



# **GUIDELINES FOR THE ELECTRICITY SECTOR ON THE ASSESSMENT OF FINES FOR BREACHES**

## **Consultation Document**

**ES 02/2022**

**Publication Date: 22 AUGUST 2022**

**Response Date: 30 SEPTEMBER 2022**

Contents

**INTRODUCTION ..... 3**

1.2 Structure of this Document ..... 3

1.3 Responding to this Consultation..... 4

1.4 Confidentiality ..... 5

1.5 Intellectual Property ..... 5

**2.LEGAL FRAMEWORK ..... 5**

2.1.1 Empowerment of URCA..... 5

2.1.2 Duty to Consult..... 6

2.1.3 Power to Assess and Issue Fines and Penalties ..... 6

2.2 The Licence Conditions..... 6

**3 OBJECTIVES OF THIS CONSULTATION ..... 7**

**4. IMPOSING A FINANCIAL PENALTY ..... 8**

**5. CONCLUSION AND NEXT STEPS ..... 9**

**Annex A: PROPOSED GUIDELINES..... 10**

**Annex B: LIST OF CONSULTATION QUESTIONS..... 14**

## INTRODUCTION

The Utilities Regulation and Competition Authority (URCA) is the independent regulator and competition authority for the Electricity Sector (ES) in The Bahamas. URCA regulates the ES through the Electricity Act, 2015 ('EA'), which provides for, inter alia, the functions and powers to issue regulatory and other measures.

The EA establishes that URCA's primary role is the regulation of the ES in accordance with the goals, objectives and principles underpinning the National Energy Policy (NEP) and Electricity Sector Policy (ESP).

As the sector regulator, under the EA and the Utilities Regulation and Competition Authority Act, 2009 (URCA Act) URCA is empowered to impose a regulatory penalty or fine<sup>1</sup> on a licensee who breaches a provision of the EA, a licence condition, regulatory and or other measures. The imposition of financial penalties for breaches is also a means to effectively ensure compliance with sector regulations and established standards.

The aim of these Guidelines is therefore to advance the development of the regulatory framework governing the ES and in so doing bring greater clarity, transparency, and consistency to the methodology and factors that URCA will consider in order to arrive at appropriate fines that are proportionate to the breaches.

### 1.2 Structure of this Document

The remainder of this consultation document is structured as follows:

- Section 1: Continues by outlining, inter alia, how persons may respond to and participate in this consultation process;
- Section 2: Outlines the legal basis and framework under which URCA is conducting this consultation process;
- Section 3: Outlines the objectives of the consultation process;
- Section 4: Provides URCA's general considerations for imposing a financial penalty;  
Describes URCA's "next steps" in the consultation process;
- Section 5:

---

<sup>1</sup> Section 72 (1), Electricity Act

- Annex A: Sets out URCA’s proposed Guidelines for the assessment of fines for breaches. and
- Annex B: Contains the consolidated list of questions asked in this consultation document.

### 1.3 Responding to this Consultation

URCA invites written comments and submissions from members of the public, licensees and interested parties on the issues raised in this consultation document. Comments and submissions can be shared on any aspect of this consultation document, and in so far as it is possible, each section has been numbered for ease of reference. Persons may deliver their written comments or submissions to URCA’s Director of Utilities and Energy either:

- by hand, to URCA’s office at Frederick House, Frederick Street, Nassau, Bahamas; or
- by mail, to P. O. Box N-4860, Nassau, Bahamas; or
- by fax, to (242)-393-0237; or
- by email, to [info@urcabahamas.bs](mailto:info@urcabahamas.bs) .

All comments and submissions to this consultation document should Be submitted on or before 30 September 2022. URCA will acknowledge receipt of all responses.

URCA’s preferred format for written responses is as follows:

- Respondent’s name;
- Name of organisation (or state whether respondent is an individual consumer);
- Email address or other address of respondent;
- Response to Question 1;
- Response to Question 2, etc.; and
- State any other matters that you believe URCA should consider under the instant consultation process.

The questions raised in this consultation document have also been compiled and listed in Annex B of this document for ease of reference. Full explanation to the answers submitted or views held by respondents on any of the issues raised or proposals made in this consultation would also be helpful.

## 1.4 Confidentiality

URCA believes that, as a matter of transparency and good regulatory practice, it is important for the public and interested parties to this consultation process to have sight of the views and positions expressed by all respondents. As such, as soon as reasonably practicable after the close of the response date for this consultation, URCA intends to publish all responses on the URCA website.

