



## FAIR TRADING COMMISSION

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BARBADOS

NO. 0001/10

### FAIR TRADING COMMISSION

**IN THE MATTER** of the Utilities Regulation Act, CAP. 282 and the Fair Trading Commission Act, CAP. 326B of the Laws of Barbados;

**IN THE MATTER** of the Utilities Regulation (Procedural) Rules, 2003;

**AND IN THE MATTER** of the Application by the Barbados Light & Power Company Limited (the Applicant) to the Fair Trading Commission for a review of electricity rates pursuant to Section 16 of the Utilities Regulation Act, CAP. 282;

**AND IN THE MATTER** of an Application for a Review by the Barbados Consumer Research Organisation Inc. of the Decision and Order of the Fair Trading Commission dated January 25, 2010;

### APPLICANT

Barbados Consumer Research Organisation Inc. (BARCRO)

### BEFORE:

Sir Neville Nicholls	Chairman
Mr. Gregory Hazzard	Commissioner
Mr. Andrew Brathwaite	Commissioner
Mr. Alfred Knight	Commissioner
Mr. Andrew Willoughby	Commissioner

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DECISION

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## **PART ONE - BACKGROUND**

1. On May 8, 2009 the Barbados Light & Power Company Limited (BL&P) submitted an application to the Fair Trading Commission (Commission) for a review of its electricity rates. The Application was accompanied by Affidavits of the BL&P's witnesses; employees, Mr. Peter Williams, Mr. Hutson Best, Mr. Mark King and Mr. Stephen Worme and expert witnesses, Mr. Robert Camfield and Mr. Michael O'Sheasy.
2. During the pre-hearing process additional evidence was entered through the exchange of numerous interrogatories, requests for information and filings of documents. To determine the review of the electricity rates a hearing was convened from October 7, 2009 to October 23, 2009 at which all of the witnesses were thoroughly cross-examined.
3. Following the hearing, the Commission adjourned to deliberate on the issues and to consider all of the evidence before making its decision. On January 28, 2010 the Commission reconvened the hearing to deliver its Decision and Order dated January 25, 2010. The Commission ordered that all new tariffs should come into effect on bills issued from March 1, 2010.

### **Filing of the Motion for Review**

4. The Commission received an application from the BARCRO on the 17<sup>th</sup> day of February 2010 seeking a stay of the March 1, 2010 implementation of the Decision and review of the Commission's Decision and Order dated January 25, 2010.
5. The Commission, having reviewed BARCRO's Notice of Motion for Review (Motion) found that the Applicant was not able to establish sufficient grounds to

support a stay of the Commission's Decision and Order. The Commission therefore denied the Application for a stay.

6. In addition to its Motion, BARCRO also filed with the Commission Affidavits of Mr. Malcolm Gibbs-Taitt and Mr. Carl Ince, which were not only unsigned and unsworn but failed to set out a clear and concise statement of the relief that BARCRO was seeking. In accordance with Rule 8 of the Utilities Regulation (Procedural) Rules, 2003 (Rules) BARCRO is required to submit a Motion which, *inter alia*, contains the decision or order being sought, the grounds upon which the Motion is made and an indication of any oral or other evidence it is seeking to present. The Motion should also be accompanied by a supporting Affidavit setting out a clear and concise statement of the facts.
7. The Commission notified BARCRO that it had failed to comply with Rule 8 of the Rules and requested that it amend and re-file its review application.
8. BARCRO filed an amended Motion and Affidavit of Mr. Malcolm Gibbs-Taitt, Director General of BARCRO dated March 18, 2010.

#### **Duty of the Commission**

9. By virtue of Section 36 of the Fair Trading Commission Act, CAP. 326B "FTCA" and Rule 53 of the Rules, the Commission has jurisdiction on an application from a party or on its own motion to review, vary or rescind any decision given by it. In instances where the Commission allows a review, the process is prescribed by the Rules. The Commission's discretion to review and vary or rescind a decision or order is exercised with a view to ensuring that there is consistency and predictability of the Commission's decision-making process.
10. A review is not a vehicle for applicants to re-argue their submissions made at an earlier proceeding simply because they do not agree with the decision. Under the

FTCA, the authority of the Commission to allow a review is discretionary. An applicant must first demonstrate, on a *prima facie* basis, the existence of the permissible grounds of review; this is referred to as the threshold question.

