

No. _ of 2024

VIRGIN ISLANDS

**TELECOMMUNICATIONS CODE (PART X) (PENALTY) GUIDELINES,
2024**

ARRANGEMENT OF SECTIONS

Section

**PART I
PRELIMINARY PROVISIONS**

1. ..Citation and commencement.
2. ..Interpretation.
3. ..Purpose.
4. ..Scope.

**PART II
PENALTY ASSESSMENT**

5. ..Power of the Commission to impose penalties.
6. ..Duty to undertake penalty assessment.
7. ..Consideration of precedents.
8. ..Primary considerations.
9. ..Relevant factors.

**PART III
THE COMMISSION'S DETERMINATION**

10. ..Procedure to be followed by the Commission.
11. ..Representation by the Regulated body.
12. ..Limitation period.
13. ..Departing from these Guidelines.
14. ..Periodic review of these Guidelines.

**PART IV
GENERAL PROVISIONS**

15. ..Alternative powers of the Commission.
16. ..Compound penalties.
17. ..Payment by instalments.
18. ..Category of penalties.

**PART V
COMPLIANCE**

19. ..Relationship with licences.
20. ..Compliance and enforcement.
21. ..Interest.
22. ..Recovery.

DRAFT

VIRGIN ISLANDS
STATUTORY INSTRUMENT 2024 No.
TELECOMMUNICATIONS ACT, 2006
(No. 10 of 2006)

Telecommunications Code (Part x) (Penalty) Guidelines, 2024

[Gazetted , 2024]

The Telecommunications Regulatory Commission, in exercise of the powers conferred by sections 6(j), 75(2)(b) and 91(3) of the Telecommunications Act, 2006 (No. 10 of 2006), issues these guidelines (the **Guidelines**).

PART I
PRELIMINARY PROVISIONS

Citation and commencement.

1. These Guidelines may be cited as the Telecommunications Code (Part x) (Penalty) Guidelines, 2024 and shall come into force on the date of publication in the Gazette.

Interpretation.

2. In these Guidelines, unless the context otherwise requires,

No. 10 of 2006.

“Act” means the Telecommunications Act, 2006;

“affiliate”, with respect to regulated body, means an undertaking that is in the same group as that regulated body;

“authorisation holder” means a person to whom a frequency authorisation has been granted under the Act;

“Commission” means the Telecommunications Regulatory Commission established under the Act;

“breach” means any action that violates the Act, any telecommunications related legislation, the

Telecommunications Code or any directive issued by the Commission, unless the context indicates otherwise.

“frequency authorisation” means an authorisation granted by the Commission under section 19 of the Act;

“group”, in relation to a regulated body (the “first regulated body”), means that regulated body and any other regulated body that is

- (a) a parent of the first regulated body;
- (b) a subsidiary of the first regulated body;
- (c) a subsidiary of a parent of the first regulated body;
- (d) a parent of a subsidiary of the first regulated body;
- (e) an undertaking in which the first regulated body, or an undertaking specified in paragraphs (a) to (d), has a significant interest.

“licence” means a licence granted under the Act;

“licensee” means a person to whom a licence has been granted under the Act;

“penalty” means any sanction, including fines or other punitive measures, imposed by the regulatory body in response to a contravention of applicable laws, the terms and conditions of a licence, or a frequency authorisation, for the purpose of ensuring compliance and deterring future violations.

“regulated body” means a licensee or an authorisation holder;

“relevant factors” means the circumstances surrounding a breach;

“regulatory obligations” means any act or course of action that a regulated body is legally bound to fulfil under the Act, Telecommunications Codes or its licence or frequency authorisation.

“significant interest” has the meaning specified under section 2 of the Act;

“Telecommunications Code” means such guidelines, standards and other requirements as the Commission may issue or specify in accordance with section 91 of the Act.

“undertaking” means a company, partnership or an unincorporated association.

Purpose.

- 3.** The purpose of these Guidelines is to:
- (a) establish the factors that the Commission may consider when determining the amount of any penalty it will impose on any regulated body when exercising its enforcement powers under section 75(2)(b) of the Act; and
 - (b) ensure that any penalty imposed on a regulated body is proportionate and sufficient to deter the relevant regulated body and the wider telecommunications industry from partaking in illegal activity and contravening regulatory requirements.