However, URCA may treat as confidential responses that are clearly marked (in part or full) as “Confidential”. Explanations should be provided to justify any information that is submitted on a confidential basis. In such circumstances, a redacted version should also be submitted to URCA. URCA has the sole discretion to determine whether to publish any submission marked “Confidential”.

## 1.5 Intellectual Property

Copyright and all other intellectual property that form any part of a response to this consultation will be assumed to be licensed to URCA for its use during this consultation process.

# 2. LEGAL FRAMEWORK

## 2.1 The Electricity Act, 2015

### 2.1.1 Empowerment of URCA

The EA empowers URCA, as the regulator for the ES in The Bahamas, with implementing the ES policy, enforcing provisions of the EA and enforcing licensee’s licence conditions.

This section of the consultation document accordingly sets out in detail the legislative provisions under which URCA proposes to establish and implement the proposed Guidelines on the procedure and principles that URCA intends to utilise to arrive at fines for breaches in the ES.

Section 6(1) of the EA establishes that “the main goal and objective of the electricity sector policy shall be the creation of a regime for the supply of safe, least cost, reliable and environmentally sustainable electricity throughout The Bahamas”.

Section 6(2) (l) of the EA provides that “the principles and objectives governing the sector policy and electricity supply regime, in accordance with the aims and goals of the national energy policy shall be the – Provision of a regulatory structure that balances the interests of and affords opportunity for input from all stakeholders, honours contractual commitments and encourages investment.”

Section 37(1) of the EA provides that “the primary role of URCA is the regulation of the electricity sector in accordance with the goals objectives and principles underpinning the national energy and electricity sector policies.”

### 2.1.2 Duty to Consult

Section 41 (2) of the EA provides that URCA: (a) Allow persons with sufficient interest a reasonable opportunity to comment on proposed regulatory or other measures which in the opinion of URCA, are of public significance; (b) Accept as having sufficient interest for the purpose of paragraph (a) persons whose rights or interest may be materially adversely affected or prejudiced by the proposed regulatory and or measures; and (c) Give due consideration to the comments of persons having sufficient interest prior to introducing the regulatory and other measures concerned.

Section 42 of the EA outlines what makes a regulatory or other measure one of public significance duty to consult and provides: (1) A regulatory or other measure is likely to be of public significance where it relates to electricity supply systems or services, energy efficiency programmes, or renewable energy resources and can lead to one or more of the following- (a) A major change in the activities carried on by URCA under this Act; (b) A significant impact on persons carrying on activities in areas regulated by URCA under this Act; and (c) A significant impact on the general public in The Bahamas.

URCA considers the Guidelines for the imposition of fines for the ES as a regulatory measure a matter of significant importance. URCA also recognizes the financial implications to Licensees that accord with the imposition of fines. Considering the forgoing URCA is of the view that a public consultation is warranted.

### 2.1.3 Power to Assess and Issue Fines and Penalties

Section 72 (1) of the EA provides that “...a licensee who contravenes a provision of this Act, or a licence condition, or regulatory and other measures is liable to a regulatory fine or other penalty determined by URCA, not exceeding ten percent of the licensee’s relevant turnover.”

## 2.2 The Licence Conditions

URCA has incorporated the general obligation to comply with laws, regulation and licence conditions in all its license classes namely, Public Electricity Licence, Authorised Public Electricity Licence (‘APESL’) and Independent Power Producer Licence (‘IPPL’). A standard Public Electricity Licence, APESL, and IPPL will include the following obligations:

General Obligations:

**12.1** The Licensee shall comply with the Act and any other Act of The Commonwealth of The Bahamas that has application to it in the discharge of its performance under this licence.

**12.2** The Licensee shall comply with regulatory and other measures including any directive, order rule, decision, or approval issued, made or granted by URCA in accordance with its duties and functions under the Act of this Licence.

**13.1** Where URCA has reason to believe the Licensee has failed to comply with any relevant law, regulation or condition of this licence, URCA may exercise all such powers and duties as are afforded to or required of it under the Act or any other relevant and may take all such actions as is permitted to it thereunder against either the Licensee or its Subsidiary Undertaking”.

The cumulative effect of the foregoing provides URCA with a statutory as well license-based mandate to take appropriate regulatory action inclusive of the issue of fines where there has been a breach of the EA or a license condition by a licensee.

