Section 2.5.7 of the Consumer Protection Regulations, and Conditions 3.3 and 32(a)(ii) of BTC's IOL. A fine of 5.15% shall be applied to the total revenue derived from BTC's Triple Play bundles for the months of November 2018, December 2018, and January 2019.

## 5. Final Determination

This Final Determination is issued by the Utilities Regulation and Competition Authority ('URCA') pursuant to section 99 of the Communications Act, 2009 ('Comms Act').

**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** Paragraph 11.2 of the Retail Pricing Rules obliges an SMP operator to first obtain URCA's written approval before introducing any changes to non-price terms and conditions for Price Regulated Services that could be expected to affect either the effective price paid by consumers or the costs incurred by the SMP operator.

**WHEREAS** Paragraph 32 of the Retail Pricing Rules states that the SMP operator must not, without the prior written consent or approval of URCA, either change the price and/or terms and conditions of an existing Price Regulated Bundle, or introduce a new Price Regulated Bundle.

**WHEREAS** Paragraph 12 of the Retail Pricing Rules states that in all cases, the SMP operator must not advertise or announce publicly in any way its proposed price (including any changes to non-price terms and conditions) for a Price Regulated Service until it has received URCA's approval.

**WHEREAS** Paragraph 15.1 of the Retail Pricing Rules states that in the event of a price increase for a Price Regulated Service or Price Regulated Bundle, the SMP operator must, within 30 calendar days of the date of URCA's written approval, advertise a notice in at least one national newspaper giving subscribers at least 14 calendar days' notice of the price change or change in non-price terms and conditions.

**WHEREAS** Condition 3.3 of BTC's IOL states that the Licensee undertakes to comply with the Conditions of the Licence, regulatory and other measures and the provisions of the Communications Act.

**WHEREAS** Condition 32(a)(ii) of Part G of BTC's IOL requires BTC to comply with any such obligations as URCA may set out in any determination, including, when relevant, the obligations listed in Conditions 37, 38, 39, 40 and 41.

**WHEREAS** the Consumer Protection Regulations obliges licensees to abide by the following:

A Service Provider shall give a Customer not less than one (1) month notice of any proposed modification, amendment or variation to a contract (which term includes a change in the price of any Service or Product, whether approved by URCA or not) which is likely to be of material detriment to the Customer. The giving of such notice shall be grounds for termination of the contract by the Customer from the effective date of the notice, without penalty or charge other than in respect of any Services already provided to the Customer under the contract (but not in respect of Products purchased by the Customer in connection with the Services). The Service Provider shall, at the same time as giving the notice, inform the Customer of the ability to terminate the contract without penalty if the proposed modification is not acceptable to the Customer by the Customer giving written or other notice to that effect to the Service Provider at any time during the notice period. (Section 2.5.7)

**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 29 November 2018, BTC sent a notification to URCA that it was removing the following nine channels from its Flow TV line-up effective 1 January 2019: Big Ten Network, CGTN, Fox Deportes, Fox Soccer Plus, Fox Sports 2, Fox Sports Racing, National Geographic, National Geographic Wild, and BBC America. Unbeknownst to URCA, BTC began advertising the prospective changes in *The Nassau Guardian* on 30 November 2018. After URCA informed BTC that the changes must be approved by URCA by way of an application, BTC submitted an

application to URCA on 12 December 2018 with an effective date of 24 January 2019. On 14 December 2018, URCA became aware that BTC had commenced advertising the changes prior to receiving URCA's written consent or approval and informed BTC of the same.

**WHEREAS** On 25 January 2019, BTC wrote to URCA stating that three of the channels earmarked for removal as of 31 December 2018 were no longer removed. As such, the following six channels were removed effective 1 January 2019: Big Ten Network, Fox Soccer Plus, Fox Sports Racing, National Geographic, National Geographic Wild, and BBC America.

**NOW** URCA is of the opinion that the Licensee is in breach of Paragraphs 11.2, 12, 15. 1, and 32 of the Retail Pricing Rules, Conditions 3.3 and 32(a)(ii) of BTC's IOL, and Section 2.5.7 of the Consumer Protection Regulations for the following reasons:

- (i) BTC failed or refused to adhere to an SMP obligation set out by URCA in a determination;
- (ii) BTC failed or refused to apply to URCA for approval to change the terms and conditions of an existing Price Regulated Bundle;
- (iii) BTC failed or refused to obtain URCA's written approval before increasing the effective price of a Price Regulated Bundle.
- (iv) BTC's one month's notice to customers as per the Consumer Protection Regulations is null and void due to BTC not receiving URCA's prior written consent or approval; and
- (v) BTC's actions constitute repeated breaches of its obligations, including URCA's 22 March 2018 Final Determination and Order - ECS 02/2018.

URCA has determined that the Licensee shall:

- (i) At all times abide by the approval and notification procedures specified in the Rules and other similar obligations or regulatory measures;
- (ii) Pay a fine under section 109 of the Comms Act in equal to 5.15% of BTC's total revenue from its bundles that include pay television for the months of November 2018, December 2018, and January 2019. The fine should be paid no later than thirty (30) calendar days from the issuance of this Final Determination. Along with the payment of



## 6. 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, an Order pursuant to section 95 of the Comms Act.

**WHEREAS** by Final Determination made on 28 February 2020, URCA has determined that The Bahamas Telecommunications Company Limited ('the Licensee') has breached Paragraphs 11.2, 12, 15.1, and 32 of the Retail Pricing Rules, Conditions 3.3 and 32(a)(ii) of BTC's Individual Operating Licence (IOL), and Section 2.5.7 of the Consumer Protection Regulations for the following reasons:

- (i) BTC failed or refused to adhere to an SMP obligation set out by URCA in a determination;
- (ii) BTC failed or refused to apply to URCA for approval to change the terms and conditions of an existing Price Regulated Bundle;
- (iii) BTC failed or refused to obtain URCA's written approval before increasing the effective price of a Price Regulated Bundle.
- (iv) BTC's one month's notice to customers as per the Consumer Protection Regulations is null and void due to BTC not receiving URCA's prior written consent or approval; and
- (v) BTC's actions constitute repeated breaches of its obligations, including URCA's 22 March 2018 Final Determination and Order - ECS 02/2018.

**IT IS HEREBY ORDERED** that the Licensee shall:

- (i) At all times abide by the approval and notification procedures specified in the Rules and other similar obligations or regulatory measures;

- (ii) Pay a fine under section 109 of the Comms Act equal to 5.15% of BTC's total revenue derived from its bundles that include pay television for the months of November 2018, December 2018, and January 2019. This fine should be paid no later than thirty (30) calendar days from the issuance of this Order. Along with the payment of the fine, BTC must submit financial data for the months of November 2018, December 2018, and January 2019 in order for URCA to verify the amount of the fine.

**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.**



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**J. Carlton Smith**  
**Director of Electronic Communications**