Scope.

- 4.** These Guidelines apply to all licensees and authorisation holders in the telecommunications industry.

PART II PENALTY ASSESSMENT

Power of the Commission to impose penalties.

- 5.** Where the Commission is entitled to take enforcement action and decides to impose a penalty on a regulated body pursuant to section 75(2)(b) of the Act, it shall fix the amount of the penalty in accordance with these Guidelines, subject to such limitations as may be specified in the Act.

Duty to undertake penalty assessment

- 6.** (1) Before imposing any penalty on a regulated body, the Commission must undertake a penalty assessment on a case-by-case basis, subject to section 7 of these Guidelines.

(2) Such penalty assessment as referred to in subsection (1) shall include consideration of relevant factors, as outlined in these Guidelines and as considered appropriate by the Commission.

Consideration of precedents.

- 7.** (1) In making a penalty assessment, the Commission may consider case law, as may be relevant.

(2) Notwithstanding subsection (1), depending on the facts and context of each case, the Commission may depart from such case law.

(3) Any penalty previously imposed by the Commission shall not be considered as placing an upper threshold on the amount of any future penalty to be imposed by the Commission.

Primary considerations.

8. To determine the starting point of a penalty, the Commission may first consider:

- (a) the seriousness of the breach;
- (b) aggravating and mitigating factors;
- (c) any case law; and
- (d) the need to ensure that the threat of fines will act as a sufficient incentive to comply.

Relevant factors.

9. (1) The Commission shall, in exercising its discretion, take into account all relevant factors in determining the amount of a penalty, including, without limitation:

- (a) the seriousness of the breach;
- (b) the duration of the breach;
- (c) the prevalence of that type of breach in the industry;
- (d) the degree of harm, whether actual or potential, caused by the breach, including any increased costs incurred by consumers or other market participants;
- (e) the extent to which the breach was caused by a third party, or any relevant circumstances beyond the control of the regulated body;
- (f) any gain, financial or otherwise, accrued to either the regulated body in breach or an affiliate, as a result of the breach;
- (g) any appropriate steps taken by the regulated body to prevent or avoid breach;
- (h) the extent to which the breach occurred deliberately or recklessly, including the extent to which management knew, or ought to have known, that a breach was occurring or would occur;
- (i) the extent to which the breach is continuing;
- (j) any steps taken by the regulated body to end or otherwise remedy the consequence or impact of the breach, once aware of it;
- (k) any history of breach (of the same or similar nature) by the regulated body in breach;

- (l) the extent to which the regulated body in breach has cooperated with the Commission to resolve the breach;
- (m) the extent to which the level of penalty is proportionate taking into account the size of the turnover of the regulated body; and
- (n) such other matters as considered appropriate by the Commission.

(2) In determining the degree of harm under subsection (1)(d), the Commission may seek to quantify the financial amount accrued to the regulated body and the number of people affected, as a result of the breach.

PART III THE COMMISSION'S DETERMINATION

Procedure to be followed by the Commission.

10. (1) Where the Commission proposes to impose a penalty on a regulated body for a breach in respect of which these Guidelines apply, it shall send a notice of proposed penalty to the regulated body stating:

- (a) the breach in respect of which it proposes to impose the penalty;
- (b) the amount of the proposed penalty; and
- (c) the entitlement of the regulated body to make representation to the Commission in accordance with **section 11** of these Guidelines.

(2) The Commission may at any time prior to the issuing of a penalty notice under subsection (4), withdraw a notice of proposed penalty and substitute a new notice of proposed penalty for a different amount.

(3) Where the Commission issues a new notice of proposed penalty under subsection (2), it shall specify the time within which the regulated body may make representation to the Commission under **section 11(1)** of these Guidelines, which shall not be less than twenty-one days from the date on which the original notice of proposed penalty was issued to the regulated body under subsection (1).