## 3 OBJECTIVES OF THIS CONSULTATION

In imposing financial penalties, URCA’s objectives are generally two-fold: to impose fines that reflect the gravity of the infringement; and, to deter or disincentive certain acts and/or behaviours. URCA is also keenly mindful of its obligation to monitor and enforce standards for the protection of electricity consumers.

URCA is of the view that it would prove beneficial to issue guidance with respect to how its powers under sections 63 and 72 of the EA will be exercised. These Guidelines are intended to promote transparency, consistency, and impartiality to the URCA’s approach to determining regulatory fines.

### **3.1 Justification for URCA providing Guidelines on the Assessment of Fines for Breaches in ES.**

URCA is of the view that regulatory framework for the assessment of fines for breaches is needed to establish the approach that will be taken by URCA when imposing a fine for a breach of the EA, a licence condition, regulatory and other measures. In developing these Guidelines, URCA has considered the need to provide licensees with clear guidelines regarding the way they can expect fines to be calculated and the factors to be considered. URCA considers that the establishment of these Guidelines will serve the policy objective of developing a comprehensive regulatory framework which supports the advancement of the sector.<sup>2</sup> URCA is also cognizant of the need for regulatory measures to be proportionate to their purpose, fair and transparent in compliance with section 7(2)(c) of the EA.

This consultation therefore has the following core objectives:

- i.To provide guidelines in relation to the exercise of URCA’s powers to levy fines that promote consistency and certainty within the sector;
- ii.To set out the factors that URCA considers when setting a fine;

---

<sup>2</sup> National Energy Policy page 3 at paragraph 5

- iii.To provide key stakeholders an opportunity to seek clarity on the way URCA intends to approach the assessment of fines for breaches;
- iv.To promote regulatory confidence by ensuring the assessment guidelines that are established are transparent, fair and non-discriminatory;
- v.To promote the development of the regulatory framework necessary to effectively regulate the sector; and
- vi.To seek feedback on the clarity of the proposed guidelines.

## 4. IMPOSING A FINANCIAL PENALTY

### High Level Principles

4.1 Where a licensee is fined and where consumers have suffered loss, damage, inconvenience or other adverse consequences as a result of the contravention or failure, URCA will normally aim to impose a financial penalty and/or to ensure that consumers receive appropriate redress. Further, URCA will seek to deprive a licensee of all the financial benefits derived from the contravention or failure where it is proportionate, reasonable and practicable to quantify it.

URCA will also seek to impose a financial penalty and/or make an appropriate order that:

- Reflects the seriousness of the contravention or failure; and
  - Deters future misconduct by the licensee under investigation and other industry participants
  - Penalizes the licensee if needed necessary

The total amount payable by a licensee will be calculated in a manner that is transparent, fair, and non-discriminatory<sup>3</sup> and in accordance with the 5-step procedure outlined in Guidelines annexed.

### URCA

**4.2** URCA is empowered to open an investigation when there is cause to suspect that a breach has occurred.<sup>3</sup> An investigation can be initiated by URCA, a licensee or based on an allegation received.

**4.3** Once URCA is satisfied that its investigation has yielded a positive finding that a breach has in fact occurred, is occurring, or its investigation is being obstructed by lack of co-operation, URCA may issue an order to enforce a determination or an adjudication.

**4.4** When deliberating whether it is appropriate for an order to include a financial penalty URCA will consider all the material facts and circumstances of the breach in question.

**4.5** In the event that URCA is of the view that a financial penalty is appropriate, URCA will exercise its discretion to determine the reasonable amount to be imposed that is proportionate to the suspected breach and giving due consideration to the Guidelines Annexed.

---

<sup>3</sup> Section 8 (1) of the URCA Act



**4.6** Any licensee that is suspected of committing a breach will be afforded an opportunity to make representations regarding the suspected breach and the fine URCA intends to impose. URCA will duly consider all representations received.<sup>4</sup>

**4.7** A licensee that fails and/or refuse to comply with the determination or to pay the regulatory penalty or both may have their licence revoked.

**4.8** In exceptional cases, URCA may, upon request, take account of the licensee's inability to pay in a specific social and economic context. For example, specific payment plans could be agreed upon by URCA based on satisfactory/verifiable evidence that the imposition of a fine as provided for in these Guidelines would render the licensee insolvent or irretrievably jeopardize the economic viability.

**4.9** Under section 67 (1) of the EA, a licensee affected by an Order made by URCA, imposing a fine, may appeal against it to the Utilities Appeal Tribunal (the Tribunal).

