
THE FAIR TRADING COMMISSION

IN THE MATTER OF THE APPLICATION FOR A RATE ADJUSTMENT AND THE
INTRODUCTION OF USAGE BASED/FLAT PLANS (No. 3 of 2003)

filed by

CABLE & WIRELESS (BARBADOS) LIMITED

AND IN THE MATTER OF AN APPLICATION FOR COSTS BY INTERVENORS
PURSUANT TO SECTION 46 OF THE FAIR TRADING COMMISSION ACT CAP. 326B

DECISION AND ORDER

BEFORE:

Sir Neville V. Nicholls
Chairman

Professor Andrew Downes
Commissioner

Mr. Gregory Hazzard
Commissioner

IN THE MATTER OF

the Fair Trading Commission Act CAP. 326B

AND IN THE MATTER OF

the Utilities Regulation Act CAP. 282

AND IN THE MATTER OF

the Utilities Regulation (Procedural) Rules S.I. 2003 No. 104

BEFORE:

Sir Neville V. Nicholls
Chairman

Professor Andrew Downes
Commissioner

Mr. Gregory Hazzard
Commissioner

DATE: May 2 , 2007

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PART ONE - NATURE OF PROCEEDINGS

On February 14th 2007, the Fair Trading Commission (“the Commission”) held a public hearing at Sherbourne Conference Centre. The hearing was held pursuant to orders of the Commission dated July 30th 2004 and January 17th 2005.

The purpose of the said hearing was to determine how the Commission would exercise its discretion in relation to an order for the costs of the 2003 rate adjustment application by Cable & Wireless (Barbados) Limited and the eligibility of persons participating therein to recover such costs.

The Commission issued a procedural direction on January 17, 2007 wherein it was made clear that submissions were to include reasons why persons so applying should be allowed to recover costs in the form of expenses and who should pay the said costs. The aforementioned Procedural Direction also indicated that in keeping with the opinion of the High Court in Suit No. 373 of 2006 (“the Case Stated”), only submissions dealing with the recovery of costs of out-of-pocket expenses would be considered for persons not represented by an Attorney-at-Law.

PART TWO - BACKGROUND

1. On August 5, 2003 Cable & Wireless submitted an application to the Commission seeking to move from the current flat rate tariff system to a revised usage based system for residential and business users (domestic rate payers) of the domestic service.
2. As a result of the Cable & Wireless application, the Commission convened a rate adjustment hearing to deal with the issues. A number of domestic consumers of telecommunications services and at least one interested party (collectively and herein after referred to as “intervenors” by virtue of the **Utilities Regulation (Procedural) Rules 2003**) were allowed to intervene and participate in the hearing on behalf of Barbadian consumers. Twelve (12) of the intervenors were not represented by legal counsel during the hearing.
3. At the end of the process, by way of a decision and order dated July 20, 2004, Cable & Wireless’ application was denied by the Commission. It was further ordered that the existing rates for the domestic telephone service should prevail and that the Commission (pursuant to an application by the intervenors) would hear the parties on costs on a date to be determined. The Commission confirmed its decision on January 17, 2005 after hearing a motion to review.
4. In keeping with the Commission’s order of July 20th, 2004 aforesaid, the Commission convened a cost hearing on February 14, 2007.
5. While the Commission has the discretionary authority to award costs of and incidental to any proceeding before it under section 46 of the **Fair Trading**

Commission Act CAP. 326B ("FTCA"), there were no regulations or guidelines to aid the Commission in making such an award.

6. The Commission wishing to ensure transparency in the process leading to the award of costs, developed a set of guidelines which would assist it in relation to the awarding of costs.
7. When the drafting of these guidelines commenced, the Commission was of the view that the statutory discretion to award costs conferred on the Commission extended to the granting of an honorarium for intervenors that would represent an acknowledgement of the time spent in preparing for the hearing and appearing before the Commission.
8. The Commission subsequently completed and disseminated the Draft Cost Assessment Guidelines in December of 2005 and as previously stated embarked on a public consultation process and invited written comments on this document. The necessity for a public consultation arose from suggestions made by members of the public and other stakeholders in October 2005, and dovetailed well with the Commission's statutory duty to consult with the public as aforementioned.
9. Many of the intervenors who responded to the public consultation appeared to interpret section 46 to mean that the law mandates that intervenors be paid costs. Additionally, the intervenors were of the view that they should be paid for appearing before the Commission and for preparing and presenting arguments in much the same way that an Attorney-at-Law before the High Court would be paid on a party-and-party basis. This position on the part of intervenors was made clear in their contributions to the public consultation exercise.

10. Some of the parties who responded to the said exercise objected to the insertion of the honorarium clause as stated in the guidelines. Additionally, various legal arguments were raised which suggested that the Commission may be acting *ultra vires* the **Fair Trading Commission Act CAP. 326B** in granting the said honorarium or any sums other than out of pocket expenses to intervenors as costs. In the circumstances, the possibility of an application for judicial review being made against the Commission was also raised. It was also suggested that the Commission should proceed by way of Case Stated to obtain an opinion from the High Court.

11. In light of the divergence of views between the intervenors, and some of the other persons who commented on the Draft Cost Assessment Guidelines, and the serious questions of law that arose, the Commission determined that the most appropriate recourse open to it was to state a case for the opinion of a Judge under section 41 of the **Fair Trading Commission Act CAP. 326B**.

12. The following questions were asked by the Commission of the Court:
 - a. Whether the discretionary power given to the Commission under section 46 of the **Fair Trading Commission Act CAP. 326B** allows the Commission to award costs to intervenors who were not represented by Legal Counsel for preparing for and appearing at a Commission proceeding.

