



# **FAIR TRADING COMMISSION**

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## **DECISION & ORDER**

### **The Barbados Light & Power Company Limited Application for a Interim Rate Relief**

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## BACKGROUND

1. On October 4, 2021, the Barbados Light & Power Company Limited (the “Applicant”) applied for a Review of Electricity Rates to the Fair Trading Commission (the “Commission”). The Application was submitted under Section 16 of the Utilities Regulations Act, Cap 282 of the Laws of Barbados (the “URA”) (the “Application”) which gives the Commission the power to review electricity rates on an application by a service provider.
2. In the Application, one of the orders the Applicant sought was for interim rate relief in the following terms:

“BL&P seeks the approval of the Commission for the following Orders, that:  
Interim rate relief, at the proposed rates, come into effect from November 1, 2021 and shall be applied to all bills from November 1, 2021 and that this remains in place until the Commission issues its final Decision on BL&P’s Application.  
.....”
3. There was a public consultation on the application for interim rate relief, per section 4(4) of the Fair Trading Commission Act, Cap 326B. As part of that process, on 22<sup>nd</sup> April 2022, the Commission issued a consultation paper on the Applicant’s request for interim rate relief. The Commission invited responses to its consultation paper. Responses were received from Barbados Renewable Energy Association (BREA) , Kenneth Went, Public Counsel on behalf of the Ministry of Energy, Small Business and Entrepreneurship (MESBE), the Ministry of Energy and Business Development (MEBD) and the Tricia Watson/David Simpson team.
4. The application for interim rate relief was heard on July 1, 2022. Three (3) intervenors participated in the oral hearing, namely, BREA, Ministry of Energy, Small Business and Entrepreneurship (MESBE) – Business Division and Ministry of Energy and Business Development (MEBD) – Energy Division.

## APPLICANT'S REASONS FOR INTERIM RATE RELIEF

5. The Applicant has advanced several reasons for an interim rate increase. It states that its audited financial statements for 2021 show a significant deterioration in its earnings and cash flow position and that its realized rate of return before regulatory adjustments is 2.99%. Except for the years 2013 and 2018, in the time since the last rate review, it did not achieve its 10% approved rate of return. The rates of return for the years 2019 and 2020 were 8.13% and 3.90% respectively, with a projected rate of return of 1.54% for 2023. The Applicant states that the decline in the rates of return being obtained by the Applicant is unsustainable and does not constitute a reasonable return on capital within the meaning of sections 3(2)(b) and 10(b)(3) of the URA.<sup>1</sup>
6. The Applicant added that its earnings have been on the decline since 2018 and that there is a projected negative cash flow position of \$7 million in 2022, which is likely to worsen if the Applicant is unable to secure anticipated loans of \$106 million in 2022 to finance its ongoing capital program. Its profits have been on the decline with profits of \$53.4 million, \$28.7 million and \$24.5 million for the years 2019, 2020 and 2021 respectively. Its projected profits for 2022 and 2023 are \$14.8 million and \$2.5 million respectively. The Applicant reasoned that if interim rate relief is not granted to support its cash flow position, it would affect its ability to obtain debt financing at reasonable rates.<sup>2</sup>
7. The Applicant also pointed to the 9.3% increase in inflation in Barbados between March 2021 and March 2022, which it states supports the grant of interim rate relief under section 10(b)(iv) of the URA. Further, the Applicant noted that the last rate adjustment was in 2010 and that the accumulated rate of inflation since then has exceeded 38%.

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<sup>1</sup> See paragraph 12 and the Tables thereunder in the Amended Affidavit of Roger Blackman for the figures in this paragraph.

<sup>2</sup> See paragraphs 12 to 14 and the Tables under paragraph 12 in the Amended Affidavit of Roger Blackman for the figures in this paragraph.

8. The Applicant submits that the Commission must consider its financial viability when considering the application for interim rate relief and that denying interim rate relief would be to deny it the chance to be financially viable.
9. The Applicant relies on the time that elapsed since the last hearing and the delay between the application and final determination. The delays have impacted its financial position. The Applicant further noted that the rate-making process is complex and lengthy and given the Applicant's current financial position, it will suffer financial distress while awaiting a final decision of the Commission.
10. A factor which the Applicant states the Commission should consider is the protection available to customers. It stated that the Commission has the power to order a refund were it to be found that the interim rate relief was not justified.
11. The Applicant explained the impact of the proposed interim rate increase on bills as follows:<sup>3</sup>

“The proposed interim rates would reflect a 7% or \$12 bill increase for the typical residential customer serviced under the Domestic Service tariff at the April, 2022 fuel clause adjustment (FCA) of \$0.45. This expected bill increase for the typical residential customer will reduce to 3% or \$5.00 when the customer takes advantage of the 10% early payment discount<sup>1</sup> that the BLPC continues to offer its customers. Furthermore, rather than a bill increase, a net bill decrease in the typical residential customer's bill of 4% or \$8.00 is anticipated should the FTC grant the proposed interim rates, due to expected fuel savings following the commissioning of the new Clean Energy Bridge Plant in May, 2022.”

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<sup>3</sup> See paragraph 8 of Amended Affidavit of Roger Blackman for the figures in this paragraph.

12. In its written submissions, the Applicant summarized the reasons for an interim rate increase case as follows, identifying the paragraphs in the affidavits of Roger Blackman where the evidence in support was located:<sup>4</sup>

- “(a) An interim rate is crucial for viability of the BLPC; .....
- (b) Without the interim rate relief the Applicant: (i) would be unable to fund its planned investments to meet customer requirements; (ii) would not have sufficient resources to attract capital; and (iii) would be without the financial resources to respond to financial, economic or environmental shock. ....
- (c) The ability of the BLPC to obtain debt financing are reasonable rates will likely be compromised in the absence of interim rate relief. ....
- (d) The delay and/or denial of the interim rate places significant financial risk on the BLPC that can have unintended negative implications to its customers, including irretrievable loss of revenue. ....
- (e) There has been a significant deterioration in earnings and cash-flow over the past two financial years, with a negative cash flow position for 2022, increased rate of inflation since 2010 and a declining trend of rate of return on the rate base.” .....

13. The Applicant contended that the Commission, in exercising its rate-making powers, should not deprive the Applicant of a reasonable return on the fair value of its property being used for public purpose. It further contended that rates which do not allow the utility a reasonable rate of return could be regarded as confiscatory. It pointed to the fact that revenue lost during the period of regulatory lag would be irretrievable and expressed the view that such loss would likely be significant.

14. The Applicant relied on *FPC v. Hope Natural Gas*,<sup>5</sup> for the test for determining the reasonableness of utility rates. That case suggests that there should be

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<sup>4</sup> See paragraph 3 of the Applicant’s Written Submissions.

<sup>5</sup> 320 U.S. 591 (1944)

sufficient revenue for both operating expenses and the capital costs of the business. The latter includes revenue to service debt and dividends on shares. That case also suggested that the rate of return should be commensurate with returns on investments in other enterprises with similar risks and inspire confidence in the utility's financial integrity.

15. The Applicant argued that “financial distress” is not the test for deciding whether interim rate relief should be granted. Further, a utility does not have to prove that it is “ ... irretrievably destined for receivership or bankruptcy proceedings before it would be entitled to interim relief.”<sup>6</sup> The Applicant submitted that a utility must be allowed to earn a rate of return sufficient to cover its operating and debt expenses and to pay dividends on investment. It also contended that its application for an interim payment must be evaluated on the factors set out in section 10 of the URA.

## **RESPONSES TO APPLICANT**

### **Review of Tricia Watson**

16. The intervenor team of Ms Tricia Watson and Mr David Simpson (“Watson Simpson Team”) objected to the Applicant’s request for interim rate relief on the basis that the Commission has no jurisdiction to grant interim rate relief. The Watson Simpson Team said that the application was for a rate increase notwithstanding the use of the words ‘interim rate relief’. The team argued that the Applicant should have made a separate application for the interim rate relief, which should comply with the FTCA and URPR. If the Applicant wishes to make a separate application, the Commission should direct the Applicant to do so. The Watson Simpson Team further argued that in setting any rate the Commission must take into account the matters set out in section 10 of the URA and must hold a public consultation. The Watson Simpson Team contended that the Commission does not have a statutory duty to ensure the viability of

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<sup>6</sup> See paragraph 32 of Roger Blackman’s Amended Affidavit.

the utility. It also argued that the law does not allow the Commission to set or review rates unilaterally or upon preliminary staff analysis.