## 5. CONCLUSION AND NEXT STEPS

In this document, URCA has presented its objectives, legal framework and proposed Guidelines concerning the assessment of fines for breaches. URCA will carefully consider all comments and submissions received within the prescribed timeline for responding to this consultation document.

Subject to section 1.4 of this consultation document, all comments and submissions received within the prescribed timeline will be published on the URCA website. URCA intends to issue a Statement of Results and Final Decision to this consultation document within thirty (30) calendar days following the end of the consultation period unless extenuating circumstances dictate otherwise (in which case URCA will duly notify the public). URCA will give full reasons for its decisions.

URCA looks forward to constructive engagement with all interested parties on this consultation document.

---

<sup>4</sup> Section 64(7)(c) of the EA

## Annex A: PROPOSED GUIDELINES

### THE UTILITIES REGULATION AND COMPETITION AUTHORITY GUIDELINES FOR THE ELECTRICITY SECTOR ON THE ASSESSMENT OF FINES FOR BREACHES

The Utilities Regulation and Competition Authority (URCA), in exercise of the powers conferred by section 38 (3) of the Electricity Act, 2015 (EA) makes the following Guidelines:

In this section, URCA sets out its proposed Guidelines for the assessment of fines for breaches.

#### Part 1: Introduction

1.1 In exercise of the powers and duties conferred upon it by Section 38 (3) of the EA, URCA hereby issues the following Guidelines. These Guidelines may be cited as the “Guidelines for The Assessment for Fines for Breaches” (the Guidelines).

#### Part 2: Purpose

2.1 The purpose of these Guidelines is to establish a fair, transparent and non-discriminatory approach for URCA to apply when imposing fines for the contravention of the EA, regulatory or other measures issued by URCA or a licence condition.

#### Part 3: Definitions

3.1 In these Guidelines, unless the context requires otherwise, the following shall have the meanings ascribed below:

<b>Aggravating Factors:</b>	means any circumstance that makes a breach more egregious.
<b>Avoided Costs:</b>	means costs that would ordinarily be incurred during the course of doing business but have not been incurred due to the breach in question.
<b>Basic Amount:</b>	means the sum of gain to the licensee and detriment to the consumer.
<b>Maximum Penalty:</b>	means ten percent of the licensee’s relevant turnover as prescribed by section 72(1) of the EA;
<b>Mitigating Factors:</b>	means any circumstance that lessens the seriousness and severity of the breach;
<b>Relevant Turnover:</b>	means gross annual turnover attributable to the provision of a generation, transmission, distribution or supply service, or use of any generation, transmission, distribution or supply system, under the licence or exemption determination <sup>5</sup> ;
<b>Total Penalty:</b>	means the total amount calculated for the licensee to pay as the penalty for a breach. The Total Penalty enforced must be less than or equal to the maximum penalty determined by this framework.

---

<sup>5</sup> Section 2 of the EA

#### **Part 4: Application**

4.1 These Guidelines shall apply to all classes of licences issued by URCA pursuant to the EA.

#### **Part 5: Publishing obligation**

These Guidelines shall come into effect upon publication in accordance with section 43 of the EA.

#### **Part 6: Method for determining financial penalty**

6.1 The following sets out the general five-step methodology for the setting of a financial penalty:

- Step 1 – Calculate the Maximum penalty;
- Step 2- Determine the basic amount of the fine;
- Step 3- Calculation of penal element;
- Step 4-Adjustments for aggravating and/or mitigating circumstances; and
- Step 5- Apply settlement adjustment.

##### **6.2: STEP 1 Maximum Penalty**

The maximum financial penalty that can be imposed on a licensee is prescribed by Section 72(1) of the EA which states that such a penalty cannot exceed ten per cent of that licensee's... relevant turnover. Therefore, URCA will at the onset of a penalty setting exercise establish the parameters for the maximum penalty allowable. After establishing the maximum penalty URCA will then systematically traverse the other 4 steps outlined in order to calculate the reasonable financial penalty for a breach.

##### **6.3: STEP 2 Basic amount of fine**

URCA will consider the harm experienced by consumers through loss, damage, inconvenience, or any other reasonable impact resulting from the breach.

URCA will also consider any gain to a licensee as a result of a breach where it is reasonable and practicable to assess. Gain may be determined by increased profits, avoided costs or some other undue advantage to the license.

