

THE FAIR TRADING COMMISSION

IN THE MATTER of the Utilities Regulation Act Procedural Rules 2002;

AND IN THE MATTER of the Utilities Regulation Act 2000-30 (the "Utilities Regulation Act") the Fair Trading Commission Act 2000-31 (the "FTC Act") and the Telecommunications Act 2001-36 (the "Telecommunications Act") of the Laws of Barbados;

AND IN THE MATTER of the Application by Cable & Wireless (Barbados) Limited for a Review of the Decisions of the Fair Trading Commission dated the 30th day of June 2003 and the 1st day of July 2003;

**CABLE & WIRELESS (BARBADOS) LIMITED
APPLICANT**

BEFORE

Commissioner Mr. Floyd Phillips	- Panel Chairman
Deputy Chairman Mrs. Vivian-Anne Gittens	- Panel Member
Commissioner Mr. Andrew Downes	- Panel Member

HEARING: 2003 - July 30-31

APPEARANCES

Mr. Roger Forde, Legal Advisor to the Commission

Mr. Patterson K.H. Cheltenham, Q.C. and
Mr. Barry L.V. Gale, Q.C. for the Applicant

DECISION

By a Notice of Motion dated and filed on the 15th day of July 2003, Cable & Wireless (Barbados) Limited, (the Applicant), made an application to the Fair Trading Commission for review of three Decisions of the Fair Trading Commission of which two are dated the 30th June 2003 and one is dated the 1st July 2003. By the said process the Applicant also sought a stay of the implementation of the said Decisions.

For the sake of completeness, the Commission summarises the said Decisions. The first Decision dated the 30th June 2003, document FTC 03/03 mandated the Applicant to comply with certain accounting, costing and pricing principles. The second Decision also dated the 30th June 2003, document FTC 04/03 mandated the Applicant and other service providers, to comply with certain procedures in order to resolve disputes which may arise between them. The third Decision dated the 1st day of July 2003, mandated the Applicant to file a Reference Interconnection Offer (RIO) within 30 days of the date of the Order. Again, for the sake of completeness, the Commission explains that a RIO may be defined as a document prepared by the dominant carrier which sets out certain terms and conditions under which the dominant carrier is prepared to permit other licensed carriers to interconnect with the providers' telecommunications network as set out in Section 26 of the Telecommunications Act.

Application for Stay

The matter came on for hearing on the 30th day of July 2003 when the Applicant restricted its application to that of the stay. As a preliminary point, the Applicant made an oral application for an extension of 45 days, commencing on the 1st day of August 2003, to file the RIO.

At the hearing, the Applications were supported by the Affidavit of Mr. David Charles Vrancken dated the 29th July 2003 and served on the Commission on the day of the hearing of the Application. The late filing of this Affidavit is a matter of concern to the Commission which advises that such a practice should be discouraged.

Mr. David Charles Vrancken attended the hearing, gave further evidence and was examined by the Commission.

In summary, the evidence of Mr. Vrancken stated inter alia, that the three Decisions were all unreasonable and required the Commission to provide the Applicant with guidance before they could be implemented. The evidence also stated that in order to implement the First Decision (FTC 03/03), the Applicant would be required to expend unusual costs which it could not recover. The evidence further stated that in relation to the Second Decision (FTC 04/03) - Dispute Resolution Procedures, there were breaches of the Rules of Natural Justice and the Constitution of Barbados.

Legal Principles

Counsel for the Applicant submitted that the guiding legal principles relative to the Application for Stay can be extracted from the case **AG Manitoba v Metropolitan Stores et al [1987] 1 SCR 110** and the **American Cyanamid v Ethicon Ltd [1975] AC 396** namely that the Commission should first consider whether there was a serious issue to be tried; secondly, the Commission should ask itself whether the Applicant would suffer irreparable damage in the event that the Stay is not granted; thirdly, the Commission should consider the "balance of convenience" which requires consideration of the interest of the Applicant, the public and other interested parties. The Commission agrees with Counsel in respect of the guiding legal principles.

The Commission finds that the evidence of Mr. David Charles Vrancken does not establish on a balance of probabilities a serious issue to be tried. The allegations of Mr. David Charles Vrancken of unreasonableness and lack of guidance by the Commission in respect of the Decisions have not been supported by credible facts, in that the Decisions were based on accepted practices in other jurisdictions. The Commission also finds that the evidence of Mr. David Charles Vrancken does not establish that the Applicant would suffer irreparable damage. Indeed, no evidence of damage or cost was provided. The Commission further finds that the Applicant has not shown that the "balance of convenience" requires a Stay. In this light, Counsel for the Applicant referred the Commission to the case of **RJR MacDonald v AG of Canada [1994] 1 RCS 311** with particular reference to the passage at page 344 and we quote **"in considering the balance of convenience and the public interest, it does not assist the Applicant to claim that a given Government authority does not represent the public interest. Rather, the Applicant must convince the Court of the public interest benefits, which will flow from the granting of the Relief sought"**. In the instant case, the Commission finds that the evidence of the Applicant does not show the benefits to the public or that third parties would not be prejudiced by the granting of the Stay.

In the circumstances, both Applications (the oral and by Notice of Motion) are refused. The Commission is of the view that the oral application for the extension of time and that for the Stay cover similar ground and would have the same effect. In this light, the Commission is of the view that the considerations are similar to those given in the stay and must be applied to the oral application for an extension of time. As previously stated, the Applicant failed to show that the public or third party's interest would not be prejudiced by the extension. Having arrived at its Decision, the Commission queried whether the same was consistent with Public Policy and/or Government Policy. The Commission noted that the Minister may publish Government Policy in respect of telecommunication matters. The Commission further noted that

by a Notice dated the 23rd June 2003, the relevant Ministry Published an Interconnection Policy which provided that the dominant carrier would be required to file a RIO with the FTC within 30 days of being declared a dominant carrier. The Commission further noted that by letter dated the 30th day of July 2003, written to the CEO of the Commission by the Minister responsible for Public Utilities, it was stated that it was the intention of Government to amend its policy by requiring that the RIO be filed within 45 days of the provider being declared a dominant carrier. The Commission also noted that the Applicant was declared a dominant carrier on the 24th day of April 2003. Accordingly, any further extension to file the RIO would have been inconsistent with Government's Policy as articulated in the Notice or the said letter.

Dated this 29th day of August 2003.

By Order



Mr. Floyd Phillips
Chairman of Panel
For and on behalf of the Panel