## **BREA**

17. BREA asserted that from its analysis of the Applicant's updated financial information for 2021 and the projected cash flow for 2022, the Applicant had, at the end of 2021, \$12.3 million more than was projected. BREA identified the reasons for the better than projected position at the end of 2021, which it attributed to (i) \$1.6 million more in cash from operating activities (ii) \$17.3 million less in investments and (iii) \$3.4 million less in financing activities.
18. BREA mentioned that while the projected cash flow suggested the Applicant was in a very difficult cash flow position, it had observed that the cash flow from operating activities for 2022 was better than projected. Further, the Applicant had reduced its projected investments for 2022 and appeared not to be proceeding with the proposed borrowing for 2022. BREA argued that were the Applicant to carry out the proposed level of investment and borrowing, the Applicant would have a positive cash balance of \$17 million at the end of 2022. It said that such a position could not be considered financial distress.
19. BREA also observed that the Applicant provided a table showing its cash flow position (i) should interim rate relief not be given and (ii) should the Commission not give timely approval of the Applicant's request to enter loan agreements. BREA expressed the view that the approval of the loans should be dealt with as a matter of urgency. It suggested that the approval of the loans is more urgent if they are needed for investment to provide a safe and reliable electricity supply and facilitate the country's transition to 100% renewable energy by 2030. It contended that if the approval of the loans is dealt with as a matter of urgency, then the Applicant would not be in immediate financial distress.



20. BREA thought that there was insufficient evidence of financial distress in the absence of an interim rate increase. It urged that the rate hearing be dealt with as a matter of urgency. BREA pointed to the need to have a viable utility which can deliver an efficient and reliable electricity supply and facilitate the smooth transition to 100% renewable energy by 2030.
21. BREA concluded that the evidence that the Applicant provided was concerned with the length of time it will take to conclude the rate hearing and the delay by the Commission in approving loans. It suggested that the Commission review and approve the appropriate amount of loans requested by the Applicant and set a reasonable deadline to have the rate case concluded. BREA suggested that if an interim rate increase is given it should be about 60% of the Applicant's request.

#### **Kenneth Went**

22. Mr. Went opined that the accepted reason for granting interim rate relief was to mitigate the effects of regulatory lag where the utility is facing financial distress. The regulator, he said, must be satisfied that the interim relief would avert financial distress. He stated that in the 2009 rate hearing, the Applicant committed to order and install a steam plant, which it did not do. In the current application for interim rate relief, the Applicant is now arguing that unless it was given interim relief, it would not be able to fund its planned investments. He reasoned that given the Applicant's history, he was not confident that the Applicant would start to fund planned investments within the next four to six months.
23. He challenged the Applicant's contention that, without interim rate relief it would not have the resources to attract capital. He acknowledged that the Applicant's profits for 2022 were down from 2018 and 2019, which he attributed to the COVID-19 pandemic and the decline in the commercial use of electricity during that year. He anticipated improved profits for 2021. He

thought the dividends which the Applicant paid in 2018 and 2019 would excite investors and contradicted the argument that the Applicant cannot attract capital. He added that the Applicant had a net profit in 2020 and he could not see an urgent need for an interim rate increase to raise capital within the next four to six months.

24. Mr. Went added that the Applicant was seeking interim rate relief from the 1<sup>st</sup> November, 2021 so it would not be “without financial resources to respond to financial ... shock’, but there has not been any shock for the Applicant to respond to since the application was made, other than the increases in the oil prices which were passed onto the customer. He pointed to the Applicant having undrawn funds from a loan of \$33.1 million.

25. He submitted that the Commission must take into account the interest of the public and that an interim rate increase would be burdensome on the customers in circumstances where electricity bills have been on the rise since April 2022 and the cost of living is on the increase. He pointed to the high level of unemployment, the fact that businesses are struggling, and customer savings have been lost because the Applicant failed to replace the steam plant as additional reasons why an interim rate increase would be burdensome to customers.

#### **Ministry of Energy and Business Development (MEBD) – Business Development Division**

26. The MEBD submitted that while the Applicant claims that there has been a deterioration in its earnings and cash flow, its financial statements show the payment of dividends of \$25 million made in 2021. It argued that the Applicant’s cash position would have been better had the Applicant forgone the dividend payment, and that it would have had sufficient cash to avoid borrowing through to September 2022.

27. The MEBD doubted the Applicant's contention that without interim rate relief, it may not have access to debt financing at reasonable rates. It did not think that there was evidence which allowed it to grasp the argument. It pointed out that the Applicant planned on raising BDS \$106 million in 2022 to finance its ongoing capital projects but did not state affirmatively that it was unable to raise debt financing at reasonable rates. It added that with such debt financing, the Applicant should have a positive cash flow and be able to operate for the next few months until the Commission has decided on the substantive application for a rate increase.
28. The MEBD contended that the Applicant failed to explain why it did not achieve the Commission's approved rate of return. It queried, inter alia, whether the Applicant was efficient in managing the company during the period of the decline in the rate of return. It also queried what the Applicant did with the tax savings from the reduction in the corporate income tax rate. It viewed the Applicant's cash balance issues as largely self-inflicted wounds, directly related to the payment of the dividends of BDS \$25 million in 2021.
29. It argued that since increases in fuel are passed onto the customer, the customer, and not the Applicant, was experiencing financial distress from the recent increases in fuel. It thought that the Applicant should implement some belt-tightening measures of its own, and not simply be seeking to pass the cost onto the customer.

### **Ministry of Energy and Business Development (MEBD) - Energy Division**

30. The MEBD supports the Applicant's contention that the Commission may grant interim relief notwithstanding that there is no specific provision in the URA or the FTCA providing for the grant of the same. It agreed with the Applicant on the relevance of the principles set in *FPC v. Hope Natural Gas*,<sup>7</sup>

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<sup>7</sup> 320 U.S. 591 (1944).

when determining the reasonableness of utility rates, and, that the case established that a utility is entitled to earn a reasonable and fair rate of return on its capital investment. It added that the case also established that the cost which a utility may recover are those prudently incurred. The MEBD examined the case of *Bell Canada v Canada Telecommunications Commission*,<sup>8</sup> which the Applicant relied on. It agreed with the test set out in that case for the grant of interim rate relief but explained that the word “deleterious” requires the utility to show that it would suffer some harm or injury while awaiting the outcome of the decision on the substantive application for a rate increase. It argued that on that basis, the Commission was correct in requiring the Applicant to prove financial distress for the grant of interim rate relief. The MEBD identified the standard of proof as that of a prima facie case of economic detriment.

31. The MEBD further argued that the Applicant did not provide any empirical evidence of the harm it was likely to suffer which would prevent it from meeting operational costs or standards of service obligations before the decision on its substantive application for a general rate increase. It submitted that earning less or not having sought a rate increase for a long time, without more, does not result in a deleterious effect. While it accepted that there was some reduction in profitability, it argued that it might have been due to management decisions.

32. The MEBD raised concerns about the Applicant’s capital structure of 65% equity and 35% debt, with a cost on equity of 12.5% and that on debt at 2.78%. It submitted that the high cost of equity leads to a higher rate base and truncates the growth of the Applicant because of the higher dividend payouts required. The MEBD does not support the grant of interim rate relief.

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<sup>8</sup> 12 1989] 1 S.C.R. 1722.