In circumstances where URCA is unable to empirically determine the level of consumer harm or licensee gain for the purpose of establishing the basic amount; the basic amount will be calculated as a percentage of the maximum penalty having regard to the seriousness of the breach, as follows:

Level of seriousness Basic Fine Alternative Calculation:

Low 0-10%

Medium 10-20%

High 20-100%

Where a licensee has taken measures to compensate impacted consumers, consideration will be given to evidence of these efforts prior to the final determination of the basic amount of consumer harm.

Having completed the first step of establishing the basic amount, URCA will next consider the seriousness of the breach in Step 3.

#### **6.4: STEP 3 Calculation of penal element**

##### **Adjustment for gravity of breach**

When gauging the gravity of the breach, URCA will consider several factors including the nature and scope of the breach. Gravity is a calculation of the seriousness of the breach and will be determined on a case-by-case basis considering all relevant circumstances. In assessing the gravity of the breach, URCA will consider various factors, including;

- i. the nature of the breach;
- ii. the conduct of the licensee;
- iii. impact of the breach.

#### **6.5: STEP 4 Adjustments for aggravating and/or mitigating factors**

##### **Adjustment to the Basic Amount**

In setting the fine, URCA may consider circumstances that result in an upward or downward adjustment to the basic amount. Adjustments will be made based on an overall assessment, taking into account all the relevant circumstances and factors.

##### **Adjustment Aggravating circumstances**

The basic amount may be adjusted upward, up to the maximum limit specified in Step 1 and prescribed by the EA, where URCA finds that there are aggravating circumstances. Aggravating circumstances are material factors that make the circumstances of the breach more egregious.

##### **Adjustment for mitigating circumstances**

URCA may make a downward adjustment to the basic amount of a fine where it finds mitigating circumstances exist. Mitigating circumstances will arise where a licensee takes all reasonable steps to remedy, rectify, or prevent any future breach and makes a formal submission to URCA of such steps and request for adjustment by URCA.

The following list sets out potential mitigating and aggravating factors that URCA may consider when calculating a fine. The list is not intended to be exhaustive, nor does it provide figures for the percentage increase or decrease as these will be decided on the merits of every case.

### **Potential Mitigating Factors**

- First time breach
- Early admittance of breach when informed by URCA
- Licensee self identifies a breach and brings the breach to URCA's attention
- Whether in the round the licensee took appropriate steps to prevent the breach
- Breach was not intentional or due to reckless conduct
- Compliance history of the licensee
- Evidence that timely and reasonable steps were taken to resolve the breach, once the licensee became aware of it.
- Effective steps taken to mitigate against the effects of the breach
- Co-operation by the licensee with the investigation into the breach.

### **Potential Aggravating Factors**

- Repeat conduct resulting in the same or similar breaches
- Denial and avoidance of accountability when advised by URCA of the breach
- The licensee failed to self-identify the breach
- No or inadequate steps taken by the licensee to prevent the breach
- Breach was intentional or due to reckless behaviour, or negligence; consideration was also be given to the whether senior management was aware of the breach or ought to have been aware of the breach
- Breach continued or the licensee made insubstantial efforts to resolve the breach after becoming aware of it.
- Lack of or insufficient steps taken to mitigate against the effects of the breach.
- Refusal to co-operate, providing false or misleading information or obstruction of the investigation into the breach.
- Compliance history of the licensee

### **6.6: STEP 5 Apply settlement adjustment**

This factor allows for the total penalty to be reduced where the licensee accepts responsibility for the breach. Notably, this factor will not impact the basic amount as the basic amount is the minimum value which represents the harm and/or gain. This settlement adjustment factor provides an incentive to licensees to accept responsibility for the breach in a timely manner.

## Annex B: LIST OF CONSULTATION QUESTIONS

This annex provides a list of the questions raised in respect to this consultation.

1. Do you agree that the definitions set out in the definition section are necessary? If so, do you believe that the proposed working definitions are adequate? Should you disagree with the adequacy or necessity of the proposed definitions, kindly give a detailed explanation for your views and suggest an alternative.
2. Do you agree with the methodology intended to be used in the process? Should you disagree, kindly provide a detailed explanation for your views.
3. What other incentives or disincentives should URCA consider to influence licensees behaviour?
4. What fines should be standardized e.g., failure to provide information, and at what levels e.g., a dollar amount or a percentage of the basic amount?
5. Should non-financial penalty measures be enforced in addition to, or in place of a financial penalty? Should you agree with this question kindly give a detailed explanation of your views along with suggestions for non-financial penalty measures.