 - b. Whether the discretionary power given to the Fair Trading Commission under section 46 of the **Fair Trading Commission Act CAP. 326B** allows the Commission to award an honorarium to intervenors who were unrepresented by Legal Counsel in recognition of individual efforts in preparing and presenting a submission to the Commission.

- c. Whether on the basis of settled practice in Barbados, a person who is unrepresented by Legal Counsel and appearing before an administrative tribunal, where a power to award costs exists, is limited to an award of out of pocket expenses only.
13. The Case Stated was heard before the Honourable Mr. Justice Christopher Blackman in Court No.2 on May 10, 11 and 12, 2006. Parties in the Case Stated included Cable & Wireless (Barbados) Limited represented by learned Queen's Counsel Mr. Patterson Cheltenham, Mr. Barry Carrington, Public Counsel on behalf of the Barbados Council for the Disabled, BARCRO represented by Attorney-at-Law Mr. Therold Fields, Mr. Hallam Hope for CARITEL, Mr. Roosevelt King for BANGO, Mr. Alvin Cummins in person and Mr. Alvin Thorpe in person.
14. The decision on the case stated was delivered on September 28, 2006 and the Court answered the first question in the negative, the second in the negative and the third in the affirmative.
15. Therefore, the Commission completed the Cost Assessment Guidelines and issued a decision in relation thereto on January 17, 2007. A hearing on costs was fixed for February 14 and 15, 2007 in keeping with the previous orders of the Commission and a procedural direction was issued.

PART THREE - SUBMISSIONS

WRITTEN SUBMISSIONS

Mr. Michael Carrington for Mr. Leroy McClean

16. Mr. Carrington submitted that his client, Mr. McClean, is eligible for costs fit for one counsel as well as disbursements based on the following grounds:
- a. Having been granted intervenor status, he participated as fully as practicable and responsibly in the proceedings, thus contributing to the Commission's better understanding of the issues raised.
 - b. His participation contributed to the protection of consumers and rate payers in relation to the service provider Cable & Wireless.
 - c. His participation reinforced the view that each and every rate payer or consumer has a right to appear before such a tribunal and be heard.
17. Mr. Carrington also submitted that the costs should be borne by Cable & Wireless.

Mr. Alvin Cummins

18. Mr. Cummins submitted that he satisfied the criteria for the granting of a cost award as set out in section 4 of the Costs Assessment Guidelines based on the fact that he was granted intervenor status in the hearing and participated for the full 41 days of it. Furthermore, Mr. Cummins intimated that his entitlement to costs also arose based on the decision of Justice Christopher Blackman in the Case Stated regarding the awarding of costs. He indicated that the Commission has the discretion inter alia under section 46 of the Act to award cost to a party who (i) participates responsibly in the

proceedings and (ii) contributes to a better understanding of the issues by the Commission.

19. Mr. Cummins stated that the decision of Mr. Justice Blackman was that costs awards for intervenors should be limited to out-of-pocket expenses. However, the absence of guidelines at the commencement of the hearing meant that no records or receipts were kept so it will be difficult to itemise these costs.
20. He also stated that it would be more expedient, therefore, to determine costs on a per diem rate or a sum that may be adequate.
21. Mr. Cummins also indicated that there has been no provision made in the Cost Assessment Guidelines, Form IV - Summary Statement of Disbursement, for the individual intervenors to submit a claim for costs. He stated that the Guidelines are therefore unsatisfactory and unsuited for this type of application for recovery of cost in this particular rate hearing.
22. He also stated that it is customary that a person, who initiates a hearing and who is unsuccessful, bears the cost of the hearing. Therefore, Cable & Wireless (Barbados) Ltd. should be required to pay any costs awarded to intervenors in the hearing.

Mr. Hallam Hope for CARITEL

23. The written submissions of CARITEL are as follows:
 - a. The Fair Trading Commission should urgently review its decision to use the Cost Assessment Guidelines for intervenors seeking to apply for an award of costs (expenses) based on the 2003 application for a rate increase by C&W. In fact, these guidelines should not be considered in determining the merits of any costs. As such, CARITEL requested that these guidelines be not considered in

making a determination on the award of costs on the basis that to do so would be contrary to the Laws of Barbados.

- b. The legislation provides no clues about the methodology to be considered by intervenors in determining what the Commission requires from them in a determination of costs (expenses). The first indication of the methodology to be used in determining any award of costs for intervenors was on January 23, 2007, when the Draft Cost Guidelines were first submitted to intervenors.
- c. CARITEL cannot be reasonably expected to merit a fair award of costs (expenses) based on the circumstances, neither can CARITEL give an accurate account of its expenses under the circumstances. CARITEL intimated that these factors may deny them a fair opportunity to be heard.
- d. Moreover, CARITEL cannot be legitimately expected to comply with the methodology as defined in the amended Cost Guidelines as they had no clear idea of what was required of the intervenors on costs (expenses).
- e. CARITEL made an application for costs based on the fact that they were granted intervenor status and participated fully in the application for an increase in rates brought by Cable & Wireless (Barbados) Ltd in 2003. These costs include transportation to and from meetings, paper, Internet research and email, printing including cartridges, consultancy, case management and other costs mentioned.

- f. The work done at the hearing included the submission of interrogatories, questioning witnesses and weekly meetings to plan strategy.
- g. In order to prepare for the hearing, CARITEL carried out research on many issues, some of which were complicated. In order to carry out the said research, it was often necessary to prepare documents and use the Internet.
- h. CARITEL submitted that they were not unduly repetitive in its questioning and in fact, made reasonable efforts to ensure that their evidence, as well as the evidence of others was not unduly repetitive. Furthermore, CARITEL made reasonable efforts to cooperate with other parties to reduce the duplication of evidence and questions on cross examination and also to combine efforts with similarly interested persons.
- i. CARITEL stated that the Commission's rate hearing decision mentioned that CARITEL'S contribution led to a better understanding of several issues by the Commission. CARITEL also stated that during the hearing, Commissioner Professor Andrew Downes made specific reference to questions on economic externalities which CARITEL raised with a witness for the applicant. CARITEL stated that at the hearing other questions also raised by them were in consort with the Commission but did not duplicate those of the Commission's panel.
- j. CARITEL also stated that the settled practice appears to support the view that costs are covered by the party who initiates the proceedings in a hearing. Hence, Cable & Wireless (Barbados) Ltd.

should pay for any costs awarded to the intervenors. Consumers should not be the ones to pay.