## RESPONSES TO INTERROGATORIES

### Responses to BREA's Interrogatories

33. In response to interrogatories, the Applicant stated that its capital spend for 2021 was \$98.6 million rather than \$115.9 million. It explained that factors such as the COVID-19 pandemic and international supply chain and other logistical challenges delayed certain capital expenditures. It explained that its projected capital spend for 2022 of \$161.7 million was revised downwards to \$108.9 million because of the last-mentioned factors and the current business environment. It stated that its ability to execute its planned capital spend will depend upon the timeliness of regulatory approval and other factors mentioned in this paragraph. The Applicant stated that it must be financially enabled to make the necessary investments which will facilitate interconnection of renewable systems to the grid.
34. The Applicant responded to the recurring question regarding the payment of dividends, more particularly, why it had planned to pay \$44 million in dividends. It explained that the URA stipulates that in arriving at rates the Commission must ensure that an efficient service provider will be able to finance its functions by earning a reasonable return on capital. Further, it was advised that for every BBD 10 million of equity employed, the cost of equity to be paid is BBD 1.2 million. It was on that basis and on the assumption of timely interim relief, that it had planned on paying \$44 million in dividends. However, it paid only \$25 million in 2021. It also explained that between 2017 and 2021 the Applicant earned \$231.2 million in net income and has paid dividends of \$125 million or 54.05%.
35. The Applicant projected its rate of return for 2022 to be 3.73%. It reiterated the need for an interim rate increase thus:

“The BLPC continues to be in urgent need of the interim rate relief to meet customer requirements. The revised information demonstrates

that the BLPC's current projected financial position will continue to limit the operations of the utility if not urgently rectified by interim rate relief. Given its deteriorating cash flow position, the BLPC has had to prioritize expenditure and ration its cash on a day-to-day basis to prioritize and rank which obligations that have become due will be met and, in some instances, made decisions to delay certain investments while maintaining service levels to customers. The cash flow position also gives rise to a risk of the BLPC not being able to raise additional debt to fund its operations in order to supplement the deteriorating cash flow position that has arisen due to escalated costs, inadequate earnings and the debilitating regulatory environment."

### **Responses to Kenneth Went's Interrogatories**

36. Many of the interrogatories from Mr Went, in the Commission's view, went to issues more relevant to the rate review hearing and not the interim application. He asked about the Applicant's payment of dividends. The Applicant's response to the payment of dividends is stated above, in response to interrogatories from BREA.

### **Responses to the Commission's Interrogatories**

37. The Applicant described its cash flows at the end of June 2022 as follows:

"The statement of Cash Flows to the end of June 2022 and the Balance Sheet reflect cash on hand of approximately \$29M, which is largely attributable to cash flows from financing (borrowings) in 2021. This underscores the need for a rate adjustment to supplement the cash flow from operating activities. Notwithstanding the \$29M cash on hand at the end of June, the cash required to satisfy obligatory payments required for the period July to September exceeds \$200M. These projected payments exclude over \$50M of already deferred capital expenditure on account of cash flow and other challenges."

38. The Applicant provided a table which showed payments to be made for July, August, and September 2022 in the amounts of \$70,329,432; \$62,147,283 and

\$71,804,113 respectively. It explained that expenditure which has been deferred on account of cash flow and other challenges has not been included in the table.

## THE ISSUES

39. The following are the issues raised on the application for interim rate relief:

- (i) Does the Commission have jurisdiction to grant interim rate relief?
- (ii) What are the principles upon which interim rate relief is given or refused?
- (iii) Should interim rate relief be given where the hearing of the application for a rate review is imminent?
- (iv) Should the Applicant have made a separate application for interim rate relief?
- (v) Whether the Applicant has satisfied the Commission that interim rate relief is justified?

## POWER TO SET INTERIM RATES

40. The Watson Simpson team contends that the Commission has no jurisdiction to grant interim rate relief. The issue arises because the URA is silent on the power of the Commission to grant interim rate relief pending the hearing of an application for a Rate Review. It raises a question of statutory interpretation.

## GENERAL APPROACH TO INTERPRETING ACTS

41. It is settled that the primary role of interpreting a statute is to give effect to the intention of Parliament.<sup>9</sup> The court must consider the context, object and scheme of the legislation when interpreting the words of an enactment. Saunders PCCJ, in *International Environments Ltd v Commissioner of Income Tax*<sup>10</sup>, succinctly summarised the approach thus, at para [20]:

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<sup>9</sup> *Selby v Smith* [2017] CCJ 13 (AJ), para [7]; *Cable and Wireless (Barbados) Ltd. v. Fair Trading Commission* Civil Appeal No. 23 of 2003 (unreported), para 53.

<sup>10</sup> [2019] CCJ 18 (AJ).

“When we interpret the words of a statute, we must examine the object and scheme of the enactment and the entire context in which the legislation is situated. The surrounding context should be fully considered. That surrounding context must, in particular, include statutes or general laws that were enacted at different times, but which pertain to the same subject or object.”

42. In *Selby v Smith*,<sup>11</sup> the Caribbean Court of Justice (the “CCJ”) observed that both the literal and purposive approaches to interpretation have the same aim, that is, giving effect to the intention of Parliament. In most cases, the two approaches produce the same result. However, where the language of the enactment is capable of two or more meanings, then it is for the tribunal to find the right balance between the two approaches in deciding the intention of Parliament.

43. The CCJ has stated that where there is no ambiguity, uncertainty or inconsistency with the plain meaning of the words used in legislation, no further interpretation is needed: see *Queen v Flowers*.<sup>12</sup> This seems to have been the approach of the CCJ in the recent case of *Commissioner of Police v Alleyne*.<sup>13</sup> In that case, the CCJ had to consider the meaning of the words “any person” and “another person” in section 3(1) of the Sexual Offences Act Cap 154. The section made it an offence for “any person” to have sexual intercourse with “another person” without the consent of the other. The question arose as to whether the offence of rape could be committed by one male against another, and in particular, whether the words “any person” include a male person. The CCJ gave the words their ordinary meaning thus:<sup>14</sup>

“The words used are perfectly ordinary words and easily understood; they are ‘Any person who has sexual intercourse with another person

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<sup>11</sup> *Selby v Smith* [2017] CCJ 13 (A), para [7].

<sup>12</sup> [2020] CCJ 16, para [37] to para [40].

<sup>13</sup> [2022] CCJ 2 (A).

<sup>14</sup> [2022] CCJ 2 (A), para [5].



without the consent of the other person' is guilty of rape. There is no limitation on who may be offender or victim: the expressions 'any person' and 'another person' are fully capable of referring to either gender. More pointedly, another person may be male or female. Therefore, as agreed in all judicial opinions, on a literal interpretation the 'other person', the one who is the victim, may be male and hence, a man may be raped in violation of s 3(1)."

## INTERPRETING UTILITY REGULATION LEGISLATION

44. The approach to interpreting legislation involving utility regulation is the same as above. In *Reference Re Section 101 of the Public Utilities Act (Nfld.)*<sup>15</sup> the Board of Commissioners of Public Utilities (Board) was a statutory body with general supervision over all public utilities in the Province of Newfoundland and Labrador under the Public Utilities Act. The case stated by the Board concerned the jurisdiction and powers of the Board relating to the Board's approach to the determination of a "just and reasonable return" on the rate base of a utility and related matters. It emerges from this case that a power may be expressed or implied having regard to the legislative framework of the enactment, its purpose and the general principles in regulatory practice. At paragraph [13], Greene JA noted:

"The answers to the questions which have been posed must, of course, be given taking account of the legislative framework within which the Board operates. The Board is a creature of statute and its jurisdiction and powers to deal with matters brought before it, and the manner of dealing with such matters, must be found, either expressly or impliedly, within the statutes conferring jurisdiction on and governing the operation of the Board."

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<sup>15</sup> (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.).

45. Later, at paragraph [16], he added:

“It is necessary to examine the specific legislative provisions in the larger regulatory context and against the background of the purposes of the legislation and the general principles which have been developed as part of regulatory practice.”

46. In this case, the Commission’s powers are set out in the URA and the FTCA. We propose a brief review of the legal framework of these enactments.

## **URA FRAMEWORK**

47. In *Cable and Wireless (Barbados) Ltd. v. Fair Trading Commission* Civil Appeal No. 23 of 2003 (unreported), Sir David Simmons CJ reviewed the legislative framework of the URA, with which we agree. He observed that: “The URA has as its purpose the regulation of the supply of 6 services viz., electricity, water, sewage, domestic and international telecommunication services and natural gas...”.<sup>16</sup> He listed the functions of the Commission to service providers, which are set out in section 3 of the URA, as follows:

“(1) The functions of the Commission under this Act are, in relation to service provider, to

- (a) establish principles for arriving at the rates to be charged;
- (b) Set the maximum rates to be charged;
- (c) Monitor the rates charged to ensure compliance;
- (d) Determine the standards of service applicable;
- (e) Monitor the standards of service supplied to ensure compliance; and
- (f) Carry out periodic reviews of the rates and principles for setting rates and standards of service.”