11. Rule 54 (1) of the Rules sets out specific grounds on which the Commission can review a decision made in a utility regulation proceeding. Rule 54 (1) of the Rules states that:-

*“(1) Every Notice of Motion made under Rule 53 (2), in addition to the requirements of Rule 8 shall*

*(a) Set out the grounds upon which the motion is made sufficient to justify a review or raise a question as to the correctness of the order or decision and the grounds may include*

- (i) error of law or jurisdiction;*
- (ii) error of fact;*
- (iii) a change in circumstances;*
- (iv) new facts that have arisen;*
- (v) facts that were not previously placed in evidence in the proceedings and could not have been discovered by reasonable diligence at the time;*
- (vi) an important matter of principle that has been raised by the order or decision;”*

12. Rule 55 (1) of the Rules states that:-

*“(1) The Commission shall determine with a hearing, in respect of a motion brought under rule 53 the threshold question of whether the matter should be reviewed or whether there is reason to believe the order should be rescinded or varied.”*

13. In accordance with Rule 55 (3) the Commission decided that it would combine the consideration of the threshold question and a review on the merits and would hold a consolidated written hearing. Rule 55 (3) of the Rules states that:-

*“(3) The Commission may adopt whatever procedures it deems to be just and expeditious in the individual circumstances of each motion including providing for the combining of consideration of the threshold question and the review on the merits.”*

14. Pursuant to Rule 37 of the Rules, the Commission further determined that the review proceeding should be disposed of by way of a written hearing.

#### **Burden of Proof**

15. By virtue of section 133 of the Evidence Act, CAP. 121 the onus rests on BARCRO to prove its case in this review proceeding.

#### **Evidence before the Commission**

16. Following receipt of BARCRO’s amended Motion and Affidavit on March 18, 2010 and prior to the commencement of the written hearing the Commission instructed BARCRO to submit further written submissions to help support its claim. BARCRO filed with the Commission a set of written submissions dated April 20, 2010. Following this, the BL&P was invited to submit a response to BARCRO’s written submissions.
17. The BL&P filed with the Commission its written response on May 12, 2010. The BL&P in its response addressed the grounds postulated by BARCRO in its Motion and written submissions. The BL&P generally disagreed with many of the allegations set out by BARCRO. Overall the BL&P was of the view that BARCRO’s Motion and subsequent written submissions were not supported by

evidence and there was no contrary proof supplied by BARCRO which contradicted the evidence which the BL&P had submitted to support its rate review Application. The BL&P therefore concluded that BARCRO has not demonstrated any grounds for review.

18. After receipt of the BL&P's response BARCRO was invited to submit its final set of written submissions and it did so on August 09, 2010. In determining this matter, the Commission took into consideration the written submissions of both BARCRO and the BL&P.

## **PART TWO - THE THRESHOLD QUESTION**

### **The Threshold Question**

19. In its Motion and written submissions BARCRO contends that the Decision and/or Order of the Commission dated January 25, 2010 raises several grounds for review. These grounds have been grouped into the following categories:
  - (a) The timing of the BL&P's Application and the interests of the consumer.
  - (b) The increase in the rate base.
  - (c) The role of Public Counsel.
  - (d) The issue of standards of service as it relates to the review of rates.
  - (e) Shifting of the 2.64 cents from the base energy rate to the Fuel Clause Adjustment.
  - (f) Meter readings, interim billing, meter costs and customer charges.
  - (g) The late production of transcripts.
  - (h) Prohibiting BARCRO from bringing a witness.
  - (i) Value of service arguments.
  - (j) The installation of three new generators by the BL&P.
  - (k) Cross examination of the Commission's consultants.

20. To discharge its first task *vis-à-vis* the threshold question of whether a review should be granted, the Commission considered BARCRO's Motion for Review and the Affidavit of Mr. Malcolm Gibbs-Taitt dated March 18, 2010.
21. BARCRO's Motion for Review and accompanying Affidavit contained the reasons why it believed that the Commission's decision should be reviewed.
22. The Commission approached the threshold question by considering whether BARCRO had established on a *prima facie* basis that any of the grounds set out under Rule 53 of the Rules exist. The Commission considers that BARCRO must place before the Commission specific references to aspects of its decision to demonstrate or justify the existence of such grounds.
23. According to Black's Law Dictionary, a *prima facie* case is:-
  - (a) *the establishment of a legally required rebuttable presumption;*
  - (b) *a party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favour.*
24. With the body of arguments before it, the Commission examined the allegations of error and all the grounds submitted in support of the Motion, to first determine whether BARCRO produced enough evidence to support the existence of grounds for review. BARCRO relied on three grounds of review, error of law, error of fact and a change in circumstances.
25. The Commission's review of BARCRO's Affidavit found that there was a lack of evidence to support BARCRO's application. The Affidavit of Mr. Malcolm Gibbs-Taitt dated March 18, 2010 merely gives an account of the history of his career and does not address any substantive issues of the case. No evidence has been filed in

this matter to support the alleged errors of law, fact, change in circumstances or any other ground for review.