- k. CARITEL also indicated that intervenors are a legal party and the judgment by Justice Christopher Blackman clearly states that they may be awarded costs.
- l. Finally, CARITEL indicated that while the Public Utilities Board ("PUB") did not specifically award a payment to the objectors, it previously ruled that the parties should meet and arrive at a payment to the then objectors, which should be borne by the Applicant. In the event that such an arrangement could not be settled, the PUB would have had to have engaged in a process of arbitration. This principle further supports the view that the Applicant should bear any costs associated with a rate hearing.

Mr. Olson Robertson

24. The written submissions of Mr. Olson Robertson are as follows:
 - a. Mr. Robertson submitted that his application for costs has been made strictly on the basis of a flat per diem based on the system by which qualified consulting professionals were paid.
 - b. The intervenors' costs should be paid by Cable & Wireless (Barbados) Ltd from funds which have been already allocated.

Mr. Malcolm Gibbs-Taitt for BARCRO

25. Mr. Hilary Malcolm Gibbs-Taitt's submissions are as follows:
 - a. Mr. Gibbs-Taitt submitted that he was granted intervenor status following a rate application by Cable & Wireless (Barbados) Limited on 5 August 2003 for an increase in rates. Although the

letter was clear as to his status it gave no direction on the manner in which the intervenors were to be paid.

- b. He stated that he enlisted, on behalf of BARCRO, the assistance of numerous professionals including attorneys, economists and engineers. Moreover, he spent numerous hours preparing for the hearing. Hence, given his training and having reviewed the legislation, he should be compensated for time spent in participating in this matter.
- c. Furthermore, it was suggested at one of the training seminars hosted by the Fair Trading Commission which he attended, that it was standard practice in jurisdictions with legislation similar to Barbados that utility companies pay a portion of their gross annual earnings into a fund and, in Mr. Gibbs-Taitt's opinion, a part of the fund should be allocated to payment of intervenors.
- d. He also stated that notwithstanding the fact that the Fair Trading Commission has taken steps through the Costs Assessment Guidelines to make provision for some form of compensation for intervenors, the Guidelines do not sufficiently address the entire issue of compensation for intervenors.
- e. The Fair Trading Commission has the power to order that costs in this matter be paid by Cable & Wireless (Barbados) Limited and that the issue of costs referred to in the decision and the review hearing be settled in favour of the intervenors.

Mr. Noel F. Smith

26. Mr. Smith's written submissions are as follows:

- a. Mr. Smith indicated that the granting of costs to an intervenor is justified as an expense of a rate hearing, which is usually borne by the entity seeking the rate change.
- b. He stated that it was further submitted that the intervenors were able to assist the Commissioners since some of them had experience in telephony. Mr. Smith also made the comment that the Public Counsel, present or future, would not be versed in many aspects of the operations of a telephone company, power company or water company and would have to pay experts. This amount would be higher than an expense awarded to intervenors.
- c. He stated that the Commission should decide how many intervenors would be appropriate in any given case basing their decisions on the different viewpoints mentioned when the applications are received so that there is transparency in the process and to ensure that no one can question the reasons why they are not an intervenor.
- d. He also indicated that the intervenors should be reimbursed for expenses based on the number of days they attended the hearing because they received no salary or payment for doing such. Moreover, there were costs involved in time, postage, copying of documents and travelling to Grand Barbados Hotel, Sherbourne Conference Centre and Manor Lodge (locations where the hearing was being convened).

Mr. Alvin Thorpe

27. Mr. David A. Commissioning acting on the behalf of Mr. Alvin Thorpe made an application for costs to be awarded and additionally that Cable &

Wireless (Barbados) Limited (C&W) be ordered to pay his costs. The grounds on which he relied to justify such an application are as follows:

- a. The 2003 rate hearing application was initiated by C&W.
- b. C&W was unsuccessful and hence “lost” the rate hearing application.
- c. Considerable effort and expense was taken in defending his and the public’s right against C&W’s unreasonable and unjustified demands for a rate adjustment.
- d. An upward adjustment to the rates charged by C&W was granted to them for the purpose of covering the cost of a rate hearing application. Therefore, C&W is in a possession of money which can be paid for this purpose.

Mr. Barry Carrington, Public Counsel for the Barbados Council for the Disabled

28. The written submissions of Public Counsel are as follows:

- a. The Public Counsel made no application for costs on the matters under review since in his view a public award may result in an increase in telephone rates that may place a heavy and unnecessary burden on consumers.

ORAL SUBMISSIONS

Mr. Michael Carrington for Mr. Leroy McClean

29. Mr. Carrington submitted that a number of things which were done after the fact, including the whole question of costs, should have been addressed prior to the conclusion of the hearing and that the guidelines should have been put in place early. He further submitted that in the whole scheme of things, this was a situation where his client would not wish to make any

claim with respect to costs. He was not however submitting that intervenors were not entitled to costs.