48. Section 3(2) of the URA provides that when arriving at the rates to be charged, the Commission must take into account certain principles as follows:

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<sup>16</sup> See *Cable and Wireless (Barbados) Ltd. v. Fair Trading Commission* Civil Appeal No. 23 of 2003 (unreported), page 5 of 20.

(2) In establishing the principles referred to in subsection 1(a) the Commission shall have regard to

- (a) the promotion of efficiency on the part of the service providers;
- (b) ensuring that an efficient service provider will be able to finance its functions by earning a reasonable return on capital; and
- (c) such other matters as the Commission may consider appropriate.

49. The Commission is given further functions by section 3(3) which includes protection of the interest of consumers. It provides:

“The Commission shall

- (a) Protect the interest of consumers by ensuring that service providers supply to the public service that is safe, adequate, efficient and reasonable; and
- (b) Hear and determine complaints by consumers regarding billings and the standards of service supplied.”

50. Section 10 of the URA requires that every rate made by the Commission must be fair and reasonable. The words “every rate” would include an interim rate. Section 10 provides as follows:

“Every rate made by the Commission shall be:

- a) fair and reasonable; and
- b) in accordance with the principles established by the Commission under this Act or set out in rules, orders or regulations and shall take into account:
  - (i) the rates being charged by competing service providers for supplying a similar utility service;
  - (ii) the standards of service being offered by the service provider and by competing service providers;
  - (iii) the return on the rate base;

- (iv) the rate of inflation in the economy for any preceding period as may be considered appropriate;
- (v) the prospective increases in productivity by the service provider;
- (vi) ensuring that consumers are provided with universal access to the utility services supplied by service providers; and
- (vii) such other matters as the Commission may consider.”

51. Section 16 of the URA gives the Commission power to review rates on its initiative or on application by a service provider where the Commission has not fixed a time for the rate to apply.

## **FRAMEWORK OF FTCA**

52. The FTCA established the Commission “to safeguard the interests of consumers, to regulate utility services supplied by service providers, to monitor and investigate the conduct of service providers, renewable energy producers and business enterprises, to promote and maintain effective competition in the economy, and for related matters”.<sup>17</sup>

53. Section 4 of the FTCA sets out very broad functions of the Commission, including enforcing the URA.<sup>18</sup> It is charged, by section 4(2), with carrying out its function in a manner which:

- “(a) promotes efficiency and competitiveness amongst; and
  - (b) improves the standards of service and quality of goods and services supplied,
- by service providers and renewable energy producers and business enterprises over which it has jurisdiction.”

54. By section 4(3) of the FTCA, the Commission is given broad powers for setting rates thus:

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<sup>17</sup> Long Title of the FTCA.

<sup>18</sup> Section 4(1) of FTCA.

- “(3) The Commission shall, in the performance of its functions and in pursuance of the objectives set out in subsections (1) and (2).
- (a) establish principles for arriving at the rates to be charged by service providers and renewable energy producers;
  - (b) set the maximum rates to be charged by service providers and renewable energy producers;
  - (c) monitor the rates charged by service providers and renewable energy producers to ensure compliance;
  - (d) .....
  - (e) .....
  - (f) carry out periodic reviews of the rates and principles for setting rates and standards of service of service providers;”

55. By section 4(5) the Commission is given a general power to “do all that is necessary and expedient for the proper performance of its functions....” as set out in the FTCA and the URA.

56. As observed by Sir David Simmonds, KA, QC, in *Cable & Wireless (Barbados) Ltd v Fair Trading Commission et al*,<sup>19</sup> commenting on the FTCA, URA and the Telecommunications Act, 2001-36, the last of which is not relevant here, these are “.... Acts in pari materia, covering much of the same subject-matter in some parts, but with specific applicability in other parts.”

57. The review of the framework of each of the FTCA and the URA reveals that a major function of the Commission is to set rates. It seems to the Commission that both the FTCA and the URA give the Commission wide powers concerning setting rates to ensure that utility rates are always fair and reasonable to both

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<sup>19</sup> See page 5 of 20.

the utility and customers. Therefore, this Commission accepts that a “technocratic interpretation and application of the provisions of the Act is to be avoided, in favour of an interpretation which will advance the underlying purpose of the legislation, as well as the power policy of the province and be consistent with generally accepted sound public utility practice.”<sup>20</sup>

## **IMPLIED POWER TO GRANT INTERIM RELIEF**

58. In *Reference Re Section 101 of the Public Utilities Act (Nfld.)*<sup>21</sup>, the Court considered legislation governing utility regulation, albeit different legislation. Greene JA set out general principles when interpreting legislation governing utility regulation, which the Commission accepts are relevant to interpreting the FTCA and the URA as follows:

- “1. The Act should be given a broad and liberal interpretation to achieve its purposes as well as the implementation of the power policy of the province;
2. The Board has a broad discretion, and hence a large jurisdiction, in its choice of the methodologies and approaches to be adopted to achieve the purposes of the legislation and to implement provincial power policy;
3. The failure to identify a specific statutory power in the Board to undertake a particular impugned action does not mean that the jurisdiction of the Board is thereby circumscribed; so long as the contemplated action can be said to be "appropriate or necessary" to carry out an identified statutory power and can be broadly said to advance the purposes and policies of the legislation, the Board will generally be regarded as having such an implied or incidental power;

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<sup>20</sup> *Reference Re Section 101 of the Public Utilities Act (Nfld.)* (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A., para [18].

<sup>21</sup> (1998), 164 Nfld. & P.E.I.R. 60 (Nfld. C.A.).

4. In carrying out its functions under the Act, the Board is circumscribed by the requirement to balance the interests, as identified in the legislation, of the utility against those of the consuming public;
5. The setting of a "just and reasonable" rate of return is of fundamental importance to the utility and must always be an important focus of the Board's deliberations; however, the "entitlement" of the utility to a just and reasonable rate of return does not guarantee it that level of return. The "entitlement" is to have the Board address that issue and to make its best prospective estimate, based on its full consideration of all available evidence, for the purpose of setting rates, tolls and charges.
6. ...."

59. The proposition that the regulator may have power and authority where the legislation is silent finds support in other cases interpreting legislation involving the regulation of utilities: See *United States v City of Fulton*<sup>22</sup> and *Bell Canada v Canada Telecommunications Commission*.<sup>23</sup> In the last-mentioned case, the Supreme Court had to consider the power of the Commission to order Bell Canada to make a one-time credit to certain of its customers. The Commission had given Bell Canada an interim rate increase. The commission later found that the interim rate increase it had given had proved excessive. The Commission decided that Bell Canada could not retain the excess revenues and thus ordered the one-time credit to be paid to certain customers. There was no specific statutory power for the Commission to make the order. In deciding that the Commission could direct the one-time credit, in the absence of a specific power to do so, the Supreme Court of Canada observed as follows:<sup>24</sup>

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<sup>22</sup> 75 US 657 (1986).

<sup>23</sup> 12 1989] 1 S.C.R. 1722.

<sup>24</sup> See page 1756.

*“I am bolstered in my opinion by the fact that the regulatory scheme established by the Railway Act and the National Transportation Act gives the appellant very broad procedural powers for the purpose of ensuring that telephone rates and tariffs are, at all times, just and reasonable. Within this regulatory framework, the power to make appropriate orders for the purpose of remedying interim rates which are not just and reasonable is a necessary adjunct to the power to make interim orders.”*

60. Courts have interpreted legislation granting regulatory power broadly, conferring implied powers where the statutory language requires it. Ultimately, whether the Commission has the power to grant interim rate relief will be dependent upon the meaning of the relevant words in the URA and FTCA.

#### **MEANING OF “ANY RATE”**

61. Section 2 of the FTCA and Section 2 of the URA define “rates” in similarly broad terms as follows:

“rates” include:

- (a) every rate, fare, toll, charge, rental or other compensation of a service provider (or renewable energy producer);
- (b) a rule, practice, measurement, classification or contract of a service provider (or renewable energy producer) relating to a rate; and
- (c) a schedule or tariff respecting a rate.”