26. **The areas raised by BARCRO at grounds (c), (e), (f), (i) and (j) did not meet the threshold question and will not be discussed in this Decision because they did not raise any significant or new points and/or were repetitive, unsupported by evidence or irrelevant. These grounds lack merit and do not demonstrate a *prima facie* case for review. The Commission has determined that despite the fact that there is no evidence contained in the Affidavit of Mr. Malcolm Gibbs-Taitt to substantiate BARCRO's contention on a *prima facie* basis, the allegations made in relation to grounds (a), (b), (d), (g), (h) and (k) above at paragraph 19 raised some important issues that need to be clarified. The Commission therefore decided to review on merit.**

### **PART THREE - REVIEW ON MERIT**

27. Having determined the threshold question, the Commission proceeded to review on merit the issues relating to Grounds (a), (b), (d), (g), (h) and (k) named at paragraph 19.

#### **The Timing of the BL&P's Application and the Interests of the Consumer**

28. BARCRO argues that the Commission made an error of fact and law in not taking into consideration the interests of consumers in light of the worldwide economic conditions. BARCRO argued that it was unreasonable for the Commission to accept and hear the rate review Application in light of such conditions.
29. In reviewing the rates, the law sets out specifically what the Commission needs to take into consideration at sections 3 and 10 of the Utilities Regulation Act, CAP. 282 (URA). There is nothing in the law that would give the Commission the



authority not to hear at that time the BL&P's application that was properly placed before it.

30. Despite the allegations made by BARCRO, the Commission took into consideration the economic forecasts and the recessionary issues facing the country as stated in its decision of January 25 2010 at paragraphs 242 and 243. However, while this issue was contemplated by the Commission when making its decision, the Commission also remained cognisant of its statutory duty to ensure by virtue of section 3 (3) of the URA that the interests of consumers are protected by ensuring that the BL&P provides a service that is safe, adequate, efficient and reasonable.
31. The Commission is and was aware of the economic challenges being faced by Barbados and other countries. However the Commission is equally aware, especially in these times, that it is important that the country maintains a stable and reliable electricity service.
32. The Commission was required to consider the fact that the BL&P, during the rate review application hearing, submitted information which shared that the cost of operating and maintaining the utility plant has continued to increase and the company has to make substantial investments to continue to provide safe and reliable service. The URA sets out that an efficient service provider is allowed rates that will enable it to finance its operations and earn a fair rate of return.
33. Moreover, every effort was made by the Commission to moderate the impact of the new rates on consumers. Any decision to delay the rate increase would have been arbitrary as there was no guarantee that economic conditions would have improve.

34. **The Commission has found no evidence to support BARCRO's arguments and therefore a variation or modification of the Commission's Decision and Order is not justified.**

#### **The Increase of the Rate Base**

35. BARCRO claims that the Commission made an error of fact by not stating that an increase in the rate base from 6.07% to 10.00% is equivalent to an increase of the rate base of 60.7 per cent.
36. Although BARCRO has not shown the relevance of this ground, it appears that BARCRO has confused the rate of return on rate base with the actual rate base. The approved rate base is \$544, 198,726 and was discussed in the decision at paragraphs 50-80. The figures referred to by BARCRO represent the rate of return on the rate base and not the rate base itself.
37. The BL&P in its application provided that the actual rate of return for the test year is 6.07% and that it was seeking a rate of return on rate base of 10.48%. Taking into consideration the evidence provided by the BL&P, namely its *"Study of the Cost of Capital and Rate of Return Recommendation"* and other factors such as size and sovereignty risks, the Commission applied the correct principles when determining the rate of return of 10.00% and provided a detailed rationale for how it arrived at such in its decision dated January 25, 2010 at paragraph 121 to 139. It is misleading to simply look at or focus on the change in percentage as a basis for review.
38. **The Commission found no merit in BARCRO's claim and therefore a variation or modification of the Commission's Decision and Order is not justified.**