30. He stated that the position he has been instructed to posit is that his client entered the hearing as a public service. He submitted that an Application for costs would go contrary to the spirit in which the initial process was undertaken and therefore his client was withdrawing such Application.
31. In response to a question from the panel Mr. Carrington stated that the situation is that with respect to rate review hearings, it is not in all fairness a situation where somebody has been taken to Court since a service provider is mandated by law to apply to the Commission for a rate increase.
32. He stated that it would seem almost odious if awards of costs follow the same rule as in the High Court as there is essentially no winner or loser. He stated that if it came out in the evidence, that in all the circumstances, the given rate review application was preposterous and unreasonable then in those circumstances the panel could consider an award of costs. Mr. Carrington did not however believe that such a situation obtained in the present circumstances even though the rate review application had been dismissed.

Mr. Alvin Cummins

33. Mr. Cummins drew the panel's attention to the fact that costs recovery in terms of out of pocket expenses presents difficulties. He stated that in other jurisdictions, such as California and Canada, it is customary before the Hearing begins for intervenors to submit an intention to recover costs. He said that intervenors at the beginning of the 2003 rate application were not given that opportunity and as a consequence presenting credible evidence for costs recovery of expenses incurred in the hearing of the said application will present difficulty.

34. Mr. Cummins submitted that the intervenors have no way of presenting credible evidence of the expenses they have incurred. He said that the hearing was lengthy, it involved a great deal of study by all persons involved, especially the intervenors who had to do a great deal of research, and as a consequence the question arises as to how they should receive compensation.
35. Mr. Cummins said that the intervenors would have to determine what sort of costs in terms of out of pocket expenses they would need to charge. He submitted that the fairest way of making that determination would be in terms of an hourly cost for the Hearing. Mr. Cummins stated that he had no record of expenses for photocopying, taxi or any of the expenses listed in Form 4, and as a consequence he was unable, at the present time, to submit a claim for costs.

Mr. Hallam Hope for CARITEL

36. In a letter dated January 2nd, 2007, Mr. Hope requested that the Commission take into consideration the information which he believes exists in the records of the Commission and which would support the intervenors' claims for costs. He also makes reference to his letter of February 2nd 2007 in which he claims that the guidelines were submitted to the intervenors for the first time on "January 23rd, 2006". Mr. Hope also makes reference to his subsequent letter of February 5th, 2007 in which he also raised a number of other concerns about the guidelines.
37. Mr. Hope also queried whether the cost guidelines would be used by both parties, that is, by the intervenors to determine their costs and by the Commissioners to determine whether the intervenors are in compliance with their expectations and justification of their costs. Mr. Hope further queried whether the guidelines are really fair at all to the intervenors and

whether it was reasonable to expect that the intervenors will now be able to provide receipts to conform and comply with the guidelines.

38. He reiterated that Caritel participated fully in the rate review from its inception. He said there were several groups, many meetings, and that a lot of work was done in some cases even late at night, to prepare for Hearings and questioning of witnesses. He queried what would happen to the expenses associated with meetings outside of the Hearings.
39. He requested that the guidelines be put in abeyance and that a meeting be held to hear what the people have to say on their costs, give them reasonable time to prepare and ensure that they are clear in terms of what is expected.

Mr. Olson Robertson

40. Mr. Robertson stated that he was not pleading to be paid for the time he spent before the Commission at the last hearing but rather was trying to see if he could establish some principles for the future.
41. He gave the analogy of a person bringing a case before the Court and losing but yet the Court awards the applicant whatever costs he incurred and the persons who defended that case are paid nothing.
42. He submitted that Cable & Wireless should bear the expenses of intervenors from two standpoints: (1) that Cable & Wireless brought a matter and they lost; and (2) allocations have been made within the allowable expenses for such costs.
43. Mr. Robertson added that he did not think that the guidelines had any role or purpose in this costs application.

44. He said that in the future any applicant who desires to apply to the Fair Trading Commission for adjustments to their rates should bear their own costs, win or lose, and that intervenors should pay their own costs, win or lose. Further, he indicated that the expenses incurred by the applicant should be a part of the allowable expenses for whatever application they are bringing.
45. He stated that the Commission should use professional rates in adjusting costs for intervenors because each of them had to sacrifice their professions to appear before the Commission.

Mr. Malcolm Gibbs-Taitt for BARCRO

46. Mr. Gibbs-Taitt stated that his organisation BARCRO was not seeking any out-of-pocket expenses. He queried how the decision of the Court of Appeal to award intervenors costs could be overruled by an opinion of a High Court Judge.
47. Mr. Gibbs-Taitt stated that the guidelines came after the rate review application hearing and as a consequence could have no applicability to the costs thereof.
48. Mr. Gibbs-Taitt further stated that BARCRO sought professional assistance in putting its case by retaining Senator Gregory Nicholls and Mr. Therold Fields, both Attorneys-at Law, Mr. Erskine Durant, qualified former Cable & Wireless Engineer, Mr. Douglas Skeete, Chartered Accountant and Mr. William Payne, Certified Internal Auditor. He submitted that these are the persons that need to be compensated for their professional input.

Mr. Noel Smith

49. Mr. Smith submitted that requesting receipts from intervenors would be “opening a can of worms” and it would “bog down” the Commission with

looking through which receipts are valid and questioning Intervenors for additional information. This would be like a Tax Assessor working at the Tax office.

50. He stated that the Commission should decide on a figure, a cost, just as jurisdictions pay members of juries a small fee for each day they attend. He suggested that intervenors be paid a flat fee or cost of \$50.00 to \$100.00 for each day that they attended.
51. He submitted that any applicant to the Commission should be prepared to pay all costs for that Hearing. However, it would help that entity if they had some advance knowledge of the approximate costs of the Hearing, hence the suggestion of a flat fee for intervenors.