62. The words “every rate” are broad, and when given their ordinary meaning, would include an interim rate. The Commission is of the view that those words should be given their ordinary meaning, to include an interim rate. Neither the FTCA nor the URA prohibits the Commission from granting an interim rate increase, and it would require the Commission to give the words “any rate” a narrow meaning to limit their applicability to a final rate increase after the full hearing of a rate review application.



63. The Commission does not think that there is a requirement to look beyond the plain meaning of the words used in section 2 of the URA and section 2 of the FTCA to determine the intention of Parliament, given the dicta in *Digicel BVI v Telecommunications Regulatory Commission* and *Queen v Flowers*. The words should be given their ordinary meaning. That meaning is consistent with the scheme and the object of the enactments. The words of Bryer J in *Digicel BVI v Telecommunications Regulatory Commission* are apposite here:<sup>25</sup>

“[102] Thus, statutory interpretation in almost all cases must give pay to the words in their “...grammatical and ordinary sense [read] harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

“[103] This Court therefore when looking at the scheme of this Act does not see any need to look beyond the words of Section 75 to decipher the “manifest and expressed intention” of the section or the Act. The words of Section 75 are in the opinion of this Court clear. Section 75 says that the Commission may take enforcement action against a licensee. It does not say, subject to the terms of this Act or even specifically subject to the terms of Section 26. There cannot be read into this section, any provision which limits its applicability.”

64. The Commission is fortified in its view that it may fix an interim rate by the fact that both the FTCA and URA give it broad powers to fix rates which are always fair and reasonable. The power to grant interim rate relief is an adjunct to that power or is appropriate and necessary to carry out that statutory function.

65. Therefore, we hold that the Commission has the power to grant interim rate relief.

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<sup>25</sup> *Digicel BVI v Telecommunications Regulatory Commission*, Claima No BVIHCV 214 of 2012, at paras [102] and [103].

## PRINCIPLES FOR GRANTING INTERIM RELIEF

66. The Commission, in its Consultation Paper, stated that the rationale for setting interim rates is to mitigate the effects of regulatory lag in circumstances where the utility is facing financial distress, thereby impacting its ability to provide service that is safe, adequate, efficient and reasonable. The Applicant argued that the test or criterion for determining whether an interim rate increase should be given is not “financial distress” as stated by the Commission in its Consultation Paper. It stated that the words “financial distress” are not stated or defined in the URA. Terms may be misleading, and it is therefore important that we summarize the principles which will guide the Commission in the grant or refusal of the application for interim rate relief, and respond to some of the Applicant’s legal arguments.

67. An interim rate increase and a final rate increase are made on different bases. A final rate increase is made on the merits. An interim rate increase is not a decision on the merits or even a preliminary decision on the merits. An application for an interim rate increase is not subject to the same level of scrutiny as an application for a final rate increase. The decision to grant interim rate relief is made on evidence which would often be insufficient for a final decision. Further, interim rate relief is granted to relieve the applicant from the deleterious effects caused by the length of the proceedings. The Supreme Court in, *Bell Canada v Canada Telecommunications Commission*, at page 1754, remarked:

“If interim rate increases are awarded on the basis of the same criteria as those applied in the final decision, the interim decision would serve as preliminary decision on the merit as far the rate increase is concerned. This, however, is not the purpose of interim rate orders.

“Traditionally, such interim rate orders are dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made

in an expeditious manner on the basis of evidence which would often be insufficient for the purpose of a final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.”

68. The Commission accepts the submissions of both the Applicant and the Watson Simpson Team that the Commission must consider the matters set out in section 10 of the URA when setting any rate, which would include when granting interim rate relief. Section 10 requires, inter alia, that every rate must be fair and reasonable.

69. On an application for a rate increase, including interim rate relief, the Commission must balance the interest of the utility and the customer. Under the URA, the Commission owes equal statutory obligations to both consumers and the utility. *Simmons, CJ*<sup>26</sup> recognised and summarized the equal obligations thus:

“In establishing principles for arriving at the rates to be charged for the supply of a service, the Commission must have regard to promoting efficiency on the part of the service providers and, inter alia, ensuring that they can earn a reasonable return on capital ... Equally, and importantly, the Commission must take into the account the interest of the consuming public. Thus, it must “protect the interest of consumers by ensuring that a service provided to the public is safe, adequate, efficient and reasonable.”

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<sup>26</sup> *Cable and Wireless (Barbados) Ltd. v. Fair Trading Commission*, Civil Appeal No. 23 of 2003 (unreported), page 6 of 20.

70. It is these competing interests that the Commission must balance. The balancing exercise which the Commission must exercise was put by Greene JA<sup>27</sup> thus:

“This statutory entitlement of the utility to earn a "just and reasonable" return is the linguistic touchstone for the balancing exercise. This phrase emphasizes the fairness aspect, both to the utility, in earning sufficient revenues to make its continued investment worthwhile and to maintain its credit rating in financial markets, and to the consumer, in obtaining adequate service at reasonable rates. It also emphasizes the need for a tempering of each interest group's economic imperative by consideration of the interests of the other.”

71. Rate setting is a prospective exercise. The utility cannot recover revenues lost during the period of regulatory lag. Interim rate relief mitigates the harshness of the last-mentioned rule by permitting the utility to earn a reasonable rate of return during the period of regulatory lag. The Commission understands the Applicant's argument, the rate of return must be always fair and reasonable, and rates which are not, are confiscatory of the Applicant's property. Therefore, it should be allowed a fair rate of return during the regulatory lag. Regarding the argument that a rate which does not allow a utility to recover a fair a rate of return is confiscatory, Greene JA noted, at para 24:

“Having said that, the entitlement of the utility to a fair return on its investment is always regarded as of fundamental importance. In the United States, controls which fail to allow a fair return have the potential of running afoul of constitutional strictures against confiscation of property without due compensation. While the same constitutional concerns may not be present in Canada, the case law has at times nevertheless referred to the entitlement to a fair return as a "common

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<sup>27</sup> *Reference Re Section 101 of the Public Utilities Act (Nfld.)*, (1998), 164 Nfld. & P.E.I.R. 60 (Nfld.) C.A., para 23.

law right" which should be read into the legislation even where it is not specifically expressed."

72. An interim order, since it is not conclusive, can be reviewed and modified by a subsequent order or decision of the Commission. If the interim rate granted is later found to be excessive, the Commission can order the utility to refund customers or give them a credit.
73. On an application for interim rate relief, the burden of proof is on the applicant:<sup>28</sup> The applicant must show a prima facie case for the interim rate relief sought. The prima facie standard is generally accepted to be a relatively low standard of proof, not as rigorous as the civil standard of a balance of probabilities, which must be discharged at the hearing for a final rate. On an application for interim rate relief, the Commission is not ruling on contentious matters to be determined at the rate hearing.
74. It follows from the silence of the URA and the FTCA on interim rate relief, that there are no statutory guidelines for the grant or refusal of interim rate relief. The Applicant forcefully argued that "financial distress' is not the test and that interim rate relief must be granted based on the test set out in the URA and FTCA, which focuses on efficiency and the ability of the service provider to finance its functions by earning a reasonable rate of return. It contended that the focus should be on matters such as "fairness, reasonableness, standards of service, the return on the rate base, inflation and accessibility and reliable supply of electricity to consumers."<sup>29</sup>
75. Interim rate relief may be granted in a broad number of cases. It is not possible to enumerate or prescribe the cases where interim rate relief may be applied for or granted. Applications for interim rate relief must be decided on a case-by-case basis. The Commission accepts, as contended by the Applicant, that it can be granted to ensure the ability of the service provider to finance its functions

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<sup>28</sup> see section 14 of the URA.

<sup>29</sup> See Paragraph 49 of the Applicant's Submissions.

by earning a reasonable rate of return. Financial distress, in the sense that the utility is unable to or is struggling to pay its bills, would normally justify an interim rate increase. But it is not the only case where interim rate relief would be justified. The URA and FTCA give the Commission broad powers and to limit interim relief to circumstances of financial distress would be to fetter the broad powers given to the Commission to fix rates which are fair and reasonable at all times. The grant or refusal of interim rate relief must maintain flexibility. The Commission has and must retain those broad powers to deal with applications for interim rate relief.