### **The Issue of Standards of Service as it relates to the Review of Rates Process.**

39. BARCRO alleges that the Commission erred in law by removing the standards of service as an issue to be determined during the rate application hearing.
40. In accordance with section 17 of the URA and Rule 63 of the Rules, where a service provider makes a request for a change in rates, standards of service must be presented as a part of that request. Contrary to what is being argued by BARCRO the legislation does not require the Commission to examine and determine the standards of service in the course of the rate application hearing but instead requires only that the existing standards of service be presented as part of the rate application.
41. It is submitted that the Commission did not relinquish this statutory requirement. The BL&P at Volume 1, page 12 of the Application for a review of the electricity rates, proposed to retain the existing standards of service which are set out in the Commission's decision on standards of service for the BL&P.
42. In response to the BL&P's proposal, the Commission acknowledged that there were already in existence standards of service provided in its Decision dated February 28, 2006. The standards of service which became effective on June 1, 2006 were to remain in force until they were officially reviewed by the Commission and new standards of service were put in place. At the time of hearing the rate Application, the review of the 2006 BL&P Standards of Service Decision was ongoing.
43. At the Issues Conference held on September 3, 2009, the Commission informed all of the parties to the hearing that the review of the standards of service would not be determined during the rate review hearing as it was being dealt with under a separate parallel proceeding which ultimately was concluded in February 2010.

44. If BARCRO considered that the new standards of service was an issue that should have been determined within the rate application hearing, BARCRO, or any other party, was entitled to state at the Issues Conference whether they agreed or did not agree with the issues which the Commission identified would be considered at the hearing.
45. None of the parties at the time objected to the standards of service being excluded from the Commission's list of issues. All parties including BARCRO agreed that this was not a matter to be determined within the rate application hearing.
46. **It is submitted that this ground does not raise an error of law as BARCRO has misinterpreted how the issue of standards of service should be dealt with in relation to a review of the rates. Therefore a variation or modification of the Commission's Decision and Order is not justified.**

#### **The Late Production of Transcripts**

47. BARCRO alleges that the Commission erred in law when it failed to comply with Rule 46 of the Rules which provides that the Commission should produce a verbatim transcript within two (2) business days of the presentation of the evidence. BARCRO further alleges that the Commission also erred in law when in the absence of the transcripts it directed the parties by virtue of Rule 44 of the Rules to make oral closing statements immediately following the close of evidence.
48. At the commencement of the rate hearing the Commission complied with Rule 46 and was producing transcripts within two business days.
49. However, a review of some of the transcripts produced later in the hearing showed that there were substantial errors made in some instances and as such the

stenographers were granted an opportunity to correct such errors which delayed the production of the transcripts. Parties were notified by the Commission of the reasons for the delay.

50. Notwithstanding this delay, the Commission does not believe that parties were prejudiced when they were asked to make their closing statements immediately after the close of evidence.
51. By virtue of Rule 44, the Commission may make provision for oral argument to be made by the parties immediately following the close of evidence. The Commission believes that this Rule is applicable even in the absence of all of the transcripts being made available to the parties.
52. In spite of this, the Commission was especially lenient in directing that persons who were not prepared to make oral closing statements in the absence of the missing transcripts would be permitted to submit written closing arguments up to five (5) days after they had received all of the transcripts. By allowing this, the Commission was able to offset any prejudice or hardship that might have arisen as a result of the late transcripts.
53. **The Commission is of the view that any initial hardship that may have affected the parties was offset by allowing them to submit their closing statements after receipt of all transcripts. Therefore a variation or modification of the Commission's Decision and Order is not justified.**

#### **Prohibiting BARCRO from Bringing a Witness**

54. BARCRO argues that at the Issues Conference held on September 3, 2009 it was barred by the Commission from bringing its witness Mr. Lindsay Holder who is a

qualified economist. BARCRO alleges that by preventing it from bringing this witness, the Commission made an error of fact and law.

55. A review of the transcripts of the Issues Conference at pages 21 and 22 lines 558 – 578 shows that the representative from BARCRO, Mr. Gibbs-Taitt, addressed the Commission on the issue of presenting a witness. It is notable however that the exchange was general and that Mr. Gibbs-Taitt did not expressly state that he was going to present Mr. Lindsay Holder as a witness and did not ask for leave at that time, or subsequently, to present a witness.
56. Neither did the Commission at any time refuse to give leave to BARCRO to bring a witness. Mr. Gibbs-Taitt merely inquired whether a witness, if brought, would be paid. In response, the Chairman of the Commission directed him to the Guidelines (Procedural Directions No. 1) on the process to be followed if a party wished to present a witness.
57. **MR. MALCOLM GIBBS-TAITT:** “ ...Mr. Chairman, I spoke earlier about certainty, I am unable to request a very able person to come as a witness unless we get some certainty. We need to know from this Commission at an issues conference, we need to know as an issue that this good gentleman would be paid like any other witness in this process. We cannot come here and expect to get some crumbs off the table, not at all Sir, that's not good enough. As a matter of fact, consumers of Barbados deserve better. The same way Sir Henry would put the case for the Applicant and the Applicant is nothing without the consumers, it is the same way that the consumers will fund the witness or witnesses that we bring to defend their position, not the Government Sir. So with great respect this is not the Government's business, this is the business of the people and I am humbly suggesting that I am here to put the case on behalf of the consumers of Barbados Light and Power Company.”