Mr. Alvin Thorpe

52. Mr. Thorpe stated in his submission that he objected to the Costs Assessment Guidelines. He further stated that despite the decision in the Case Stated, the Fair Trading Commission should find its own remedy as the decision made by the Judge was not “set in concrete”.
53. Furthermore, Mr. Thorpe also made the point that Cable & Wireless’ application for a rate increase was denied in favour of the intervenors and the consumers. Therefore, the intervenors should be paid. Furthermore, Cable & Wireless was allowed to recover the expenses of the 1993 rate hearing by charging consumers a fee and they were to have amortized the said sum over a certain amount of years. He contended that after the end of the period of amortisation the consumer should have been credited. He argued that since Cable & Wireless is recovering costs from a hearing from 1993, there is enough money to allow everyone to recover. He noted that, as other professionals and experts involved in the rate case have already been paid, the intervenors should be paid.

54. Mr. Thorpe also noted that neither the intervenors nor the public know the costs of the hearing, the sum of money collected thus far, whether or not the money is being held in an escrow account or how it is being managed. He was of the view that while this may not be relevant, this ought to be taken into consideration when making decisions. He further requested that the Attorney, Mr. David Commissiong, who assisted him, be paid from this exercise.

Mr. Barry Carrington, Public Counsel for the Barbados Council for the Disabled

55. Mr. Barry Carrington, the Public Counsel, submitted that his office was making no application in relation to the costs of the matter under review. He was of the opinion that a costs award to Public Counsel and cumulatively to other intervenors may result in an increase in telephone rates that may place a heavy unnecessary burden on consumers.

56. The Public Counsel further submitted that the other intervenors seem to view Cable & Wireless' application for an increase in rates in an adversarial manner. That is, the intervenors believe that since the Application by Cable & Wireless was denied they had won that case and hence, they should be the parties who should be compensated. If, however, this premise is correct, fairness should dictate that when Cable & Wireless or some other entity 'wins', those intervenors who participate in the hearing, thereby frustrating the efforts of the company to receive an increase, should be made to pay costs.

57. He noted that although the law makes no provision for costs other than out-of-pocket expenses to be paid to intervenors that does not signify that those who participated should be remunerated and in effect, consumers ought not to be saddled with any additional burdens. Given the fact that the Office of

Public Counsel is regarded as the consumer's representative, Mr. Carrington considered that it is of the utmost importance that consumers are protected against high costs even if those costs emanate from persons who act on behalf of consumers.

58. Mr. Carrington further submitted that the Government of Barbados set up the Office of Public Counsel, it pays its officers and it gives a modest budget to engage the services of those consultants that the Office requires. Those costs are borne by taxpayers, and there is no desire to further burden taxpayers with a request for costs.

Mr. Patterson Cheltenham, Queen's Counsel (Q.C.), for Cable & Wireless (Barbados) Limited

59. Mr. Patterson Cheltenham, Q. C., Attorney for the Applicant submitted that the power to award cost conferred upon the Commission under section 46 is discretionary but this discretion must be exercised judicially. Furthermore, intervenors must establish that they satisfy several criteria for an award of costs in matters such as this.
60. Mr. Cheltenham, Q.C. made a distinction between the rules relating to civil procedure before the Court and the procedure in a rate hearing and the manner in which these rules affect the issue of costs. In civil proceedings before the Court, the general rule is that cost follows the event, that is, a successful party is entitled to recover his or her costs of the proceedings from the opposing party. Civil proceedings are concerned with the assertion and vindication of private rights.
61. Mr. Cheltenham, Q. C. further stated that the litigant in civil proceedings is free to sue or not to sue. Likewise, a defendant may choose to defend or not to defend an action. It is therefore fair that the successful party in such circumstances should recover his or her costs unless the Court in its ultimate

discretion in the matter should make an order that each party should bear its own costs. However, a rate hearing is qualitatively different. It is concerned with public interest. At the time of the hearing, if Cable & Wireless wanted to adjust its rates for regulated services, it was obligated under the **Utilities Regulation Act** and the **Fair Trading Commission Act** to apply to the Commission.

62. Mr. Cheltenham, Q. C. further stated that the intervenors chose voluntarily to get involved and were under no obligation or compulsion of law to do so. Mr. Cheltenham, Q. C. was of the view that the public interest was in any event expressly served by Public Counsel. He argued that if the intervenors genuinely wished to advance the public interest, then they should have used and could certainly have used the services of the Public Counsel as required by the **Utilities Regulation Act**. The intervenors cannot in the circumstances of this case legitimately expect to recoup any expenses incurred.
63. Whilst Cable & Wireless' application for rate adjustment was unsuccessful, the general principle that cost follows the event cannot apply to hearings under the **Fair Trading Commission Act** in general or in this specific case. The principle if applied in hearings under the **Fair Trading Commission Act** and **Utilities Regulation Act** would mean that if the applicant for rate adjustment succeeded, then those opposing the application would be burdened for the award of costs.
64. Mr. Cheltenham, Q. C. noted that in any event, the intervenors were generally repetitive in their questioning and efforts were duplicated. The end result was that the main objective for establishing the Office of Public Counsel was lost, time was wasted and cost increased.

65. It was submitted by Mr. Cheltenham, Q. C. that any out-of-pocket expenses which the intervenors incurred were avoidable. As a general legal principle, avoidable expenses are irrecoverable. The intervenors should have adopted the most cost efficient and effective way of representing their case, namely through Public Counsel.
66. The Queen's Counsel said that it can be argued that since the rate hearing preceded the cost assessment guidelines which are not expressed to have retroactive effect then the guidelines cannot apply to this hearing. However, he conceded that the principles set out under paragraphs 2.12, 2.13 and 4.1 are normative in the context of awarding cost in a rate hearing and in the absence of the guidelines, the Commission would be entitled to have regard to such considerations.
67. He further said that the burden of establishing eligibility for an award of expenses is on the applicant for those expenses. This must be established by intervenors drawing to the attention of the Commission facts and circumstances showing the contribution made and its importance to the better understanding of the issues before the Commission. In closing he submitted that costs should remain exactly where they are.