76. The Applicant referred the Commission to the well-known and oft-cited case in utility regulation of *Bell Canada v Canada Telecommunications Commission*, and the rationale given for interim rate orders. In that case, the Court indicated that interim rate orders are given "... for the purpose of relieving the Applicant from the deleterious effects caused by the length of the proceedings ..... its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim order."<sup>30</sup> The reference to "deleterious effects" refers to some harm occurring between the date of the application and the final decision on the application for rate review. In *Bell Canada v Canada Telecommunications Commission* the interim relief which was under review was initially granted on the basis that "... in the absence of interim rate increases, it might suffer from **serious financial deterioration...**"<sup>31</sup> [Emphasis supplied.] Where the application for interim rate relief is based on some deleterious effect to the utility during the period of lag, it would seem that the harm must be more than minimal; it must be more in the realm of serious, as was the case in *Bell Canada v Canada Telecommunications Commission*, to justify the interim rate relief.

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<sup>30</sup> [1989] 1 S.C.R. 1722, page 1754.

<sup>31</sup> [1989] 1 S.C.R. 1722, page 1729.

77. The Commission does not think that there can be a single test to determine when an interim rate relief should be given, in light of the various circumstances in which an application may be made for interim rate relief. Further, the Commission cannot be prescriptive about the circumstances that may justify interim rate relief.

78. The Commission must attempt to set rates which enable an efficient utility to finance its functions by earning a reasonable rate of return. The rates must also be fair and reasonable to customers. The utility is entitled to earn annually sufficient to finance its operations and earn a reasonable rate of return. The utility:

“is not "entitled", in the sense of being guaranteed, to that rate of return. The utility therefore takes the risk that its chosen management techniques and the future economic climate may not yield its expected success. Although some of the activities of the utility are regulated within the framework of the statutory objectives, the utility nevertheless remains subject to business risks and the effects of management decision.”<sup>32</sup>

79. Given the obligation of the Commission mentioned in the preceding paragraph, the need for an interim rate increase may arise where, inter alia, there is a significant decline in revenues, or it is not earning sufficient to finance its operations, or it is unable to raise debt financing, or it is not earning a reasonable rate of return or the refusal to grant of interim rate relief would result in some irreparable harm to the utility. The deleterious effects which may justify interim rate relief may take one or more of the forms mentioned in the preceding sentence, amongst others. The fact that interim relief is granted to prevent or relieve deleterious effects, means that interim rate relief is not automatic.

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<sup>32</sup> Reference Re Section 101 of the Public Utilities Act (Nfld.), (1998), 164 Nfld. & P.E.I.R. 60 (Nfld.) C.A., para 31.

80. The Applicant, in its written submissions, summarized the grounds upon which it seeks an interim rate increase and identified various deleterious effects to the Applicant if the interim relief is not given. It would seem to the Commission that the Applicant must provide evidence to establish a prima facie case of the deleterious effects that it alleges will occur if the interim rate relief is not granted. The deleterious effects would have to be serious, to justify the Commission granting interim rate relief on evidence which would otherwise be insufficient for making a final decision.

### **TIME OF DECISION**

81. The application for interim rate relief was heard approximately eight weeks before the date fixed for the start of the hearing of the application for the rate review. If interim rate relief is necessary to relieve or prevent deleterious effects during the period of regulatory lag, then it should be given, notwithstanding that the start of the rate review hearing is imminent. The Commission thinks that interim relief can be given at any stage of the rate review proceedings once the utility can establish the case for the interim rate relief. We note that in civil proceedings before the High Court, the rules of procedure provide for the grant of interim relief at any stage of the proceedings:<sup>33</sup> The Commission is not bound by that rule, but it reflects the general practice that interim relief may be granted at any time of the proceedings.

### **SEPARATE APPLICATION**

82. It was submitted that the Applicant ought to have made a separate application for an interim application. Since the application was filed, a Consultation Paper was issued and there was a hearing on the application for interim relief. Substantial time and expense have been incurred. There is no allegation that any person has been prejudiced by the application for interim rate relief having been made in or as part of the application for final rate review. Objections to

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<sup>33</sup> Rule 17.2(1).



procedure ought to be taken at an early stage of the proceedings. The Commission does not think it is necessary to decide whether the application ought to be made separately or not. The procedural point, even if meritorious, of which the Commission does not express an opinion, would not be fatal at this stage, where no one has been prejudiced by the procedure adopted.

## **THE COMMISSION'S ANALYSIS**

### **The Proposed Rates**

83. As part of the background to the application for interim rate relief, the Applicant noted that more than eleven years have elapsed since the last general rate increase. The Applicant states that since then, it has made significant capital investments to meet evolving market realities, maintain system reliability and prepare for the planned transition to 100% renewable energy generation by 2030 as set out in the Barbados National Energy Policy. The Applicant added that, without an increase in base revenue for more than a decade, it has been serving the people of Barbados in an environment of rising costs affecting several areas of its operations, such as production, distribution, administration, investment in network infrastructure and technology to facilitate the transition to 100% renewable energy and investments in grid modernization technology.

84. The Applicant explained that its proposed rates on an interim basis would result in base revenues increased by 11.9% as against the 38% increase in the rate of inflation since 2010, as measured by the Consumer Price Index (CPI). In addition, the Applicant says that it is committed to affordable service especially for the most vulnerable population segments, observing that the lowest rates are charged to the 35% of the customer base that uses less than 150kWh per month. It observed that this class of customers has had an increase in rates of

less than 8% since 1983, while over the same period, CPI has increased by 259<sup>34</sup>%.

85. The following is an extract from Appendix 2 of the Application, “Summary of Current and Proposed Tariffs”:

**Table 1 - Summary of Current and Proposed Tariffs**

TARIFFS	COMPONENTS	PARAMETERS	CURRENT RATES Monthly	PROPOSED RATES Monthly	\$ CHANGE	% Inc
<b>Domestic Service</b>						
	Customer Charge (\$/month)	0-150kWh	\$6.00	\$8.00	\$2.00	33%
		151-500kWh	\$10.00	\$14.00	\$4.00	40%
		Over 500 kWh	\$14.00	\$20.00	\$6.00	43%
	Demand Charge (\$/kVA)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Base Energy Charge (\$/kWh)	0-150 kWh, per kWh	\$0.150	\$0.168	\$0.02	12%
		Next 350 kWh, per kWh	\$0.176	\$0.214	\$0.04	22%
		Next 1,000 kWh, per kWh	\$0.200	\$0.249	\$0.05	25%
		Over 1,500 kWh, per kWh.	\$0.224	\$0.280	\$0.06	25%
<b>Employee</b>						
	Customer Charge (\$/month)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Demand Charge (\$/kVA)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Base Energy Charge (\$/kWh)	0-150 kWh, per kWh	\$0.108	\$0.133	\$0.03	23%
		Next 350 kWh, per kWh	\$0.127	\$0.157	\$0.03	24%
		Next 1,000 kWh, per kWh	\$0.180	\$0.227	\$0.05	26%
		Over 1,500 kWh, per kWh.	\$0.202	\$0.255	\$0.05	26%

<sup>34</sup> All statistics in this paragraph are taken from the “Barbados Light & Power Co. Ltd (BLPC)’s Application, Pursuant to Section 16 of the Utilities Regulation Act CAP. 282 of the Laws of Barbados, for a Review of Electricity Rates, 2021.”