58. **SIR NEVILLE NICHOLLS:** *"Mr. Gibbs-Taitt, it's the people that put the Government in place. The Government is supposed to represent the people. Anyhow you've made your point, I've indicated what the guidelines say and I suggest that you look at the guidelines and let your potential witness look at the guidelines and see whether with regards to sufficient certainty, inspired his public spiritedness to come and give evidence."*
59. **At no time did the Commission prejudice or prevent BARCRO, or any other party, from bringing witnesses. Therefore a variation or modification of the Commission's Decision and Order is not justified.**

#### **Cross-examination of the Commission's Consultants**

60. BARCRO alleges that at no time during the hearing did the intervenors have an opportunity to question any of the Commission's consultants to contrast their position with those of the BL&P's consultants.
61. The Commission hired NERA Consultants during the rate hearing to assist it with certain elements and issues of the rate review process. NERA was contracted to provide written reports and analysis to the Commission. They were not retained to give testimony in the matter. In this regard, NERA was merely an extension of the Commission's team. It is important to note that the Commission was not a party to be examined during the hearing but presided over the hearing as the adjudicator. Cross-examination of the Commission consultants would have been analogous therefore to having the Commission's staff cross-examined. This is simply not done as there is no burden of proof on the Commission's staff or consultants to prove a case. In proceedings, such as these, the Commission considers the evidence and submissions of the parties, the advice of its staff and consultants before arriving at its decision. Ultimately, any evidence or advice given may be rejected if the Commission is not in agreement with it since the Commission is the final arbiter.

62. **It is submitted that this ground does not amount to an error of law. Therefore a variation or modification of the Commission's Decision and Order is not justified.**

**PART FOUR - THE COMMISSION'S RULING**

63. The Commission considers the existence of alleged grounds for review raised by BARCRO to be unsubstantiated.
64. Based on the Commission's review of the information submitted and on the reasons expressed in this Decision, the Commission finds that BARCRO in its Motion and written submissions, has not demonstrated that errors of fact or law, change in circumstances or any other grounds for review exist. Neither has the Commission found that a variation or modification of the Commission's decision is justified.
65. **The Commission, having regard to all of the submissions made by BARCRO and the provisions of the legislation governing this matter, denies BARCRO'S application for a review of the Commission's decision of 25<sup>th</sup> day of January 2010.**



Dated this 22<sup>nd</sup> day of September 2010

*Original Signed by*

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Neville V. Nicholls  
Chairman

*Original Signed by*

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Gregory F.M. Hazzard  
Commissioner

*Original Signed by*

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Andrew F. Brathwaite  
Commissioner

*Original Signed by*

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Alfred W. Knight  
Commissioner

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Andrew W. Willoughby  
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**AND IN THE MATTER** of an Application for a Review by the Barbados Consumer Research Organisation Inc. of the Decision and Order of the Fair Trading Commission dated January 25, 2010;

### APPLICANT

Barbados Consumer Research Organisation Inc. (BARCRO)

### BEFORE:

Sir Neville Nicholls	Chairman
Mr. Gregory Hazzard	Commissioner
Mr. Andrew Brathwaite	Commissioner
Mr. Alfred Knight	Commissioner
Mr. Andrew Willoughby	Commissioner

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### ORDER

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## **PART FIVE - ORDER**

In recognition of the issues that have been considered and determined arising out of Barbados Consumer Research Organisation Inc.'s (BARCRO) Application for a review of the Decision and Order dated January 25, 2010;

**UPON READING** the Motion for Review from BARCRO dated March 18, 2010;

**AND UPON READING** the Affidavit of Mr. Malcolm Gibbs-Taitt dated March 18, 2010;

**AND UPON READING** the submissions of BARCRO dated April 20, 2010;

**AND UPON READING** the submissions of the Barbados Light & Power Company Limited dated May 12, 2010;

**AND UPON READING** the submissions of BARCRO dated August 09, 2010.

### **IT IS HEREBY ORDERED AS FOLLOWS THAT:-**

1. BARCRO's Application and other accompanying requests contained therein for a review of the Commission's Decision and Order dated January 25, 2010 are denied.

Dated this 22<sup>nd</sup> day of September 2010

*Original Signed by*

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Neville V. Nicholls  
Chairman

*Original Signed by*

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Gregory F.M. Hazzard  
Commissioner

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Commissioner