PART FOUR - THE LAW

The Nature of Costs

68. The issue of Costs is dealt with under the Fair Trading Commission Act CAP. 326B of the laws of Barbados which provides at section 46 (1) that:

“The costs of and incidental to any proceeding before the Commission shall be in the discretion of the Commission and may be fixed at a sum certain or may be taxed.”

69. A definition of the word “costs” is contained in section 2 of the Supreme Court of Judicature Act CAP. 117A of the Laws of Barbados, which provides so far as is material for present purposes that:

“costs include fees, charges, disbursements, expenses or remuneration.”

70. In addition section 85 of the said Act provides *inter alia* that:

“(1) Subject to rules of Court, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, are in the discretion of the Court and each Court has power to determine by whom and to what extent the costs are to be paid.”

71. The wording of section 85(1) of CAP. 117A quoted above appears to have been first enacted in the United Kingdom by section 50 of the Supreme Court of Judicature (Consolidation) Act 1925 as amended by the Administration Justice (Miscellaneous Provisions) Act 1938. In Barbados the said wording was adopted in 1956 with the enactment of section 49 of the former Supreme Court of Judicature Act CAP. 117.

Exercise of Discretion Generally

72. The law in relation to the exercise of discretion generally is well settled. Discretionary power once conferred on an administrative body by Parliament must not be exercised arbitrarily. It must be exercised reasonably, in good faith and on correct grounds, **Administrative Law 8th Edition Wade and Forsyth Oxford (2000)**.
73. An administrative body should also not fetter its discretion in advance by adopting any over rigid policies. It should allow itself to determine each matter coming before it, according to the facts and circumstances of the case.

Exercise of Discretion in relation to Costs in Civil Proceedings

74. The general principle in relation to costs awarded in a civil matter in the High Court is that costs follow the event; **Scherer and Another v Counting Instruments Ltd. and Another [1986]2 A.L.L E.R. 529** which sets out the principles regarding costs. The costs section under scrutiny in this case was **section 50 of the Supreme Court of Judicature Act 1925** which gave to Judges an unlimited discretion to make an order as to costs as he considers the justice of the case requires, in a similar manner as **section 46 (1) of the Fair Trading Commission Act**.
75. Buckley LJ, in **Scherer and Another v Counting Instruments Ltd. and Another [1986]2 A.L.L E.R. 529** stated in his judgement that while the normal rule was that costs follow the event, a party who turns out to have unjustifiably either brought another party before the Court, or given another party cause to have recourse to the Court to obtain his rights is required to recompense that other party in costs. However, the Judge also stated that it ought to be noted that under section 50 of the Judicature Act 1925, the Court has an unlimited discretion to make what order as to costs, the justice of the case requires. Consequently a successful party has a reasonable expectation of obtaining an order for his costs to be paid by the opposing party but has

no right to such an order, for it depends upon the exercise of the Court's discretion.

76. Buckley LJ further stated that this discretion is not one to be exercised arbitrarily; it must be exercised judicially, that is to say, in accordance with established principles and in relation to the facts of the case. The discretion cannot be well exercised unless there are relevant grounds for its exercise, for its exercise without grounds cannot be a proper exercise of the Judge's function.
77. The grounds must be connected with the case. This may extend to any matter relating to the litigation and the parties' conduct in it, and also to the circumstances leading to the litigation, but no further. If no such ground exists for departing from the normal rule, or if, although such grounds exist, the Judge is known to have acted not on any such ground but on some extraneous ground, there has effectively been no exercise of the discretion.
78. If a Judge, having relevant grounds upon which to do so, has upon those grounds, or some of them, made an order as to costs in the exercise of his discretion, his decision is final unless he gives leave to a dissatisfied party to appeal.

PART FIVE - REASONING

Exercise of Discretion to Award Costs in Regulatory Proceedings

79. In exercising its function in relation to utility regulation, the Commission performs quasi-judicial functions. Section 46 of the **Fair Trading Commission Act CAP. 326B**, while conferring on the Commission a discretionary power to award costs, gives no guidance as to how this discretion should be exercised.
80. This is quite unlike the statutory regime in Ontario, Canada where the Energy Board of that province is given specific statutory direction in relation to awarding costs and does not have to follow the principles normally adopted by a Court.
81. Section 30 of the Ontario Energy Board Act provides that:
- (1) **“The Board may order a person to pay all or part of a person’s costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.**
 - (2) **The Board may make an interim or final order that provides,**
 - (a) **by whom and to whom any costs are to be paid;**
 - (b) **the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and**
 - (c) **when any costs are to be paid.**

- (3) The rules governing practice and procedure that are made under section 25.1 of the *Statutory Powers Procedure Act* may prescribe a scale under which costs shall be assessed.
- (4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board.
- (5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any Court."

82. It is reiterated that in the High Court, in civil proceedings, costs are said to follow the event. This simply means that costs are awarded to the winner of the case in question.

83. The Commission is however of the view that while the nature of costs, as defined in paragraph 69, in regulatory proceedings is the same as in the High Court, the exercise of discretion in awarding costs in regulatory proceedings must be approached differently. A service provider seeking a rate adjustment must make an application to the Commission for that adjustment pursuant to section 16 of the Utilities Regulation Act CAP. 282. There is no choice in the matter. The said Act mandates the Commission upon receipt of the rate adjustment application to convene a public hearing to determine same.

