

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

**IN THE MATTER** of the Utilities Regulation (Procedural) Rules, 2003 and the Utilities Regulation (Procedural) (Amendment) Rules, 2009;

**AND IN THE MATTER** of a Decision and Order of the Fair Trading Commission dated the 12<sup>th</sup> December 2011 on the Long Run Incremental Cost (LRIC) Guidelines for implementation by Cable and Wireless (Barbados) Limited.

**BETWEEN**

**DIGICEL (BARBADOS) LIMITED**

**APPLICANT**

**AND**

**FAIR TRADING COMMISSION**

**RESPONDENT**

## **RESPONSE TO APPLICATION FOR A STAY OF DECISION AND ORDER**

### **I. Background to Response to Application for a stay of the LRIC Guidelines Decision and Order dated 12<sup>th</sup> December, 2011**

1. On 12<sup>th</sup> December 2011 the Respondent issued a Decision and Order on the Long Run Incremental Cost (LRIC) Guidelines (the “LRIC Decision and Order”) for implementation by Cable & Wireless (Barbados) Limited (“Cable & Wireless”), following the Respondent’s consultation related specifically to the LRIC Guidelines which was conducted during the period May 27<sup>th</sup> 2011 and July 8<sup>th</sup> 2011. The details of the consultative process are known to the Respondent and are set out in Parts One and Two of the LRIC Decision and Order.
2. On 13<sup>th</sup> January 2012 the Applicant filed a Notice of Motion for Review [and Variation] of the LRIC Decision and Order (the “Notice of Motion”).
3. On 13<sup>th</sup> February 2012 the Respondent issued Procedural Directions in the Notice of Motion and Application for a stay of the LRIC Decision and Order, including a requirement that Cable & Wireless submit reasons either in support of or against the granting of a stay of the LRIC Decision and Order.

### **II. Cable & Wireless’ Response to the Application for a stay of the LRIC Decision and Order**

4. Cable & Wireless opposes the grant of a stay in this Application. Cable & Wireless sets out its reasons in part III below.
5. Cable & Wireless believes that the Applicant’s request made at paragraph 6 of the Notice of Motion is inextricably linked to the request for a stay and cannot be de-linked from the consideration of the request for a stay. Cable & Wireless therefore

also opposes the grant of the request for an order restraining the Respondent from taking any further action in relation to the Decision and Order of the Respondent and the LRIC process generally until final determination of this matter or upon further determination as may be required.

### III. Reasons why the Application for a stay of the LRIC Decision should be denied

6. In the Application by Cable & Wireless for a review of the Decisions of the Fair Trading Commission (“the Commission”) dated the 30<sup>th</sup> day of June 2003 and the 1<sup>st</sup> day of July 2003, which involved an application by Cable & Wireless for a stay of three decisions issued by the Commission, the sole issue before the Commission was the application for a stay and the apposite legal principles to be applied in considering the application.

7. The Commission, in the course of rendering its judgment, accepted that the correct legal principles were to be extracted from the **AG Manitoba v. Metropolitan Stores et al [1987] 1 SCR 110** and **American Cyanamid v. Ethicon Ltd [1975] 1 All E.R. 504**, which establish that whether a stay of proceedings will be granted in any particular case is to be determined with reference to the same criteria that govern the granting of an interlocutory injunction. The Commission stated the principles as:

“...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.”

8. In the **AG Manitoba** case, Beetz J. stated:

“A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.”

9. The first test is whether there is a serious legal issue to be tried. According to Bean in *Injunctions* (Ninth Edition), citing **American Cyanamid**, the claimant does not need to show a *prima facie* case, in the sense of convincing the court that on the evidence before it he is more likely that not to obtain a final injunction at trial. All that is necessary is that the court should be satisfied that the claim is not frivolous or vexatious. Per Beetz J.:

“The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a *prima facie* case. The injunction will be refused unless he can.... The House of Lords has somewhat relaxed this first test in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court that there was a serious question to be tried as opposed to a frivolous or vexatious claim.”

10. Beetz J. (**AG Manitoba**) further opined that “...the *American Cyanamid* ‘serious question’ formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience.” It is submitted that the **American Cyanamid** formulation is also appropriate in this Application where the public interest must be taken into consideration.
11. Cable & Wireless accepts that there is a serious issue to be tried in the Notice of Motion.
12. The second test is whether the Applicant would suffer irreparable damage if the stay is not granted. The courts have, in interlocutory proceedings, established that irreparable harm is harm that is difficult to be compensated in damages.