TARIFFS	COMPONENTS	PARAMETERS	CURRENT RATES Monthly	PROPOSED RATES Monthly	\$ CHANGE	% Inc
<b>General Service</b>						
	Customer Charge (\$/month)	0-150kWh	\$8.00	\$12.00	\$4.00	50%
		151-500kWh	\$11.00	\$15.00	\$4.00	36%
		Over 500 kWh	\$14.00	\$24.00	\$10.00	71%
	Demand Charge (\$/kVA)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Base Energy Charge (\$/kWh)	0-100 kWh, per kWh	\$0.184	\$0.204	\$0.02	11%
		Next 400 kWh, per kWh	\$0.217	\$0.256	\$0.04	18%
		Next 1,000 kWh, per kWh	\$0.259	\$0.311	\$0.05	20%
		Over 1,500 kWh, per kWh.	\$0.290	\$0.354	\$0.06	22%
<b>Secondary Voltage Power</b>						
	Customer Charge (\$/month)	Each service	\$20.00	\$169.00	\$149.00	745%
	Demand Charge (\$/kVA)	Per kVA	\$24.00	\$28.82	\$4.82	20%
	Base Energy Charge (\$/kWh)	All kWh, per kWh	\$0.1380	\$0.1380	\$0.00	0%
<b>Large Power</b>						
	Customer Charge (\$/month)	Each service	\$300.00	\$1,587.00	\$1,287.00	429%
	Demand Charge (\$/kVA)	Per kVA	\$22.00	\$33.30	\$11.30	51%
	Base Energy Charge (\$/kWh)	All kWh, per kWh	\$0.1170	\$0.1170	\$0.00	0%

86. The above table shows significant proposed increases in rates across all customer classes. For example, as it relates to the customer charge for the 0 – 150 kWh category, which typically includes the most vulnerable population segments, the proposed increase is 33.3%.

## DETERIORATING CASH FLOW

87. One of the reasons which the Applicant relied upon for interim rate relief is that there has been a significant deterioration in its cash flow over time. The Applicant's management accounts for January to June 2022 show its most recent cash flow position. As of June 2022, the Applicant's cash and cash equivalents stood at BDS \$29.116 million.<sup>35</sup> It is above the Applicant's projected cash flow position of BDS \$20.833 million set out in the Affidavit of Roger Blackman dated December 8, 2021.
88. The Applicant submitted, with its management accounts, an estimate of its total cash obligations for each of three months, estimated at BDS \$70.329 million, BDS \$62.147 million and BDS \$71.804 million, for July, August and September 2022, respectively<sup>36</sup>. Included in those totals is the cost of fuel, which is a pass-through expense. Those monthly pass-through amounts are BDS \$46.745 million, BDS \$31.344 million and BDS \$36.505 million, for July, August and September 2022 respectively<sup>37</sup>. There is a period between the time the Applicant incurs the expense for fuel and when the Applicant recovers the expense from customers.
89. Further, while the Applicant submitted its cash obligations for July, August and September 2022, it did not include the projected revenue for the same period. The Commission must assume that the operating revenue trend for the period of January to June 2022 would likely continue for the remainder of 2022, which the Commission thinks is a reasonable assumption in the circumstances.
90. The cash obligations for July, August and September 2022, total BDS \$204 million<sup>38</sup>. If the cash obligations for the remainder of the year remain constant, then for the second half of 2022, the Applicant's cash obligations would be approximately BDS \$408 million.

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<sup>35</sup> Applicant's "Financial Forecast (Existing Rates) Updated for Actuals to June 2022, 2022."

<sup>36</sup> Applicant's, "BLPC Expected Obligations Summary, July - September 2022."

<sup>37</sup> Ibid

<sup>38</sup> Ibid

91. The Applicant's projected cash obligations for July, August and September 2022, included its operating and investment cash obligations. The Commission is of the view that the cash obligations for investments should be separated from the cash obligations for operations, and that it would be prudent to finance the investment obligations by debt or equity financing during the time of regulatory lag. When the amounts attributed to the cash obligations for investments are removed from the total cash obligations for July, August, and September 2022, the operating cash obligations is approximately \$192 million for that period, thus giving an estimated operating cash outflow of approximately BDS \$383 million for the last six months of 2022.

92. Based on the management accounts submitted, the operating revenue for the first six (6) months of 2022, was BDS \$289 million.<sup>39</sup> If this were to remain constant for the remainder of 2022, then the estimated operating revenue for the last six months of 2022 would similarly be approximately \$289 million. The result would be an estimated shortfall of \$94 million (\$383 million - \$289 million = \$94 million) for the latter half of 2022. Given that shortfall, the Applicant would require an increase in operating revenue of approximately 33% at minimum to cover the shortfall.

## **RAISE DEBT AND ATTRACT INVESTMENT**

93. The Applicant also advanced, as reasons for interim rate relief, that without the same, it would not have sufficient resources to attract capital and that its ability to obtain debt financing at reasonable rates would likely be compromised.

94. In our view, the Applicant has not demonstrated that it would not be able to raise debt financing in the short term should it not be granted interim rate relief. Lenders use various indicators to determine a company's ability to repay its debt obligations or whether it is an acceptable risk, such as a company's debt

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<sup>39</sup> Applicant's, "Financial Forecast (Existing Rates) Updated for Actuals to June 2022, 2022."

service coverage ratio. The Applicant did not introduce any evidence to show that its profile as a borrower, because of its debt service coverage ratio or some other indicator or matter, would militate against it obtaining debt financing or would result in being classed as a risky borrower in the market for loan financing.

95. In July 2022, the Commission approved a loan of BDS \$51 million to the Applicant at a favourable rate of interest. In our view, this weakens the Applicant's argument that unless it is given interim rate relief, its ability to obtain reasonable debt financing would likely be compromised.

96. Furthermore, according to data from the Central Bank of Barbados<sup>40</sup>, the weighted average cost of debt as of the end of May 2022 is 5.6%, far higher than the Applicant's test year cost of debt at 2.78%<sup>41</sup>. This suggests that the Applicant ought to be able to attract debt financing at reasonable rates.

97. The Commission acknowledges that the Applicant's cash flow position has deteriorated and that its revenues and rate of return are on the decline. However, these must be balanced against the payment of \$25 million in dividends in 2021<sup>42</sup> and the payment of dividends regularly since the last rate hearing. Generally, the regular payment of dividends attracts investment. The Commission does not think that the evidence before it, makes out a *prima facie* case that the Applicant would not have the resources to attract investment capital.

## **DETERIORATING REVENUES, PROFITS, RATE OF RETURN**

98. The Applicant also sought to justify its application for interim rate relief on the basis that there has been a decline in its revenues, profits and rate of return.

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<sup>40</sup> Commercial Banks' Selected Interest Rates [E1\\_E2 Interest Rates May 2022.xlsx \(live.com\)](#) date accessed August 12, 2022

<sup>41</sup> Applicant's, "Barbados Light & Power Co. Ltd (BLPC)'s Application, Pursuant to Section 16 of the Utilities Regulation Act CAP. 282 of the Laws of Barbados, for a Review of Electricity Rates, 2021."

<sup>42</sup> BLPC, Financial Forecast (Existing Rates) Updated for Actuals to June 2022, 2022.

The evidence the Applicant tendered in support of interim rate relief showed a decrease in those metrics.

99. Operating income declined from approximately \$57 million in 2019 to just over \$30 million in 2020, with a further decrease in 2021 to approximately \$27.4 million. Those reductions in operating income were likely due in part to the COVID-19 pandemic. There was also decline in annual rate of return which dropped from 8.08% in 2019 to 3.9% and 2.99 % in 2020 and 2021, respectively.

100. The Applicant's operating profit for the first six months of 2022 continued a downward trajectory. At mid-2022, its operating profit was \$9.8 million<sup>43</sup>, whereas, for the full year 2021, its operating profit was \$27 million. If the Applicant's operating profit were to continue on the present path for the last six months of 2022, then its likely operating profit would be near BDS \$20 million. This would be a further drop in the Applicant's profits for 2022.

## **SOCIAL AND ECONOMIC CONSIDERATIONS**

101. The ongoing COVID-19 pandemic has had a significant negative impact on the Barbadian economy since 2020. Researchers from the Inter-American Development Bank (IDB) have stated that the "pandemic has triggered the deepest global recession since World War II."<sup>44</sup> The COVID-19 pandemic has led to business closures and job losses. In addition, the global energy crisis, with rising energy costs, has added to the economic pressures in Barbados and worldwide. As recently as March 2022, information from the Barbados Statistical Service puts the rate of inflation in the country at 9.3%, up from 4% in January 2022.

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<sup>43</sup> Applicant's "Financial Forecast (Existing Rates) Updated for Actuals to June 2022, 2022."