84. This is fundamentally different from Civil Court proceedings where a litigant has an option to settle or resolve a matter without recourse to the Court. Conversely, a defendant in Civil Court proceedings must defend a suit brought against him unless he believes he has no arguable case. If he does not defend the suit he runs the risk of having damages and costs awarded against him. An intervenor in a rate adjustment hearing participates voluntarily; as the law or circumstance does not compel him to act. He does so, generally, through a sense of public spiritedness.

85. In the circumstances, therefore, it cannot be said that in relation to the outcome of a rate adjustment hearing there is an “event”. In other words there is no winner or loser. To follow this principle to its logical conclusion would mean that when a service provider makes a rate adjustment application that is approved whether wholly or in part, intervenors in such a matter may be required to pay costs to the service provider.
86. This being a likely occurrence in regulatory proceedings was foreshadowed by the Hon. Mr. Justice Frank King in A. Wendell A. McClean v. The Barbados Telephone Company Ltd. No. 1038 of 1994 H. C. (Barbados) when he stated in passing in the final paragraph of his judgment that there could well come a day when the costs provisions must be applied to objectors (intervenors).
87. The Commission therefore is satisfied that the exercise of discretion to award costs in a rate adjustment application must be approached from a different perspective than the Court.

The Role of Public Counsel

88. The Commission is aware of Government’s policy behind the establishment of the Office of Public Counsel as it relates to utility regulation. This policy is reflected in the Parliamentary debates on the legislation administered by the Fair Trading Commission.
89. On September 2nd, 1998 the Prime Minister of Barbados, the Right Honourable Owen Arthur, in delivering his budgetary statement indicated that in relation to the proposed Office of Public Counsel:
- “a position of people’s counsel will be created to assist objectors at these hearings. This attorney will represent and appear for members of the public at hearings of the Commission and judicial proceedings**

involving the interest of users of the services of utilities and the monopolies.”

90. On June 20th, 2000 the Honourable Ronald Toppin, then Minister of Commerce, Consumer Affairs and Business Development, stated on the floor of Parliament:

“Very interestingly and important in this regard is going to be the introduction of Public Counsel to assist consumers with presentation of their arguments before the Commission.

‘Public Counsel’ is referred in the Utilities Regulations Act as legal aid where persons who wish to be heard before the Commission and who would and should recognise that they may not be in the best position to articulate their own causes will be able to resort to the assistance of Public Counsel who will help them to prepare the case.

Also, where there is more than one objector, who essentially will be saying the same thing, Public Counsel will be able to advise on the consolidation of the action, prepare necessary documentation, go before the Commission on their behalf and argue a matter on their behalf. Public Counsel will not only play a role in assisting the consumers who use utilities for domestic purpose but will also by his knowledge, because he has to be a lawyer, be ensuring that the hearing will not wash far and wide and, in fact, be significantly streamlined.”

91. It is clear therefore that while Government did not seek to abolish public participation in regulatory proceedings the Office of Public Counsel was established as a convenient medium through which members of the public could channel their collective effort.

92. The Office of Public Counsel is staffed with legal personnel who are experienced in participating in proceedings with a judicial tenor. The Office of Public Counsel has been given a budget that should minimise *inter alia*, personal expense to intervenors as well as allow the recruitment of appropriate experts to testify on behalf of consumers. If the Office of Public Counsel is properly utilised, the individual intervenors ought to incur few personal expenses in rate adjustment applications.
93. It is clear having regard to section 15 (5) of the **Utilities Regulation Act** that the Commission could not limit the number of persons who were desirous of participating in the rate adjustment hearing as consumers. These consumers referred to as 'intervenors' by the Utilities Regulation (Procedural) Rules 2003 were however entitled to be represented by Public Counsel under section 15 of the Utilities Regulation Act.

Rate Adjustment Application was not Frivolous and Vexatious

94. The Commission in making its decision also considered whether there was some matter relating to the conduct of the rate adjustment application by Cable & Wireless which would give rise to making an award of costs against it.
95. The Commission accepts the submission of Mr. Michael Carrington that one of the factors upon which an award of costs against a service provider ought to be predicated is whether the rate application was frivolous or otherwise without merit. Although Cable & Wireless' application was refused on the grounds of insufficiency of evidence, there has never been any evidence or suggestion that the application itself was frivolous. Indeed, the rate adjustment hearing subsequently turned out to be very involved, technical and complex but was not frivolous and vexatious.

Submissions on Entitlement to Costs

96. The procedural direction issued to the parties in preparation for the Cost Hearing mandated that the parties make submissions to the Commission on the question of their entitlement to costs and who should pay these costs. There was very little information submitted in either the written or oral presentations of those persons making applications for costs to assist the Commission in determining whether it ought to exercise its discretion in their favour.
97. Most of the applicants for costs focused their submissions on formulating a method of payment to intervenors that if accepted by the Commission would have been at variance with the decision of the High Court in Suit No. 373 of 2006 ("the Case Stated"). By way of example, Mr. Noel Smith suggested a daily rate of \$50 to \$100, Mr. Olson Robertson suggested that the intervenors be paid at rates payable to professional persons, while Mr. Alvin Thorpe advocated that the Court's decision be ignored and that the Commission should determine a method of payment of its own.
98. The decision of the High Court was very clear in stating that when awarding costs to persons who were not represented by legal counsel, the Commission was limited to those out-of-pocket expenses which could be properly quantified and vouched for.
99. In attempting to properly exercise its discretion in relation to an award of costs, the Commission also took into account the submissions made by Cable & Wireless (Barbados) Ltd. in relation to the duty of the Commission to act fairly to all parties who appeared before it.
100. The Commission in making its decision as to whether it should exercise its discretion and award costs has considered that there were no substantial submissions from the applicants as to why they should be awarded costs.