“The court should go on to consider whether ...if the claimant were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages...would be an adequate remedy and the defendant

would be in a financial position to pay then, no interim injunction should normally be granted, however strong the claimant's claim appeared to be at that stage." (**American Cyanamid** at 510 f-g)

13. According to Bean, if damages would not adequately compensate the claimant for the temporary damage and he is in a financial position to give a satisfactory undertaking as to damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interim injunction may be granted. If the claimant is not in a financial position to honour his undertaking as to damages, and appreciable damage to the defendant is likely, an injunction will usually be refused.
14. The Commission's analysis in the review of the Decisions of the Commission dated the 30<sup>th</sup> day of June 2003 and the 1<sup>st</sup> day of July 2003 proceeded on the premise that the applicant in that matter had established no evidence of damage or cost and therefore had not established that it would suffer irreparable damage. Adopting the analysis of the Commission, the Applicant in this matter has not adduced any evidence of damage or cost and has therefore failed to demonstrate that it would suffer irreparable damage if the stay applied for is not granted.
15. The third test requires that the tribunal consider the balance of convenience. In other words, which of the two parties will suffer the greater harm from granting of refusal of relief? Where the decision of a body such as the Commission is in issue, consideration must be given to the public interest in determining where the balance of convenience lies (**AG Manitoba**).
16. In **AG Manitoba** Beetz J. points out that some judges consider at the same time (as considering whether irreparable harm would be done to the applicant) the situation of the other party to the litigation and ask themselves whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails, while other judges take the view that this last aspect forms part of the balance of convenience.

17. According to Bean, “By definition, once the investigation has reached this third stage, the decision of the court, whether in favour of or against an injunction, will inevitably involve some disadvantage to one or the other side which damages cannot compensate. The extent of this ‘uncompensatable disadvantage’ either way is a significant factor in determining the balance of convenience...The wider public interest may in some cases be considered as decisive”. In the review of the Decisions of the Commission dated the 30<sup>th</sup> day of June 2003 and the 1<sup>st</sup> day of July 2003, the Commission quoted **RJR MacDonald v. AG of Canada [1994] 1 RCS 311** at 344:

“...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 relief sought.”

18. The Commission in the 2003 decision, refusing to grant the stay being sought, found that the applicant’s evidence in that matter did not show the benefits to the public or that third parties would not be prejudiced by the grant of the stay.

19. Therefore, in addition to consideration of the public interest benefits, the interests of Cable & Wireless must be considered as part of the balance of convenience. While the Commission is ‘the other party’ in the Notice of Motion, Cable & Wireless is a third party to whom the Decision and Order directly relates.

20. The protracted appellate process contemplated by the Applicant’s request at paragraph 5 of the Notice of Motion will likely prejudice the public interest in that the time that elapses while proceedings are stayed could lead to substantial delays in implementing a LRIC model for use in establishing interconnection rates.

21. In regulatory matters the public interest is served by timely decision-making and swift implementation of final decisions. In considering the prejudice to the public interest the Respondent must also take into account the purpose for the development of the LRIC model in respect of which Decision and Order on the Guidelines were issued. The Respondent has stated that the TSLRIC estimates generated by the final model will be used to determine interconnection rates for the services contained in C&W's RIO (Consultation Paper Long Run Incremental Cost (LRIC) Guidelines For Cable & Wireless (Barbados) Limited, FTC/Cons2011/01). The next review of interconnection rates is due to commence in or about February 2015 and could commence as early as February 2014. Any delay in implementing the LRIC model is likely to delay the review of interconnection rates.
22. Based on the Commission's analysis in the review of its Decisions dated the 30<sup>th</sup> day of June 2003 and the 1<sup>st</sup> day of July 2003, it is for the Applicant to show evidence that a stay would benefit the public interest, and that third parties would not be prejudiced by the granting of the stay.
23. It is submitted that the Applicant has failed to meet the balance of convenience test. The Applicant has not produced any evidence to show that it would be affected by any injustice, or that a stay would benefit the public interest, or that third parties, specifically Cable & Wireless, would not be prejudiced by the granting of the stay. Consequently the Applicant's case must fail.

**IV. Submissions on Application for a Stay of the LRIC Guidelines Decision and Order dated 12<sup>th</sup> December, 2011**

24. Based on the foregoing reasons, Cable & Wireless submits:
  - i. That the Applicant's request for an order staying the Decision and Order of the Respondent and the LRIC process generally until final determination of all of the matters raised in the Notice of Motion or upon further determination of the matters raised as may be required should be refused; and

- ii. That the Applicant's request for an order restraining the Respondent from taking any further action in relation to the Decision and Order of the Respondent and the LRIC process generally until final determination of this matter or upon further determination as may be required should be refused.

Dated this 24<sup>th</sup> day of February 2012

Per \_\_\_\_\_

P. K. H. Cheltenham, Q. C.  
Counsel for Cable & Wireless  
(Barbados) Limited