(4) Subject to **section 11(2)** of these Guidelines, following the expiration of twenty-one days from the date of the proposed penalty notice, the Commission may, by written penalty notice, impose a penalty on the regulated body in an amount not exceeding the amount stated in the proposed penalty notice.

Representations by the Regulated body.

11. (1) Where a regulated body receives a notice of proposed penalty, it may, within twenty-one days of the date of the notice, make representations to the

Commission as to why it should not be required to pay the penalty or as to why the proposed penalty should be reduced.

(2) Before imposing a penalty on a regulated body, the Commission shall consider any representations received under subsection (1).

(3) A regulated body that receives a penalty notice shall pay the penalty stated in the notice to the Commission within fourteen days of receipt of the notice.

Limitation period.

12. (1) The Commission may not issue a proposed penalty notice to a regulated body with respect to a breach after the end of the period of two years commencing on the date that the Commission first knew of the breach.

(2) For the purposes of subsection (1), the Commission is deemed to know of a breach if it has information from which the breach can reasonably be inferred.

Departing from these Guidelines.

13. (1) All fines remain at the discretion of the Commission, subject to such limitations as may be specified in the Act.

(2) The Commission may fix a penalty below any minimum penalty specified in the Act where the Commission determines that exceptional circumstances surrounding the breach so require.

Periodic review of these Guidelines

14. (1) The Commission may review and revise these Guidelines, from time to time, to ensure that the Guidelines are adequate, sufficient and complete, taking into consideration the experience of applying it over time.

(2) Such periodic review, referred to in subsection (1) shall:

- (a) be subject to public consultation; and
- (b) take place at least every five years.

PART IV GENERAL PROVISIONS

Alternative powers of the Commission.

15. (1) The imposition by the Commission of a penalty on a regulated body with respect to a breach does not limit the power of the Commission to take any other enforcement action against the regulated body with respect to that breach, except that where the Commission imposes a penalty, it shall not revoke the regulated body's licence or frequency authorisation in reliance on the same breach.

(2) Where the Act, the Telecommunications Code or a licence provides for the payment of a penalty by a regulated body with respect to a breach, the Commission:

- (a) may, in its discretion, determine whether to impose a penalty under these Guidelines or under the Act, the Telecommunications Code or licence, but
- (b) shall not impose more than one penalty on a regulated body in respect of the same breach.

Compound penalties.

16. When a regulated body has, by reason of committing more than one breach, become liable to more than one penalty, the Commission may compound the penalties.

Payment by instalments.

17. The Commission may agree to the payment of a penalty in instalments over such period of time as it considers appropriate.

Category of penalties.

18. Where a breach committed by a regulated body falls into more than one category of breach, the Commission:

- (a) may, in its discretion, determine into which category the breach will fall, but
- (b) shall not impose the penalty under more than one category.

PART V COMPLIANCE

Relationship with licences.

19. (1) The requirement of a regulated body to pay any penalty, as notified by the Commission, shall be incorporated by the Commission into all licences and frequency authorisations issued under the Act.

(2) Any failure by a licensee or authorisation holder to pay a penalty as assessed by the Commission in accordance with these Guidelines shall constitute a breach of their licence or frequency authorisation, as the case may be.

Compliance and Enforcement.

20. The imposition of a fine by the Commission on any regulated body with respect to a breach does not prevent the Commission from taking further enforcement measures against the regulated body, with respect to that breach, as provided in sections 75 to 77 of the Act.

Interest.

21. (1) Without prejudice to any other enforcement action available to the Commission, a regulated body that does not pay the prescribed penalty in accordance with these Guidelines will be liable to pay interest to the Commission at the rate of five percent per annum or such other prescribed rate.

(2) The interest specified under subsection (1) shall be charged commencing from the due date of any prescribed penalty to the date the amount is paid.

Recovery.

22. (1) Every penalty imposed under these Guidelines constitutes a debt due to the Commission at the time it becomes payable.

(2) The assessed penalty and any interest payable under **section 21** of these Guidelines may be recovered by the Commission as a civil debt in summary proceedings.

Issued by the Telecommunications Regulatory Commission this ___ day of _____, 2024.

(Sgd.) Vance Lewis

Chairman of the Board