Contributions of Intervenors

101. The Commission heard very little as to what factors it should consider if it were minded to award costs to the individual applicants therefor.
102. The Commission is of the view that while the intervenors contributed to the hearing their contribution was not decisive in the final outcome since the Commission had consultants and staff to research the case and was fully able to grasp the issues that were placed before it.
103. The Commission has considered the contribution of the intervenors to the outcome of the overall rate application hearing but while appreciative of their contribution does not think that it was decisive to the outcome of the rate application hearing.

Administrative Costs

104. Costs to intervenors were minimised or avoided as the Commission facilitated the participation of the intervenors in the hearing by photocopying, serving documents and assisting, *inter alia*, with other administrative functions.

Retroactivity of Cost Assessment Guidelines

105. Much has repeatedly been said about the retroactive nature of the Cost Assessment Guidelines. The Commission wishes to make it absolutely clear that no such issue arises or is present. The Guidelines were developed simply to give transparency to section 46 of the Fair Trading Commission Act. It was open to the Commission to apply the same principles contained in the Guidelines in relation to eligibility for and quantification of costs even if the Guidelines had not been developed.

Amortization of 1993 Cable & Wireless Rate Hearing Expenses

106. The Commission refers to this issue as raised by Mr. Alvin Thorpe for completeness. The Commission has no authority to revisit, reopen and or vary an order made by the Public Utilities Board nearly fifteen years ago particularly one that was not appealed against on this ground. In any event, the Commission has fully addressed Mr. Thorpe's concerns by way of a letter dated January 12, 2007 and addressed to Mr. David Commissiong on behalf of Mr. Thorpe. This matter was immaterial to the exercise of determining costs.

PART SIX - CONCLUSION

107. The award of costs is for the Commission a multi-tiered process. The Commission must first determine how it will exercise its discretion. If the Commission decides that it will exercise its discretion to award costs, it has to determine as an adjunct which of the applicants for costs is, on the facts of the matter, entitled to such an award. Once the question of entitlement is determined the Commission has to determine the quantum of the award.
108. In exercising its discretion in this matter Commission is not attempting to lay down any authoritative set of criteria upon which this discretion may be exercised in the future. Discretion must however be exercised judicially and based upon facts and circumstances arising from the matter at hand.
109. The Commission has therefore considered the following circumstances:
- a) That while the **nature** of costs in regulatory proceedings is the same as in civil proceedings, in the absence of any statutory specificity to the contrary, the **approach** to awarding costs is different.
 - b) That the **Office of Public Counsel** was not properly utilised as a mechanism for streamlining challenges to the rate adjustment application and saving costs.
 - c) That there has been no suggestion that the rate adjustment application by Cable & Wireless was **frivolous and vexatious** even though it lacked sufficient evidence to substantiate a rate increase/change.

- d) Both at the Costs Hearing and in the written and oral submissions on the entitlement of costs filed in relation thereto there was a paucity of argument as to why the Commission should exercise its discretion to award costs.
- e) That while the intervenors made a useful contribution to the hearing of the rate adjustment application this is not the only factor to be considered by the Commission in making a determination as to whether costs should be awarded. The Commission used its staff and consultants and was able to fully grasp the issues involved in the rate adjustment hearing.
- f) The Commission itself sought to minimise administrative expenses that would have ordinarily accrued to the intervenor. These expenses would be included in the costs of the hearing which the Commission would be entitled to recover from Cable & Wireless by way of an annual levy.

110. In the circumstances the Commission is not satisfied that it should exercise its discretion to award costs to the persons who have so applied. It is therefore ordered that all parties will bear their own costs of the rate adjustment application including the costs of the Costs Hearing.

111. The Commission wishes to thank all parties for their assistance in terms of the submissions made and the overall conduct of the Costs Hearing.

Dated this 2nd day of May 2007

Original Signed by
.....
Sir Neville V. Nicholls
Chairman

Original Signed by
.....
Professor Andrew Downes
Commissioner

Original Signed by
.....
Mr. Gregory Hazzard
Commissioner

PART SEVEN - COMMISSION'S ORDER

BARBADOS

No. 1 of 2007

THE FAIR TRADING COMMISSION

IN THE MATTER of the Utilities Regulation Act CAP. 282

AND IN THE MATTER of the Application by Cable & Wireless (Barbados) Limited to the Fair Trading Commission for rate adjustment pursuant to section 16 of the Utilities Regulation Act CAP. 282

AND IN THE MATTER of an Application for Costs by Intervenors pursuant to section 46 of the Fair Trading Commission Act CAP. 326B

Office of Public Counsel

Mr. Olson Robertson

Mr. Noel Smith

Mr. Alvin Cummins

CARITEL

Mr. Alvin Thorpe

Mr. Leroy McClean

Barbados Consumer Research Organisation Inc. (BARCRO)

APPLICANT

Cable & Wireless (Barbados) Limited

RESPONDENT

BEFORE

Sir Neville V. Nicholls

Professor Andrew Downes

Mr. Gregory Hazzard

Chairman

Commissioner

Commissioner

APPEARANCES

Mr. Patterson Cheltenham, Q.C and Mr. Alrick Scott for Cable & Wireless (Barbados) Limited

Mr. Barry Carrington and Ms. Summer Chandler for the Office of Public Counsel

Mr. Michael Carrington for Mr. Leroy McClean

Upon reading the Applications filed by the Applicants; and
Upon reading the written submissions filed by the Parties; and
Upon hearing the Intervenors; and
Upon hearing the Counsel for the Respondent

IT IS HEREBY ORDERED that all parties will bear their own costs of the rate adjustment application including the costs of the Costs Hearing.

Dated this 2nd day of May 2007.

Original Signed by
.....
Sir Neville V. Nicholls
Chairman

Original Signed by
.....
Professor Andrew Downes
Commissioner

Original Signed by
.....
Mr. Gregory Hazzard
Commissioner