<sup>44</sup> Garavito, Maricruz, Diether Beuermann, Laura Alvarez, and Ariel McCaskie. 2020. "The Consequences of COVID-19 on Livelihoods in Barbados: Results of a Telephone Survey | Publications." Publications.iadb.org. Inter-American Development Bank. October 2020. <https://publications.iadb.org/publications/english/document/The-Consequences-of-COVID-19-on-Livelihoods-in-Barbados-Results-of-a-Telephone-Survey.pdf>.

102. With that, the costs of living have increased sharply, placing considerable strain on the household budget, especially the budget of the lower to middle-income earner. To address the rising cost of living in the short-term, the Government expanded the basket of goods exempted from VAT to add forty-four new items, to take effect from July 21, 2022 to 31<sup>st</sup> January 2023. Further, the Government and private sector organizations agreed to keep markups on the items in the basket of goods at a modest rate. Also, as part of the relief to the public, the Government reduced the VAT payable on electricity charges for the first 250kWh from 17.5% to 7.5% for a period from August 1, 2022, until January 31, 2023. In effect, the cost of living crisis required the effort and participation of all stakeholders.

103. The COVID-19 pandemic and the rising inflation have impacted the Applicant and its customers. These, in addition to the ongoing energy and cost of living crises, are matters outside of the control of the Applicant and its customers. However, they are matters which the Commission must consider when balancing the interest of the Applicant and the customers in deciding the Applicant's application for interim rate relief.

#### **THE RATE OF INTERIM RELIEF**

104. The Commission did not think that the Applicant established, on a *prima facie* basis, that during the period of regulatory lag, unless it was given interim rate relief, its ability to obtain debt financing at reasonable rates would likely be compromised. Further, the case has not been established, in the view of the Commission, that the Applicant would not have sufficient resources to attract capital. In addition, the Commission is of the view that it would be prudent, during the period of regulatory lag, to finance any new capital projects by loan or equity financing. It is generally accepted, as a prudent business practice, to finance capital expenditures, such as the purchase of long term fixed assets, by



some debt or equity instrument. Concomitantly, operating expenditure are generally financed through operating revenues.

105. In many cases, the reason for interim rate relief is a serious decline in revenues. The preliminary evidence suggests, as recited above, a decline in operating revenues, profits and the rate of return in the last few years identified above. The preliminary evidence further suggests a likely continuing decline in operating revenue during the regulatory lag period.

106. As indicated above, the shortfall in operating revenues is estimated to be in the region of BDS \$94 million requiring an estimated increase in revenues by 33% at minimum to cover the projected operating costs. The increases sought by the Applicant formed part of its general rate application. The increases ranged from 0% (indicating no change) up to 745% across the various customer classes. A rudimentary average of the proposed increases is approximately 74%, suggesting that on average, that is the level of increase the Applicant is seeking in order to enhance its operating revenue. One-half of the percentage (74%) by which the Applicant seeks to increase its rates, that is 37%, is closely in the region of the percentage increase in revenue that the Commission estimates is required to cover the shortfall.

107. Therefore, the Commission estimates that approximately 50% of the rates sought by the Applicant would yield the estimated shortfall for the expected period of further regulatory lag of no more than six months. Accordingly, the Commission does not think that it would be fair and reasonable to grant the full rate of increase sought by the Applicant on an interim basis. However, it would be reasonable to grant some interim rate relief. The Commission is of the view that it would be appropriate, in all the circumstances, to grant interim relief at 50% of the rates sought by the Applicant, with the exception of the rate for employees of the Applicant.

108. In arriving at this decision, the Commission has considered the principles for arriving at rates to be charged as set out in this decision, the URA and the FTCA. Without limiting the generality of the preceding sentence, the Commission remained mindful of the obligation to balance the interest of the utility and the customer and to ensure that every rate is fair and reasonable. The Commission was also mindful that ratemaking is prospective, and any significant decline in revenue established at the rate hearing cannot be addressed retrospectively. However, on the other hand, if it is found, at the rate hearing, that the interim relief ought not to have been granted or was excessive, the Commission can order a refund or a credit to the account of customers.

## THE DETERMINATION

109. Given the foregoing, the Commission has determined that the level of interim rate relief approved shall be capped at 50% of the requested rates for all customer classes with the exception to the rates to be charged to the employees of the Applicant for whom 100% of the rate requested is approved. These interim rates shall be effective from the date of this Decision until the Commission issues a final determination on the Applicant's substantive application for rate review. Additionally, should these interim rates be found excessive after the full rate review, the Applicant shall refund its customers the difference between these rates and the final approved rates, with an interest rate equivalent to the return on equity to be approved in the substantive rate review. The approved interim rates are outlined in the table below.

**Table 2 - Interim Rates Approved**

TARIFFS	COMPONENTS	PARAMETERS	CURRENT RATES Monthly	INTERIM RATES Monthly	\$ CHANGE	% Inc
<b>Domestic Service</b>						
	Customer Charge (\$/month)	0-150kWh	\$6.00	\$7.00	\$1.00	17%
		151-500kWh	\$10.00	\$12.00	\$2.00	20%

TARIFFS	COMPONENTS	PARAMETERS	CURRENT RATES Monthly	INTERIM RATES Monthly	\$ CHANGE	% Inc
		Over 500 kWh	\$14.00	\$17.00	\$3.00	21%
	Demand Charge (\$/kVA)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Base Energy Charge (\$/kWh)	0-150 kWh, per kWh	\$0.150	\$0.160	\$0.01	7%
		Next 350 kWh, per kWh	\$0.176	\$0.196	\$0.02	11%
		Next 1,000 kWh, per kWh	\$0.200	\$0.225	\$0.025	13%
		Over 1,500 kWh, per kWh.	\$0.224	\$0.254	\$0.03	13%
<b>Employee</b>						
	Customer Charge (\$/month)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Demand Charge (\$/kVA)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Base Energy Charge (\$/kWh)	0-150 kWh, per kWh	\$0.108	\$0.133	\$0.025	23%
		Next 350 kWh, per kWh	\$0.127	\$0.157	\$0.03	24%
		Next 1,000 kWh, per kWh	\$0.180	\$0.227	\$0.047	26%
		Over 1,500 kWh, per kWh.	\$0.202	\$0.255	\$0.053	26%
<b>General Service</b>						
	Customer Charge (\$/month)	0-150kWh	\$8.00	\$10.00	\$2.00	25%
		151-500kWh	\$11.00	\$13.00	\$2.00	18%
		Over 500 kWh	\$14.00	\$19.00	\$5.00	36%
	Demand Charge (\$/kVA)	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable
	Base Energy Charge (\$/kWh)	0-100 kWh, per kWh	\$0.184	\$0.194	\$0.01	5%
		Next 400 kWh, per kWh	\$0.217	\$0.237	\$0.02	9%
		Next 1,000 kWh, per kWh	\$0.259	\$0.284	\$0.025	10%
		Over 1,500 kWh, per kWh.	\$0.290	\$0.320	\$0.03	10%
<b>Secondary Voltage Power</b>						
	Customer Charge (\$/month)	Each service	\$20.00	\$94.50	\$74.50	373%
	Demand Charge (\$/kVA)	Per kVA	\$24.00	\$26.41	\$2.41	10%

TARIFFS	COMPONENTS	PARAMETERS	CURRENT RATES Monthly	INTERIM RATES Monthly	\$ CHANGE	% Inc
	Base Energy Charge (\$/kWh)	All kWh, per kWh	\$0.1380	\$0.1380	\$0.00	0%
<b>Large Power</b>						
	Customer Charge (\$/month)	Each service	\$300.00	\$943.50	\$643.50	215%
	Demand Charge (\$/kVA)	Per kVA	\$22.00	\$27.65	\$5.65	26%
	Base Energy Charge (\$/kWh)	All kWh, per kWh	\$0.1170	\$0.1170	\$0.00	0%

Dated this 16<sup>th</sup> day of September, 2022

*Original signed by*

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Donley Carrington  
Chairman

*Original signed by*

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John Griffith  
Commissioner

*Original signed by*

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Ruan Martinez  
Commissioner

*Original signed by*

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Samuel Wallerson  
Commissioner